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**(1953) 09 OHC CK 0014**

**In the Orissa High Court**

**Case No :** O.J.C. No''s. 46 and 48 of 1953

Chandrayya and Others APPELLANT

Vs

Member, Excise, Board of Revenue and Another RESPONDENT

**Date of Decision :** 29-09-1953

**Acts Referred:**

Bihar and Orissa Excise Act, 1915 — Section 34, 35
Constitution of India, 1950 — Article 226

**Citation :** AIR 1954 Ori 74 : (1953) 19 CLT 501

**Hon'ble Judges :** Panigrahi, C.J;Mohapatra, J

**Bench :** Division Bench

**Advocate :** H. Mohapatra and R.N. Misra, for the Appellant; A.G. and Asst. Govt. Advocate, for the Respondent

**Final Decision :** Dismissed

## Judgement

Mohapatra, J.

(O. J. C. 46/53)

1. This is a petition under Art. 226 of the Constitution of India presented by the three petitioners with a prayer for issue of a writ of mandamus or any other direction that may be deemed at by this Court in the following circumstances:

The licenses for the retail vend of country spirit at five places mentioned in the petition in the district of Koraput were put to auction for annual settlement by the Collector. One Upendra Senapati was granted license in respect of three places and one S. Narasimhulu in respect of the other two. The licenses were to expire on 31-3-53. For the year commencing on 1-4-53 the auction look place on 4-3-53 in respect of the above-mentioned five places for realising fees for the licenses for the retail vend of country spirit. The bid of petitioner 1 was accepted by the Collector for the licenses of three places and the bids of petitioners 2 and 3 in respect of each of the other two places were also accepted by the Collector and accordingly on 30-3-53 licenses were granted to them for their respective shops for the period from 1-4-1953 to 31-3-1954, whereupon they are carrying on their business of selling country spirit. They further submit that on 9-3-1953, opposite party 1, that is, the Member, Board of Revenue (Excise) passed an ex parte order on an incompetent appeal filed by the two previous licensees that these shops should be put to auction again and the previous licensees would start the bid at a call of Rs. 3500 in respect of the five shops taken together. It is to be mentioned here that these two previous licensees were in arrears to Government and under the Rules they were not allowed to bid at the auction where the petitioner''s bids were accepted. The Collector, therefore, passed an order on 30-3-1053 that as desired by the Board the country spirit shops at those five places which were provisionally settled previously would be put to resale in a lot with a starting bid of Rs. 3500/- of Upendra Senapati and S. Narasimhulu and that the resale would take place on 10-4-1953.

2. The main ground on which the petitioners present the petition before us is that inasmuch as they were granted licenses for the year commencing on 1-4-1953, their rights under the licenses are complete and that further order for resale is in excess of jurisdiction of the Collector. The further ground taken by the petitioners is that the order passed by Opposite party 1 is incompetent.

3. The opposite parties have filed a counter to the effect that in fact the disputed five shops were put to auction individually on 4-3-1S53; but as the reserved fees were not obtained the shops were ''provisionally settled'' with the petitioners who were granted only provisional licenses. Simultaneously with the making over of the provisional licenses to the present petitioners a notice of resale was also published to the effect that the five shops were to be put to auction again on 10-4-1953 and that the opposite parties had proceeded in accordance with law and the Collector had in the circumstances the power to put the shops to resale as the reserved fees were not obtained by the first auction.

4. It is clear from the records that in fact the bids of the petitioners on 4-3-53 were accepted by the Collector only provisionally and that the petitioners were not only aware of the position but accepted the position with their eyes open. The most important record is the settlement register wherein the particular settlements after auction are entered almost simultaneously with the settlement. It appears from the settlement register that on 4-3-1953 the shops were settled with the petitioners provisionally and that the petitioners also consenting to the settlement put their signatures against the said entries. It is made further clear also that the licenses which were granted to the petitioners on the basis of which the petitioners have started their shops clearly show that they are provisional licensees. The petitioners accepted the licenses without any objection. Mr. Mohapatra, appearing on behalf of the petitioners, contends that at the time when the bid was accepted they (the petitioners) were not given to understand that it was only provisional. The contention does not stand to reason in view of the fact that the petitioners had signed the settlement register almost simultaneously with the closure of the bid. In this connexion, we should refer to

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the Sale Notification laying down the terms subject to which the sale would be conducted and the shops would be settled. In para. 4 it is mentioned as follows:

"The auction will be held subject to the following conditions;

1. The Collector does not bind himself to accept the highest or any bid. It is open to the Collector, in exceptional cases (e.g., when adequate fee is not offered), to accept a bid provisionally subject to the confirmation of the same by the Commissioner of Excise."

x x x x The petitioners went to bid fully aware of these terms and when they voluntarily accepted the position that it was a provisional settlement with them, it does not seem to us that they have got the right to invoke our jurisdiction under Art. 226, the alleged rights of the petitioners being merely contractual ones.

