
(1993) 09 OHC CK 0019

In the Orissa High Court

Case No : O.J. Cs. No's. 2023, 2946, 2947, 4825 and 4841 of 1993

Jagdish Prasad Jaiswal and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 15-09-1993

Acts Referred:

Constitution of India, 1950 — Article 163(3), 226, 227, 74(2)

Citation : (1993) 2 OLR 476

Hon'ble Judges : B.L. Hansaria, C.J.; R.K. Patra, J

Bench : Division Bench

Advocate : Govind Das, G. Rath, S.K. Padhi, S. Pasicda, M.B.K. Rao, K. Mohammad, N. Patra, A.K. Patra and D. Mohapatra, for the Appellant; Sovesh Roy, General and S.K. Das, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

B.L. Hansaria, C.J.—A tragedy took place in Cuttack on 7th May, 1992. It was liquor tragedy; it was a man made tragedy. It is the magnitude of the tragedy (it took 124 human lives according to the State) which led all concerned to think how best it can be prevented. The Excise Department on its own took up this matter, as it ought to have, and a study was undertaken to find out whether there was anything wrong in the policy adopted by the State relating to grant of liquor licence which had led to the tragedy. The Department in right earnest got into the matter and first examined whether a case of prohibition exists for which demands were raised after the liquor tragedy. A Cabinet memorandum, which is available to us as Annexure 9, states that the policy of prohibition in the State was not found acceptable because of the reasons contained in that annexure to which we do not propose to advert as we are not concerned with that policy in the present batch of cases. But then, a hard thinking was done on the question of adoption of what has been described in the memorandum as "O. S. and C. S. system" (O. S. stands for out stillled system and C. S. for country spirit system). The memorandum has mentioned eight points on the comparative merits and

demerits of the system. Ultimately, the Department proposed to introduce O. S. system in three more districts, namely, Sundargarh, Keonjhar and Mayurbhanj, which would be in addition to Sambalpur, Bolangir and Kalahandi districts and Boudh Sub-division of Phulbani district. This is the first decision which the Department arrived at. This thinking of the Department is contained in the aforesaid memorandum dated 10-2-1993, which indeed is a codification of what had been the Department's view on the subject. We have said, so because from Annexure-1 dated 24-12-1992, we find that what has been mentioned in the aforesaid memorandum had in fact been accepted as the policy of the Government for the year 1993-94 by December, 1992. (As to this, it may, however, be stated that from the perusal of departmental file which was made available to us, we found that this policy decision, though taken with the consent of the Chief Minister, was made subject to approval by the Cabinet).

2. Annexure-11 is a communication from the Principal Secretary to the Government in the Revenue and Excise Department and is addressed to the Excise Commissioner of Orissa and states that the out stilted system shall be introduced in the aforesaid districts during the year 1993-94. It would be necessary to know what are the reasons for the adoption of the aforesaid policy, of which mention has been made in Annexure 6, which is a proposal emanating from the Excise Commissioner containing the following grounds :

1. Mahua flower is available in adequate quantity in these districts.
2. These districts are mostly inhabited by tribal people.
3. Purchasing capacity of the tribal people do not permit consumption of C, S. whose price is much higher than O. S, liquor.
4. In absence of alternative utilisation of Mahua flowers, which are available in abundance, they go into the hands of illicit distillers.
5. O. S. liquor from the neighbouring districts of Sambalpur and Kalahandi is smuggled to these areas resulting in low consumption of C. S. through licensed shops.

It may be stated that for manufacture of O. S. liquor, Mahua is the basic raw material, whereas C. S. liquor is produced by using molasses; and the later process leaves room for preparation of spurious liquor, which was responsible for the tragedy which took heavy toll of human lives.

3. Pursuant to the aforesaid policy, public notice was issued by the Collector, Sundargarh on 14-1-1993 vide Annexure-2 to OJC No. 2023 of 1993 (it is this OJC to whose annexures we have referred earlier and shall refer further while giving annexure numbers) calling for objection relating to the grant of O.S liquor licence. The Collector thereafter issued sale notice vide Annexure 3 dated 27-1-1993 stating that O. S. shops will be settled on tender-cum-auction basis on 10-2-1993. The Government letter dated 8-2-1993 (Annexure 4) states to the Excise Commissioner that "Government has been pleased to sanction 41 (forty-

one) main outstill shops with 101 (one hundred one) branches ...". Auction as notified was held on 10-2-1993 and bids were knocked down in favour of the highest bidders and provisional settlements were made, to which effect there is an averment in paragraph 6 of the petition. The petitioners' case is that thereafter they made investment in setting huts, purchasing of utensils, etc. Then came the Cabinet decision dated 14-2-1993 to cancel the provisional settlement of the aforesaid shops and to introduce C.S system in the aforesaid three districts. Thereafter, the provisional settlements given in favour of the petitioners were cancelled vide Annexure 5 dated 18-2-1993. The petitioners have questioned these cancellations which are based on the aforesaid policy decision of the Government.

