

(1992) 11 OHC CK 0022

In the Orissa High Court

Case No : O.J.C. No's. 3676, 3820 and 4150 of 1992

Janamohan Das and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 05-11-1992

Acts Referred:

Commissions of Inquiry Act, 1952 — Section 3
Constitution of India, 1950 — Article 226

Citation : AIR 1993 Ori 157

Hon'ble Judges : B.L. Hansaria, C.J;B.N. Dash, J

Bench : Division Bench

Advocate : J. Das, for the Appellant; S. Roy, General, for the Respondent

Final Decision : Allowed

Judgement

Hansaria, C.J.—7th May, 1992. Cuttack was calm when the day dawned. Who had known that a "disaster of unprecedented proportions" was going to strike and disturb placid waters of the Mahanadi and Katha-jodi? But it took place. A man-made tragedy took a great toll 124 deaths, according to the State), and it was our well known hooch tragedy. Not that the people of this State have not know a about such tragedies taking place in the past, but then, it was the great dimension of the tragedy which stunned the people, so much so that they almost lost faith in all instrumentalities of the State. People started thinking whether they had been left to the wolves to be killed. The question with which we are seized is about the responsibility of the State to find out why spurious liquor took the toll of 124 lives, and what steps are required to be taken to stop recurrence of such a heinous crime, at the root of which lies the naked greed for money and nothing else. Ours is a "socialist democratic republic" and its people have been promised by the Constitution a right to live and not to be killed except in accordance with the procedure established by law. Do the instrumentalities of the State owe no obligation to enforce Article 21 of the Constitution? But then, how can they do so unless they know what they are required to do in this regard?

And, how would they know about it unless they find out who are the evil-doers and how they conjointly act to fulfil their evil designs ? To inform the mind of the Government in this regard, should it not try to find out all the relevant facts to enable it to tailor its laws, to gear up its machinery, to plug the loop-holes and take other required steps? Why should the Government feel shy to know full facts necessary for the aforesaid purpose ? And if it feels shy, does not discharge its legal obligations, remains inactive to serve an alien purpose, can this Court not direct it to discharge its duty? These are some of the questions with which we are seized in these petitions, whose ramifications are too wide and too serious to soft-pedal in any way our constitutional obligation.

2. We may state at the threshold itself that we are conscious of the position that our Constitution has meticulously defined the functions of the various organs of the State, although the doctrine of separation of powers has not been recognised in its absolute rigidity. So, the legislature, the executive and the judiciary have to function within their respective spheres demarcated by the Constitution. No organ can usurp the function assigned to another. Indeed, the functioning of democracy depends upon the strength and independence of each of its organs. It is for this reason that the power of judicial review given to this Court is exercised by it with restraint and within self-imposed limits. It would not fetter the power of the other wings of the State, nor would it exercise its power in a matter which relates to the policies of Government or the making of the laws, nor also when a matter lies within the "unfettered" discretion of the other wings of the State. While exercising the power of judicial review, the Court does not function as an appellate authority. It springs into action as the upholder of the rule of law and sentinel of democracy when it is satisfied that the executive has either transgressed the law or has by its inaction permitted others to transgress the law.

3. The occasion to approach this Court is non-appointment of a Commission of Inquiry (colloquially called, "Judicial Inquiry "and it is this expression which we shall use hereinafter) as visualised by the Commissions of Inquiry Act, 1952 (for short, "the Act"). Another reason is non-payment of compensation to the kith and kin of the victims of the tragedy, The petitioners seeks a direction of the State Government to do both. Let us see whether the law permits this Court to do so.

JUDICIAL INQUIRY

4. It is Section 3(1) of the Act which is relevant for our purpose. Let us read that section:--

"The appropriate Government may, if it is of opinion that it is necessary so to do, and shall, if a resolution in this behalf is passed by each House of Parliament, or as the case may be, the Legislature of the State, by notification in the Official Gazette, appoint a Commission of Inquiry for the purpose of making an inquiry into any definite matter of public importance and performing such functions and within such time as may be specified in the notification, and the Commission so

appointed shall make the Inquiry and perform the functions accordingly."

The aforesaid shows that the power of appointment is discretionary and that it can be invoked on the appropriate Government arriving at a subjective satisfaction that a definite matter of public importance is required to be inquired.

