

(1993) 03 OHC CK 0016

In the Orissa High Court

Case No : Original Jurisdiction Case No. 6897 of 1992

Bhajaram Chowdhury

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 01-03-1993

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 29, 39
Constitution of India, 1950 — Article 162, 226

Citation : AIR 1993 Ori 248

Hon'ble Judges : R.K. Patra, J; L. Rath, J

Bench : Division Bench

Advocate : G. Tripathy, for the Appellant; D. Das, A.G.A., for the Respondent

Final Decision : Dismissed

Judgement

1. The grievance raised by the petitioner in this case is rejection of his representation by the State Government for reduction of the exclusive privilege amount fixed for the exclusive privilege of the country liquor shop at Bharagada taken by him. The petitioner became the exclusive privilege holder for the year 1990-91 for the shop at a price of Rs. 40,000/- per month. He admittedly failed to pay the dues and instead made a representation to the Collector, Ganjam for its reduction on the plea that because of the natural calamity of inundation on account of heavy rain, the shop was washed away and could not function in November and December of 1990. That application having not been disposed of and instead distress warrant having been issued against him, he filed O.J.C. No. 4959 of 1990 in this Court which was disposed of on 21-12-90 with direction that even if the petitioner's representation was disposed of, the Collector would re-hear him and that until the representation was decided, the distress warrant would remain unexecuted. The Collector having rejected the representation, the petition again filed O.J.C. No. 918 of 1991 before this Court claiming the self-same relief. That case was decided on 9-4-91, on the submission of the learned Government Advocate that the only authority empowered to grant remission of

the exclusive privilege sum is the State Government, directing that the petitioner may file a representation before the Government which should be disposed of expeditiously by it and execution of the distress warrant to remain stayed till the matter was decided. The present writ petition has been filed as the representation has been rejected by the State Government. It is averred that no copy of the order of rejection has been made available to the petitioner and that he had been told that the order would be sent to him by post. On our direction, the learned Additional Government Advocate has filed counter affidavit in which the fact of rejection of the representation of the petitioner is admitted and stated that the rejection was on the basis of the report of the Tahsildar, Aska; the parawise comments of the Superintendent of Excise, and the order of the Collector dated 10-1-91.

2. The amount of exclusive privilege is fixed u/s 29 of the Bihar and Orissa Excise Act and under Sub-Section (3) thereof, the amount determined under Sub-Section (2) is declared to be final and binding on the parties making the offer once it is accepted. It is the submission of Mr. Tripathy that despite such finality attached, Section 39 of the Act in terms confers power on the Board of Revenue to direct reduction of the amount of fees payable for the unexpired portion of the grant period. That after the enactment of Section 29(3) by Orissa Acts 17 of 1970 and 10 of 1971 the Board's power u/s 39 to reduce the fees is no longer available has been settled by this Court in *Ram Kishun Ram Vs. State of Orissa and Others*, holding that the finality as contemplated u/s 29(3) of the Act cannot be interfered with by the Board of Revenue u/s 39. It is however submitted by Mr. Tripathy that the very power u/s 39 is exercisable by the State Government and hence the representation made to the State Government in accordance with the direction of this Court in O.J.C. No. 918/91 was a statutory one. The submission is thoroughly misconceived. Section 39 in terms vests authority exclusively in the Board of Revenue without anything there to show that merely because Section 29(3) was introduced in the Act, the power of the Board got automatically transferred to the State Government. As was pointed out in *Ram Kishun Ram Vs. State of Orissa and Others*, , under the amended scheme the sum of money u/s 29(1) of the Act for the grant of exclusive privilege u/s 22 is to be determined either by auction or by calling tenders or otherwise as the State Government may direct. After such enactment there has been no corresponding provision enacted as in Section 39 of the Act. Hence, it must be taken that under the statute as it now stands, there is no provision of making any representation for consideration for reduction of the amount fixed which has otherwise become final.

3. Even so, though it cannot be said that a representation to Government statutorily lies for reduction of the amount, yet it cannot be said that a representation to the State Government is absolutely ruled out. Since ultimately the amount is due to the State Government, it must inherently be possible for the Government to consider cases of genuine difficulties and agree to accept a lower amount than what had been finally settled. Such a power must be inherent

in all governmental activities as the right of representation of a person either-affected by the State's action or under an obligation to the State can never be denied. This power of the State has to be held as flowing out of Article 162 of the Constitution of India under which the executive power of the State is co-extensive with the legislative power. Hence, since no provision in the Excise Act prohibits exercise of discretion by the State Government in the matter, such administrative power in the State Government must be constitutionally inferred.

4. It is in that context that this Court had directed in O.J.C. No. 918/91 that the petitioner might make a representation to Government bringing to its notice the difficulties stated to be faced by him and that the Government was to dispose of the representation if so made. Doubtless the exercise of power by the State Government in disposing of the representation would be an administrative function and not statutory, but as is by now too far well settled in law, even exercise of purely administrative function by the State Government is subject to at least the modicum of fairplay, equity and good conscience and unless it is shown that the executive power has been so exercised, or it is shown that the power is not so exercised, the interference of this Court may be called for.

5. It is in this context necessary to be seen as to whether the rejection of the representation of the petitioner by the State Government is in consonance with the principles of fairplay, equity and good conscience. The counter-affidavit filed discloses the State Government to have relied upon the report of the Tahasildar, the parawise comments of the Superintendent of Excise and the order of the Collector. From the Tahsildar's report, it appears that so far as the licence for the country spirit shop is concerned, the business actually flourished after the flood devastation since the inhabitants of the area received house building grants and the amount so received was more spent at the shop. The report of the Superintendent of Excise shows that on verification of the daily liquor sale account of the petitioner's shop, it was found that there was no sale from 4-11-90 to 6-11-90 (both days inclusive), i.e. three days and that a quantity of 500 BL 400 UPC 8, liquor was washed away due to the flood on 4-11-90. The order of the Collector shows that the petitioner as the exclusive privilege holder of Sheragada had himself told that his shop remained closed for three days, i.e. from 3rd of November to 5th of November, 1990. These facts were considered by the Government in rejecting the representation. It cannot be said that such considerations by the State Government were not relevant or were extraneous to the question at issue. There was absolutely no case made out that in disposing of the representation there was any lack of fairplay by the Government.

6. A submission is made by Mr. Tripathy that the petitioner was not heard before his representation was rejected. A reference to the representation made by him vide Annexure 1 to the writ petition does not show him to have demanded such an opportunity. It was decided by this Court in *Ferro Alloys Corporation Limited Vs. Union of India (UOI)* and *Another*, that personal hearing is not necessarily a part of the principles of observance of natural justice.

7. In that view of the matter, we do not find any merit in this writ application which is dismissed. In the circumstances, there would be no order as to costs.

R.K. Patra, J.

I agree.