4. As it is primarily the policy decision which has been assailed, we have to apprise ourselves as to whether such a decision is amenable to judicial review and, if so, on what grounds such a decision can be reviewed by a writ Court. The policy decision related to a matter covered by the Bihar and Orissa Excise Act, 1915, Section 22 of which deals with the grant of "exclusive privilege". This expression is used in Section 29 also. We are thus concerned with the policy relating to a matter to exclusive privilege of the State, Let it, therefore, be seen what are the parameters of this Court's power when called upon to examine the reasonableness of the aforesaid policy decision, which would be permissible if judicial review be available in a case of the present nature and that too on the ground of the policy being not reasonable.

5. Shri Govind Das appearing for the petitioner in OJC No. 2023 of 1993 has principally advanced argument on behalf of the petitioners. Before we advert to his submissions, we may even at the threshold, while on the question of law, refer to Lakhanlal and Others Vs. The State of Orissa and Others, , to which our attention has been invited by Shri S. K. Das, learned Government Advocate. In paragraph 24 of that judgment as to grant of licence under the very Act with which we are concerned, it was stated by referring to State of Orissa and Others Vs. Harinarayan Jaiswal and Others, that the exercise of power cannot be questioned "so long as they are not used in an unreasonable or mala fide manner". Lakhanlal's case itself, therefore permits examination whether the power has been used in unreasonable or mala fide manner.

6. Administrative law had made long strides and the long march of law has by now permitted Courts to examine the reasonableness of even a matter founded on policy decision or about which it can be said to be a part of prerogative. Shri Govind Das has drawn our attention to some land-mark English decisions and the views expressed by world renowned authors on administrative laws, namely. Professor Wade and de Smith. The decisions to be referred are : (1) Laker Airways Ltd. v. Department of Trade 1977 OB 643. which is a decision of Court of Appeal; and (2) Regina v. Secretary of State for the Home Department, Ex parte Asif Mahmood Khan (1984) 1 WLR 1337 which is again a decision of Court of Appeal.

7. In *Laker Airways*, Lord Denning MR, as he then was, first spelt out what prerogative is by stating that "prerogative is a discretionary power exercisable by executive government for the public good, in certain spheres of governmental activity for which the law has made no provision, such as.....". The noble Judge then stated that even in case of exercise of prerogative power. Courts can examine whether they are not used improperly or mistakenly (see page 706). The "public good" concept is then applied to the facts of the case and it is concluded at page 708 by saying that if it is found that such a power has been exercised improperly or mistakenly so as to impinge unjustly on the legitimate rights or interests of the subject, then the Courts must so declare. A famous passage from the historic case of *Liversidge v. Anderson* (1942) AC 206 appearing at page 244 was quoted wherein it was stated that "between executive and the subject. Courts stand alert to see that no coercive action is justified in law".

8. Asif Mahmood Khan's case had dealt with a matter absolutely within the domain of prerogative inasmuch as the question was whether Khan should be allowed to enter the United Kingdom. The subject-matter fell within the realm of policy decision and it was started by Watkin L. J., that even in such a matter the exercise of power had to be in good faith and if the manner of making the decision was unreasonable, Courts can intervene.

9. Professor Wade in the 6th Edn. of his book "Administrative Law", puts the matter beyond the pale of controversy as it is staged that Minister's decisions on important matters of policy are not sacrosanct against the unreasonableness doctrine.(See Page 410). Of course there may be different degrees of unreasonableness with "abuse or power at one end and the scale of mere misjudgment at the other" Professor de Smith speaks in the same vein in his "Constitutional and Administrative Law" and at page 584 of his 4th Edn. the learned author opines that prerogatives are no exceptions while judging whether the decision based on such prerogative right, which is discretionary in nature is subject to judicial review.