5. Let us first see what does it mean when it is said that a discretionary power vests in a functionary. It is by now well settled that whenever such a power is conferred, the functionary cannot take a stand that it is his absolute discretion to exercise the power or not to exercise the same, This legal proposition not having been assailed by the learned Advocate-General, we need not refer to the innumerable decisions on this point for disposing of the present petitions, It would be enough if one landmark decision alone is taken note of and that decision is of the House of Lords in *Padfield v. Minister of Agriculture* 1966 AC 907 : (1968 (1) AllER 694. Before stating what was held in that decision, we have felt tempted to quote a few observations made in *United States v. Munderlich*, (1951) 342 US 98, which one must always keep oneself reminded while dealing with discretionary power. They read :

"Law has reached its finest moments when it has freed man from unlimited discretion of some ruler, some official, some bureaucrat Absolute discretion is a ruthless master. It is more destructive to freedom than any one of man's other invention."

6. Now to *Padfield*. The matter which went to the House of Lords in that case related to investigation of a complaint as to operation of some scheme "if the Minister in any case so directs". A contention was advanced on behalf of the Minister that either he has no discretion in the matter or has unfettered discretion. This contention was rejected by the House of Lords. Lord Reid pointed out that the discretion conferred by the statute had been so done with the intention that it must be used to promote the object of the statute, and if due to any reason the discretion is used to thwart that object, an aggrieved person was entitled to the protection of the court. Lord Hudson observed that the Minister could not escape from the possibility of control by mandamus by adopting, a negative attitude without explanation inasmuch as being guardian of the public interest he had a duty to protect the interests of those who claim to have been treated contrary to the public interest. So, it can be said that the theory of unfettered discretion got exploded in *Padfield*, if not earlier. We do not propose to pursue this aspect of the matter further because of the aforesaid concession of the learned Advocate-General.

7. Let us now see what is the law when a statute permits exercise of certain power on existence of a pre-condition and it leaves the donee of the power to subjectively decide whether the pre-condition exists, In this connection, what has to be seen is the scope of judicial review of administrative decision. The law here again is well settled and the same is that such a decision is amenable to interference if the same be based on irrelevant or extraneous considerations, in

ignorance of relevant considerations, so unreasonable that a reasonable person instructed in law could not have arrived at it (to put it differently, if it is arbitrary) and finally, if it be mala fide. As the learned Advocate-General has not disputed this legal position also, we have been saved from the unnecessary task of burdening the judgment with the case law on the subject. For the purpose at hand, therefore, it would be enough if reference is made to the Constitution Bench decision in *State of Rajasthan and Others Vs. Union of India and Others*, Reference to this case law has been deemed sufficient to bring home what has been stated above, because the question of permissibility and scope of judicial review of the satisfaction of the President arrived at relating to the imposition of President's rule in exercise of power under Article 356(1) of the Constitution came to be examined when the following was a part of our paramount parchment :

"Notwithstanding anything in this Constitution, the satisfaction of the President mentioned in Clause (1) shall be final and conclusive and shall not be questioned in any Court on any ground."

Being confronted even with such a constitutional provision, the majority of the Judges of the Bench held that if the satisfaction be mala fide or based on wholly extraneous and irrelevant grounds, the court would have jurisdiction to test the validity of the satisfaction, because in that case it would be a case of no satisfaction. The same would apparently be the position if the satisfaction were to be based on non-existent fact as a non-existent fact cannot give rise to any satisfaction at all.

8. Another legal question which needs our examination is the scope of a writ court to issue mandamus to exercise a discretionary power, as distinguished from issuing a writ of certiorari in quashing a decision taken in exercise of the power. For this legal knowledge, reference to one Constitution Bench decision alone would be sufficient as the learned Advocate-General has also relied on that, the same being *A.K. Roy and Others Vs. Union of India (UOI) and Others*, This decision needs a close look. We are concerned with that part of the aforesaid decision which dealt with the prayer of the petitioner to issue a writ in the nature of mandamus to the Central Government to bring into force the Constitution (44th Amendment) Act. Chandrachud, C.J., who spoke for the majority of the Bench, observed thus in this connection in para 52 :--