5. We will next refer to Rule 109, Clause (a) appearing at p. 140 of Vol. I of the Orissa Excise Manual --- the Rules having been framed by the Board of Revenue u/s 90, Bihar and Orissa Excise Act, 2 of 1315. The Rule runs thus :

"109 (a) The fees for licenses for the retail vend of the following intoxicants shall be fixed by auction subject to a reserved fee sanctioned in each case by the Commissioner:

(1) Country spirit."

x x x x It is further made clear from the instructions issued by ''the Board of Revenue in para. 98 appearing at p. 42 of Vol. III of the Orissa Excise Manual that

"the licenses are put to auction subject to a reserved fee, previously sanctioned by the Commissioner of Excise. This upset fee must be kept strictly confidential."

This Instruction seems to be on the basis of administrative policy and convenience. Para. 99 of the instructions shows that

"when the sanctioned upset fee is not obtained in any case, the Collector........ may, in his discretion, accept a lower fee provisionally, but the case must be reported to the Commissioner of Excise, and it must be understood that the settlement is not final......."

From the above consideration, therefore, it appears to be clear that there is enough provision in law that the Collector is empowered to settle the licenses only provisionally when the reserved fee are not reached. Mr. Mohapatra contends that the petitioners were not aware of the reserved fees; but as we have indicated above, under the instruction as a matter of administrative to policy it is quite reasonable that the reserved fee is kept confidential. But nevertheless the position being that the Collector has the power in law to settle provisionally, and when the petitioners had accepted the settlement as provisional and had acted upon that provisional license there is no case for invoking our jurisdiction under Article 226, particularly when the petitioner''s

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rights are contractual Eights.

6. Mr. Mohapatra takes up the further point that the order passed by the Member, Board of Revenue (Excise) in appeal on 9-3-1953 on the application filed by the two defaulting licensees is incompetent and against the principles of natural justice that they were not given notice of it. We find that under the provisions of Section 8, Bihar and Orissa Excise Act, 1915, the Board of Revenue has got the general power of control over the Collector and further that in cases where reserved fee is not reached the power to sanction is also provided for. If, therefore, as desired by the Board, the Collector ordered a resale when the first sale was provisional no principle of natural justice is contravened. In consideration of these circumstances, therefore, we find that there is no merit in this petition. The petition, therefore, is dismissed with costs. Hearing fee is assessed at Rs. 100/- (one hundred rupees).

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7. This petition is also on similar facts and involves the same questions. This case is in respect of the retail vend of country spirit for the year 1953-54 at Bajrakabat in the town of Cuttack. Here also the petitioner obtained the provisional license and there was an order for fresh auction under same circumstances. The case is fully covered by the judgment passed in O. J. C. No. 46/53. The petition is, therefore, dismissed with costs. Hearing fee is assessed at Rs. 50/- (fifty rupees).

Panigrahi, C.J.

8. I am of the same opinion and would like to add a few words. In putting the liquor shop to auction the Collector was not performing any judicial or quasi-judicial act. He was not deciding any question of fact affecting the rights of parties. What he was doing is purely an administrative act for securing excise revenue to the best advantage of the State. If he chose not to accept the bid of the petitioner it cannot be said that he was deciding any right. What he did was primarily an administrative act subject to the control of the Board of Revenue. In a similar case where a license was cancelled by the Controller of Textiles, Ceylon, the Judicial Committee held that the cancellation was purely an administrative act: see -- ''Nakuda Ali v. M.F. De S. Jayaratne'', 1951 AC 66 (A).

9. Counsel for the petitioner urged that he had acquired a contractual right under the pro visional license granted to him. It that be so it is well settled that a right that had accrued under a contract cannot be the subject of mandamus. It has not been shown that the Collector was under any duty to accept the bid of the petitioner in which case the question of appropriateness of a writ of mandamus could be considered. But if it be merely a contractual right mandamus will not issue to carry out the, terms of the contract.

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