10. Having taken us overseas. Shri Govind Das brings us back to our motherland and refers to *State of M.P. v. Nandlal Jaiswal* (1986)4 SCC 666 which contains a very elaborate discussion as to" when policy matters are subject to judicial review. Being confronted with the question whether the grant of licence for various purposes with which the case dealt was based on a policy decision of the Government and if so, whether the decision was reasonable, Bhagwati C J examined the matter so thoroughly that this part of the judgment starts from paragraph 17 and it ends in paragraph 40, which covers 24 printed pages. The learned Chief Justice concluded in the last paragraph that the manner and method of reaching the policy decision and other circum stances in which the policy decision was taken and the considerations which entered into the making of the policy satisfied the Court that the policy decision was "an informed and reasoned decision arrived at after detailed inquiries, fact finding efforts and

reports spreading over a period of more than a year and a half", Not only this, several queries and issues were raised by the Finance Department boldly and fearlessly and these queries and issues were fully and frankly dealt with, clarifications were given and the entire matter was fully considered. It was also noted in that paragraph that there was no suddenness of decision no impulsive caprice or arbitrariness in reaching the decision; the policy decision was plainly and avowedly an informed and institutionalised decision and the manner in which it was reached was clearly indicative that it was neither mala fide nor guided by any corrupt or collateral considerations.

11. Nothing remains further to be noted to hold that a policy decision of the kind at hand has to satisfy the test of reasonableness and must also appear to be a reasoned decision. For a decision to be reasonable, the same must work for public good, it must advance public interest.

12. Let us now see what are the facts before us to state that the policy decision which was first taken or subsequently made known satisfy the aforesaid criteria. In so far as the first policy decision is concerned, there is indeed no challenge before us. We do not, however, accept the policy to satisfy the judicial mind only because there is no challenge. But we find that absolutely good reasons have been given and the policy has been arrived at not with suddenness, but after detailed inquiries and fact finding efforts and reports of which mention has been made in the aforesaid Cabinet Memorandum. Whether we should look into the Cabinet Memorandum is a matter which we shall advert later.

13. Coming to the Cabinet decision, let us first clear the grounds. The first point to be considered and decided is, can the Court go into the reasons of a Cabinet decision ? The learned Government Advocate submits on the strength of some decisions of the Apex Court that the bar created by Art. 74 (2) or, for that matter Art. 163 (3) would not permit a Court to ask for reasons of Cabinet decision, which is an advice tendered by the Ministers either to the President or the Governor as the case may be. That this is the position is sought to be brought home to us by reading out paragraph 60 of S.P. Gupta Vs. President of India and Others, in which other similar decisions on the point had also been taken note of. In that paragraph, while dealing with Art. 74 (2), which protects disclosure, it has been stated that the reasons which have weighed with the Council of Ministers in giving the advice would certainly form part of the advice. It is, therefore, contended that as the Court cannot inquire into whether any advice was given, so also it cannot inquire what were the reasons given for the advice. But then, in the same paragraph it has been stated that the materials on which the advice was tendered by the Council of Ministers cannot be said to be a part of the advice and so it would not get the protection of the aforesaid Article.

14. Shri Govind Das states that the Cabinet Memorandum is a material and it would be open to the Court to look into this to find out if reasons exist when calling upon to make the reasons known. The Cabinet Memorandum is before us which has, of course, been filed by the petitioners. Question is whether we can

look into this ? Shri Das contends that in view of what has been stated in Jaiswals case, this question is no longer *res Integra* inasmuch as it has been stated at page 603 of that judgment that if the decision of the Cabinet is produced before the Court without any objection on behalf of the State, the Court is entitled to look into it. Indeed, that judgment has scrutinised microscopically what had found place in the Cabinet Memorandum as would appear from a reading of the same from paragraphs 19 to 40. Thus, what was the first step which Chinnappa Reddy, J. took in *L.G. Chaudhari Vs. Secretary, L.S.G. Department, Government of Bihar and Others*, for a three-Judge Bench by stating in paragraph 3 that proceedings of the Council of Ministers can be "looked into", engulfed a larger field by taking a second big step, a "Daman" step, permitting scrutiny of the decision, not merely looking into it; and in *Jaiswal* the scrutiny was so severe, thorough, painstaking and purposeful that it cannot be urged as on today that the Court cannot look into the Cabinet Memorandum. We, therefore, propose, to look into this and see what the decision taken on the basis of the Cabinet Memorandum was