"But we find ourselves unable to intervene in a matter of this nature by issuing a mandamus to the Central Government obligating it to bring the provisions of Section 3 into force. The Parliament having left to the unfettered judgment of the Central Government the question as regards the time for bringing the provisions of the 44th Amendment into force, it is not for the Court to compel the Government to do that which, according to the mandate of the Parliament, "lies in its discretion to do when it considers it opportune to do it". The Executive is responsible to the Parliament and if the Parliament considers that the Executive has betrayed us thrust by not bringing any provision of the Amendment into

force, it can censure the Executive. It would be quite anomalous that the inaction of the Executive should have the approval of the Parliament and yet we should show our disapproval of it by issuing a mandamus But the Parliament has left the matter to the judgment of the Central Government without prescribing any objective norms. That makes it difficult for us to substitute our own judgment for that of the Government on the question whether Section 3 of the Amendment Act should be brought into force..... It is for these reasons that we are unable to accept the submission that by issuing a mandamus, the Central Government must be compelled to bring the provisions of Section 3 of the 44th Amendment into force..... If only the Parliament were to lay down an objective standard to guide and control the discretion of the Central Government in the matter of bringing the various provisions of the Act into force, it would have been possible to compel the Central Government by an appropriate writ to discharge the function assigned to it by the Parliament."

9. Learned Advocate-General submits that the aforesaid reasons, because of which writ of mandamus was refused in that case, apply *proprio vigore* here. Let us examine whether this contention is acceptable. To do so, we have to note the nature of the power which has been conferred on the Central Government dealt in A. K. Roy's case. The section conferring power on the Central Government to bring into force the Constitution (44th Amendment) Act, 1978 was couched in the following language:--

"It (meaning the Constitution (44th Amendment) Act) shall come into force on such date as the Central Government may by notification in the Official Gazette appoints"

Thus, the Parliament had left the matter to the judgment of the Central Government without prescribing any norm. It is because of this that the Constitution Bench characterised this power as "unfettered judgment", which required the Court to say that if the inaction of the Executive would have the approval of the Parliament, the same cannot be disapproved by the Court by issuing a mandamus.

10. The language of the statute at hand is, however, different. Section 3 of the Act has conferred the power to order for judicial inquiry when the need to inquire into any matter of public importance is felt. So, the question would be, if there be a definite matter of public importance, can judicial inquiry be refused ? According to us, the discretion conferred by Section 3 of the Act cannot be said to be "unfettered" inasmuch as the Parliament did think that if a definite matter of public importance would be there, a judicial inquiry should be ordered, if a need for the same exists according to the appropriate Government. There is no dispute so far. We would further say that if any reasonable man reasonably instructed in law would have come to the conclusion that the need for judicial inquiry exists, the denial of the same by the Government could, in the facts of a case, be regarded by the Court as meant to serve an alien purpose. We would have occasion to say later more about alien purpose.

11. We may say to the credit of the learned Advocate-General that he himself admitted, and fairly (being not only a legal adviser to the Government, but a constitutional functionary having independent statutory powers and duties which are exercised to subserve public interest, as stated at page 1752 of Seervai's "Constitutional Law of India", 3rd Edn., Vol. II) that a discretionary power vested in the Executive has to be exercised in a just, reasonable and fair way, as stated in paragraph 6 of *Aeltemesh Rein, Advocate, Supreme Court of India Vs. Union of India (UOI) and Others*, , to which our attention is invited by the learned Advocate-General himself. Not only this, the learned Advocate-General fairly admits that if a discretionary power is exercised mala fide, the same would be subject to interference by this Court in exercise of its power of judicial review. This concession has been made by the learned Advocate-General being conscious of the position in law that mala fide vitiates even the most solemn transaction. Use of power for ulterior or alien purpose has been regarded as bad ever since 1904 when Lord Lindlay stated in *General Assembly of Free Church of Scotland v. Overtown* 1904 AC 515,

".....that there is a condition implied in this as well as in other instruments which create powers, namely, that the powers shall be used bona fide for the purpose for which they are conferred". (Emphasis ours.)

12. What has been stated above about the positive act of exercise of discretionary power would apply with equal force to the refusal to exercise the discretion, because if exercise of discretionary power is subject to judicial review on the ground of, say, mala fide, non-exercise of the power to serve as alien purpose would also be subject to judicial review and in an appropriate case a mandamus to exercise the power can be issued.