15. We have been apprised about this by the opposite parties themselves by way of filing further affidavit on 13-8-1993 in reply to the rejoinder filed by the petitioner. With this affidavit has been enclosed an extract of the "Proceedings of the 17th meeting of the Council of Ministers held on 14-2-1993" as at Annexure E. Paragraph 13 of this affidavit states that the matter relating to excise policy of 1993-94 was placed before the Council of Ministers under serial No. 34 of the agenda and Annexure E is a "copy of the agenda and the observation of the Council of Ministers thereon". A perusal of this annexure shows that against serial No. 34, the decision was :

"Approved except that C.S. system will continue as before in the districts of Mayurbhanj, Keonjhar and Sundargarh. If auctions have been held in these districts to open C.S. shops, they may be cancelled."

(The words "C.S." were subsequently corrected as "O.S.")

16. So, the Cabinet approved that agenda item except that C.S. system will continue as before in the districts of Mayurbhanj, Keonjhar and Sundargarh. It may be stated that in the Memorandum in question, the Excise Department had given (XIII) suggestions in all, of whom (i) was introduction of O.S. system in the aforesaid districts, Thus, we find that though the Memorandum had contained reasons as to why O. S. system should be introduced as suggested, the decision not to do so does not contain any reason. The effort of the learned Government Advocate that reasons might have existed which have not been disclosed and which cannot be asked for because of what has been stated in *S.P. Gupta's* case, is heroic no doubt, but futile, because in the aforesaid affidavit it having been stated that Annexure E contains "observation of the Council of Ministers", we have to say that nothing beyond what has been noted under agenda serial No. 34 exists.

17. Now, we find that the Cabinet Memorandum as placed before the Council of Ministers had desired for good reasons that C.S. system should be introduced in the three districts in question in addition to the four others where it was prevailing from before. This was, however, not approved ; why, we do not know. We, however, know the reasons why the introduction was desired. As already stated, these reasons do indicate that "public good" was sought to be advanced, one of which was to check preparation of spurious liquor. What can be more conducive to "public good" so far as the matter at hand is concerned ? But then, for non-acceptance of this proposal no reasons exist.

18. Lack of reason would indicate that there was no good reason. Law permits us to arrive at this conclusion. In this connection, we may refer to what Lord Upjohn stated in the classic case of *Padfield v. Minister of Agriculture* 1968 AC 997. *Padfield* was a case where the question examined was whether the discretion conferred on a Minister by a statute is unfettered. As that principle would be applicable, because of what has been stated above, even to a discretion or policy founded on prerogative, what has been stated in *Padfield* regarding the Minister's discretion ought to apply, according to us, to a case of the present nature also. Lord Upjohn's view in this connection finding place at page 1061 is that if the Minister does not give any reason for his decision, it may be, if circumstances warrant it, that a Court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion to which he had done, in which case the Court may order a prerogative writ to issue.

19. The facts as they have unfolded to us do satisfy our judicial mind that the policy which was sought to be introduced vide Annexure 1 was for "public good", which was set at naught for no good reasons. We are, therefore, constrained to set aside that policy and the cancellation order as at Annexure 5 pursuant to that policy.

20. Before concluding, we may state that Shri Govind Das submits that though the petitioners had been given provisional settlements only, they had legitimate expectation to get final settlement. What is "legitimate expectation" can be described no better than quoting paragraph 29 of *Union of India and others Vs. Hindustan Development Corpn. and others*, as it states that this is latest recruit to a long list of concepts fastened by the Courts for the review of administrative action and this creation takes its place beside such principles as the rules of natural justice, unreasonableness, the fiduciary duty of local authorities and "in future, perhaps, the principle of proportionality". We agree with Shri Das that the petitioners did have legitimate expectation and a right had been conferred on them by the provisional settlement, which would have ceased to be inchoate and ripened fully, but for the cancellation which came because of the aforesaid policy decision, which has not stood the test of judicial scrutiny.

21. In the result, the writ petitions are allowed by quashing the cancellation order dated 18-2-1993 as annexed to these petitions. As we have set aside the cancellation order, it is apparent that all the provisional settlements have to be

confirmed because we do not find any legal hurdle. Necessary orders in this regard shall be passed expeditiously.

R.K. Patra, J.

22. I agree.