13. At this stage, we may refer to locus classicus of *Julius v. Bishop of Oxford* (1880) 5 AC 214. This Julius of English law reminds us of the Julius of English literature. That Julius (Caesar) was found to be over-ambitious and got killed. This Julius, however, still survives because, unlike that Julius who used his power for personal aggrandisement, this Julius came forward to rescue the distressed people. Let us see how this has been done. Julius says this through the mouth of Lord Cairns L.C., --

"There may be something in the nature of the thing empowered to be done, something in the object for which it is done, something in the condition under which it is to be done, something in the title of person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so."

The aforesaid observations of the law Lord have resounded on innumerable occasions through the corridors of different courts of the country. Indeed, the observations are awe-inspiring; and the apex Court of the country, right from *Commissioner of Police, Bombay Vs. Gordhandas Bhanji*, , has quoted the same

in a catena of decisions. Learned Advocate-General, however, submits that the aforesaid observations of Julius have no application to the case at hand inasmuch as the present petitioners have no right in them to demand the enforcement of the discretion conferred by the section. We do not, however, think if for this reason a direction to exercise the discretionary power can be refused because what Julius has said is that there may be something in the nature of the thing, something in the object for which the power is conferred that the power gets coupled with duty and makes it the duty of the donee of the power to exercise the same when called upon to do so. The object, which is sought to be achieved in the present case by asking for judicial inquiry, is definitely one which is intimately connected with larger public interest, and so, if a case for invocation of the power is made out, we owe a duty to order the same,

14. Nothing further is required to be stated on the general law applicable to the case at hand. We shall advert later to those decisions which would be necessary to be looked into after having known the ground on which the petitioners seek an order for judicial inquiry. To know this, we may note the broad and relevant facts. As already stated, a grim tragedy took place on 7th May, 1992. Keeping in view the enormity of the tragedy, the State Government on the very next day directed the Revenue Divisional Commissioner, Central Division, Cuttack to hold an administrative inquiry in respect of the following matters:--

"(i) A thorough verification of the sequence of events leading to the consumption of spurious country liquor and consequent deaths.

(ii) Source of country liquor which was responsible for the incident and the person/ persons responsible for the supply of spurious country liquor.

(iii) Involvement or negligence of field staff of Excise and Police Departments in the matter of timely detection and prevention of such malpractice and offences.

(iv) Suggestions regarding remedial measures to prevent similar occurrence in future."

The Revenue Divisional Commissioner submitted his report on 12-7-1992. The case of the State is that in view of the report of the Revenue Divisional Commissioner, the recommendations contained in which have been accepted by the Government, no need for a judicial inquiry exists, as whatever the State Government thought necessary to be informed about the tragedy has been done by the Commissioner, and no new facts of public importance have come to light warranting judicial inquiry.

15. The case of the petitioners, on the other hand, is that the terms of reference of the inquiry entrusted to the Revenue Divisional Commissioner would show that a vital matter of public importance was left out. That matter is involvement of "certain Ministers and persons with powers", as stated in paragraph 21(b) of O.J.C. No. 3676 of 1992. The legal submission is that it is to protect the aforesaid persons that a judicial inquiry regarding the above matter is not being

held, by which the Government is protecting its own Ministers and thereby achieving a purpose totally "alien" to the Act. To put it differently, the refusal to hold judicial inquiry to know about the above is fraud on power, a species of mala fide.

16. Having known the case of the petitioners, let us see whether a case of mala fide has been made out and whether non-exercise of power, if mala fide, would render it bad so much so that a court can issue a writ of mandamus to exercise that power.

17. To know the law of mala fide, it would be enough for the purpose at hand to refer to two decisions of the apex Court. The first is *Express Newspapers Pvt. Ltd. and Others Vs. Union of India (UOI) and Others*, , and the second, *State of Punjab and Another Vs. Gurdial Singh and Others*, . This aspect of the matter has been dealt in the first decision in paragraphs 115 to 118. A perusal of the same would show that mala fide actions can be said to be of two types -- one about which it is said that they evince malice in law, and the other, malice in fact. Those actions are said to be vitiated by malice in law where the authority exercises its power in breach of law, say, by taking into account bona fide and with best of intentions some extraneous matters or by ignoring relevant matters. That would be a case of fraud on power. Malice in fact is imputed when the power is exercised for improper motive, say, to satisfy a private or personal grudge or for wreaking vengeance of, say a Minister, as was the case in *S. Pratap Singh Vs. The State of Punjab*, (the page number of this citation has been wrongly printed as "733" in paragraph 118 of the aforesaid case). In the present case, no allegation of "improper motive", as is this expression used in law in the present context, has been made. We would, therefore, not regard the present as a case of malice in fact. Let us see whether it can be said that there was fraud on power in the sense that there was misuse of power. Use of a power for an "alien purpose" would be misuse of power, as would appear from what has been stated in paragraph 118 of *Express Newspaper* (supra).

18. Same conclusion would be reached if we note *Gurdayal Singh's* case (supra). It was stated therein in paragraph 9 as below :--

"..... bad faith which invalidates the exercise of power -- sometimes called colourable exercise or fraud on power, and often times overlaps motives, passions and satisfactions -- is the attainment of ends beyond the sanctioned purpose of power by stimulation or pretension of gaining a legitimate goal..... When the custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested, the court calls it a colourable exercise....."

19. From the above, it follows that a colourable exercise of power would be a fraud on power and hence, the same would be an instance of malice in laws and exercise of power for considerations "outside" would be a case of fraud on power. The same would be the legal position if power is not exercised for considerations

"outside", i.e., if a power is not exercised for an "alien purpose".

20. Let us now see whether the "alien purpose" alleged in the cases at hand can be accepted. The learned Advocate-General has contended, and rightly, that an allegation of mala fide is easy to make but difficult to establish. It is further urged that the burden of establishing mala fide is on the person who makes it and the court would not regard such a burden to have been dislodged on the basis of vague allegations. It is also contended that the allegation of the petitioners that judicial inquiry is not being ordered by the Government because of the involvement of certain Ministers and persons with powers is vague (as nobody has been named ?) and there is absolutely no material even to prima facie establish this allegation.

21. Let us first see what type of proof a court would require in a case where mala fide is alleged. This aspect of the matter was examined by a Constitution Bench in Pannalal Binraj Vs. Union of India (UOI), . It was stated therein that if there be an allegation of abuse of power, the burden which is cast to prove the same is not "by way of proof to the hilt". (See paragraph 31). What has been stated about the standard of proof qua abuse of power would, a fortiori, apply to the case of misuse of power. The law in this regard was stated by another Constitution Bench in S. Partap Singh's case (supra) as below in paragraph 8 :--

"We demur to the suggestion that mala fide in the sense of improper motive should be established only by direct evidence, that is, that it must be discernible from the order impugned, or must be shown from the notings in the file which preceded the order. If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reason able and inescapable inference from proved facts."

The aforesaid was said about exercise of power for "improper motive", i.e., malice in fact. (It is known in legal world that Partap Singh was a case where the petitioner had alleged wrath and personal hostility of the Chief Minister of his State). We are of the opinion that a higher standard of proof cannot be required when the allegation is about malice in law. The law in this regard as found in yet another Constitution Bench decision: The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others, , is :

"The burden is discharged if the party alleging mala fide shows it as "reasonably probable"." (See paragraph 58)

22. So, reasonable probability of the existence of the ground alleged would be enough to accept a plea of mala fide. Let us see whether, judging on the touchstone of reasonable probability, it can be said that the petitioners have established their case. The learned Advocate-General contends that the aforesaid averment has been made only on the basis of newspaper reports, the correctness of which has not been testified even by the petitioners, and so, it cannot be said that the averment stands established. As to this, the reply of Shri Das is that this allegation has not at all been denied by the opposite parties in

their counter-affidavit, and so, we should accept the same. We do not, however, propose to accept the allegation because of its non-denial. So the question is whether on the basis of newspaper reports and/or those events of the, of which judicial notice can be taken, can it be said that the burden has been discharged by the petitioners ?

23. As to the reliance on the newspaper reports, Shri Das brings to our notice Rakesh Chand Narain Vs. State of Bihar, , in which, basing on a newspaper report relating to the sub-standard condition existing in Ranchi Mental Hospital, certain directions were given by the apex Court, which shows that full credence was given even to a newspaper report. We do not, however, propose to base our decision on newspaper reports, a cutting of one of which alone finds place as Annexure 1 of O.J.C. No. 3820 of 1992 which has stated about one Surendra-nath Das alias Balu (who was allegedly at the back of the tragedy even as per the report of the Revenue Divisional Commissioner) having started illicit liquor business in collusion with "some ruling party man".

24. Apart from what has been stated in the press in this regard, Shri Das states that it is a "notorious" fact that illegal activities, of the kind at hand in a big way cannot take place without political patronage, especially of persons in power. We have not felt happy in putting this submission on record, but it seems to be an unpleasant truth. At least, this is how people at large feel. We wish this were wrong. But then, if a fact be taken as "notorious", law permits a court to take judicial notice of the same, as stated by a Division Bench in Sambhu Ram v. Emperor AIR 1971 Sind 127 (sic), and by Mockett, J. in the Special Bench decision of In the matter of a Pleader, In Re: Madura, .

25. From the above, we would state that the allegation of the petitioners in this regard has to be regarded as reasonably probable. We may now deal with the case of the State. As already stated, its case is that "(a) a new fact of public importance" having come to light after the report of the Revenue Divisional Commissioner, there is no need for judicial inquiry. Before we express our opinion on the tenability of this stand, we would mention about the law which has to be borne in mind while considering the relevant aspect of the matter. As the decision not to hold a judicial inquiry is based on the subjective satisfaction of the Government, it may be stated that the law does not permit to judge the tenability of the satisfaction by considering as to what would have been the result if some ground other than the one considered would have been before the authority. It is for the simple reason that the authority had arrived at its satisfaction on the basis of fact, ground or material before it. It is not known to the court what view it would have taken if the new ground would have been before it. This, however, is permissible when a decision is said to be based on objective satisfaction, in which case the court can almost put itself in the place of the authority and think whether the materials which were before the authority or which could have been before the authority justifies the decision taken by it. In a subjective satisfaction case all that is permissible in this context is that a court

can, while judicially reviewing the decision, go to the extent of examining whether any reasonable person reasonably instructed in law could have come to the conclusion arrived at by the authority on the basis of the materials which were taken into consideration by the authority in arriving at the decision.

26. Now let us see whether the decision of the State Government on the ground given above can be sustained. We do not think why existence of "new" fact was at all thought relevant by the Government in deciding not to order for judicial inquiry. The fact of tragedy was already there. There was no need for a new tragedy to happen, and that too of the proportion of the kind at hand, to have moved the Government to order for judicial inquiry. This was an absolutely irrelevant fact which went into the subjective satisfaction of the authority. Indeed, we would go further and say that it was a non-existent fact inasmuch as the fact of tragedy was there. It just could not have been wished away because the Revenue Divisional Commissioner had submitted his report. That report has stated nothing about the involvement of "Ministers and persons with powers" in the tragedy at hand. Indeed, the Revenue Divisional Commissioner was not called upon to inquire into this aspect of the matter. So, the report of the Revenue Divisional Commissioner had no relevance to refuse to exercise discretion to order for judicial inquiry.

27. In this connection we would refer to the submission of the learned Advocate-General which is that as following the report of the Revenue Divisional Commissioner innumerable cases have been instituted against Surendranath alias Balu, during investigation of which cases it would be possible to find out whether Balu had been aided or abetted by others, may be even by persons in or with power, and if it would be so found, those persons would also be booked for trial along with Balu, if ultimately the investigations were to result in charge-sheets, and so, need for inquiring into the aspect at hand has ceased to exist by now. We would think that this could have been a good ground to refuse judicial inquiry. But that is not the stand of the State. As already stated, in a case where a decision is based on subjective satisfaction, new ground in support of the satisfaction cannot be urged, and so, we cannot take the ground urged by the learned Advocate-General into consideration while deciding about the sustainability of the satisfaction arrived at by the Government. At the cost of repetition, we may say that the authority wanted "new" fact to satisfy its mind whether a need for judicial inquiry existed, and not that facts have already come into existence, because of which no judicial inquiry was necessary.

28. The only other observation we have to make is that the law is well settled (a la Rajasthan case) that if subjective satisfaction is based on irrelevant ground, the same would be amenable to interference even by a writ court in exercise of its power of judicial review. The same would be the position if the ground be non-existent. So, we are not in a position to sustain the stand taken by the Government in refusing to order for a judicial inquiry.

29. May we say in passing that the present being a case where reason for non-

exercise of discretion has been made known to the court, we need not address ourselves to the legal position as to whether if no reasons are given, the court can ask for the same, which aspect of the matter was not examined in the aforesaid Rajasthan case also, as in that case as well, reasons for requiring dissolution of State Assemblies were known. The only other observation we would like to make in this regard is that if reasons are not made known, it would be permissible to a court of law in an appropriate case to say that no good reasons exist for exercise or non-exercise of the discretion, as observed by Lord Pearce in *Padfield*. (See pages 1052-54 of 1968 Appeal Cases).

30. The submission of the learned Advocate-General that the allegation of the petitioners is vague, need not detain us, as the only basis of this submission can be that the concerned persons have not been named, which could not have been done in the very nature of things. It is indeed to find this that the inquiry has been prayed for.

31. Before concluding, we would refer to another passing submission of the learned Advocate-General. The same is that as delay occurs when judicial inquiries are ordered, the same may also be a ground for Government's refusal. As to this, we would make two observations : The first is that this is not the reason given in the present case. The second is that, according to us, it would be a relevant consideration only where very quick action is desired to be taken by the Government to deal with a very important matter of public interest, to enable to do which Government's mind has to be informed about the reason etc. of the happening of the event, recurrence of which is sought to be prevented. We do not think if the present is a case where Government thought or could reasonably think that it must take all steps immediately to stop recurrence of a tragedy of the present proportion. We would concede that some immediate steps were undoubtedly called for, and it may be that for that purpose, a judicial inquiry is not suitable. But for the evil of the type at hand, not only some sporadic and short-term steps, but long-term measures also, are required to be taken to prevent its recurrence, which could well await finding of judicial inquiry. So, according to us, the aspect relating to delay would have been an irrelevant consideration to refuse the inquiry.

32. In view of all the above, we hold that refusal of judicial inquiry in the present case is to serve an "alien purpose" (which party in power would normally like to get matters involving its members inquired into by a judicial body?). The law, therefore, permits us to order for a judicial inquiry, which we hereby do. May we add that we think that the Government would not feel shy to do so, as it is the Court which is ordering for the same; more so, when the inquiry would serve larger public interest which consists in seeing that lives of people are not taken away by persons involved in encouraging trading in illicit liquor. Further, it would be good for the Government if, on inquiry being made, it would be found that nobody of its party had any role to play in the great tragic drama. Needless to say that the Government is under a constitutional obligation to protect the

people from those who trade in the blood of the people.

33. Before parting with this aspect of the matter, we propose to put on record our appreciation for the painstaking efforts taken by the Revenue Divisional Commissioner in inquiring into the matters referred to him and giving various suggestions. The Revenue Divisional Commissioner has himself described the Cuttack event as a "disaster of unprecedented proportions", which words we have quoted in the opening paragraph of our judgment. Thus, he assessed the situation correctly and, it seems, also rose to the occasion. We hasten to add that these observations of ours may not be understood to mean that the findings incorporated in his report are correct, according to us. Had the matter at hand been referred to the Revenue Divisional Commissioner (we would concede that propriety would not have demanded this, as, being a servant (officer) of the Government, the Commissioner could not have been called upon to enquire whether anybody of the Government was involved in the matter), we would not have felt called upon to order the Government to hold inquiry for the aforesaid purpose. May we state here that the learned Advocate-General had submitted that the Act does not prohibit entrustment of inquiry even under the Act to an executive officer, as had been done once earlier here, he said, by appointing Shri L. I. Parija, IAS, when he was the Chief Secretary, to inquire into certain Paradip Port matter. If the idea behind making this submission be that the Commissioner himself could have been asked by the Government to inquire into the aforesaid, but it did not do as it did not feel it necessary, we would say that according to us the non-entrustment of the aspect at hand to the Commissioner (if the Government would have thought that it would not have minded ordering so) or, for that matter, to anybody to inquire, was to serve an alien purpose.

COMPENSATION

34. The basis of praying for a direction to pay compensation to the kith and kin of the victims is that the tragedy had taken place because of the negligence of the State Government officials, but for which, illicit trading in spurious liquor at a large scale would not have been possible. The legal points for determination, therefore, are: (1) whether any legal obligation has been cast by any statutory provision on the State Government officials to see that illegal trading in liquor does not take place; (2) whether non-performance of the statutory duty can be said to be negligence; (3) whether negligence in performing duty is actionable in tort; and (4) whether for the tortious acts of its employees, the State Government can be held liable and, if so, whether it can be asked to pay compensation.

35. Let us examine these points serially :

(1) A perusal of the Bihar and Orissa Excise Act, 1915 shows that trading in liquor is not permissible unless licence for the same is obtained and Section 47 of the Act even visualises prosecution of a person selling liquor in violation of the provisions of the Act. So, the Act requires sale of liquor in licensed shops and the

State Government officials are under a legal obligation to see that there is no illegal trading in liquor.

(2) The second legal question answers almost itself because but for the negligence of the excise officials in taking due steps to enforce the provisions of the Act, it is apparent that the illegal trading in liquor cannot take place, and that too in a large scale.

(3) This point need not detain us because ever since the decision of the House of Lords in *Donoghue v. Stevenson* 1932 ACJ 562, it has been accepted that negligence is a specific tort in itself. Not only this, in such a case element of "fault" is not required to be established, (see page 182-3 of Salmond Reuston's *The Law of Torts*", 18th Edn.}).

(4) (a) This stands answered by the decision of the apex Court in *Saheli, A Women's Resources center, Through Ms Nalini Bhanot and Others Vs. Commissioner of Police Delhi Police Headquarters and Others*, , in paragraph 11 of which it has been observed that it is well settled that the State is responsible for the tortious acts of its employees. Being of this view, a sum of Rs, 75,000/- was awarded against the State to the concerned person as compensation because the death of her child had taken place due to police atrocities. And this was done in a writ proceeding.

(b) In the written note submitted on behalf of the opposite parties by Shri S. K. Das, learned Government Advocate on 3-11-1992, reference has, however, been made to a Constitution Bench decision in *Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh*, to urge that for tortuous acts committed by public servants, State is not liable. (Decision in SAHELI is by a 3-Judge Bench which has not taken note of this case.) A reference to that decision shows that this view was taken relating to acts which are referable to the exercise of sovereign powers delegated to public servants. As to other acts, this principle would not apply. This has been made abundantly clear in paragraph 21 of the judgment in which it has been stated that if a tortious act is committed by any public servant and it gives rise to a claim for damages, the question to ask is: was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of sovereign powers of the State to such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortious acts will not lie. On the other hand, if the tortious act has been committed by the public servant in discharge of duties assigned to him not by virtue of the delegation of sovereign power, an action for damages would lie.

(c) So, the question is whether the acts of the public servants with which we are concerned can be said to be a part of sovereign function delegated to them. The present is not an appropriate occasion to deal at length with the question as to what is the meaning of the word "sovereign". It would be enough to say that this word does not admit of an absolute definition, as observed by Htbbert in his

illustrious book "Jurisprudence". Whatever meaning may be attributed to this word, this much is well settled that that power is called "sovereign" which cannot be lawfully exercised except by sovereign. Now, the relevant power which the Act has conferred on the Government is to control trading in liquor for which purpose requirement of licence has been provided and the public servants have been given powers to see that nobody else trades in liquor. This power conferred on the State cannot by any token be regarded as sovereign inasmuch as even under the provisions of the Orissa Municipal Act, 1950, licences have to be obtained from the municipalities as required by various provisions of that Act. For this reason, it cannot be contended that even the municipalities have to be regarded as sovereign bodies. The power of licensing is a regulatory measure and this power is conferred even on public bodies which do not form part of the Government. So, the decision in *Kasturilal* cannot come to the assistance of the opposite parties and cannot override *SAHELI* (supra).

36. Let us examine the facts of the present case to know whether a case for awarding compensation has been made out or not. Before we do so, we may state that the stand taken by the Government that it is not liable to pay compensation because the tragedy cannot be attributed to sale of liquor in Government licensed shops has no relevance in view of the aforesaid position in law, though this fact has some nexus with the question of quantum of compensation to be paid. Insofar as the allegation of the petitioners relating to the negligence of the Government officials is concerned, all that is required to be done is to refer to the findings of the Revenue Divisional Commissioner himself. Before we refer to the findings, one pertinent fact deserves notice. The same is that no less a person than the Director-General of Police of the State had thought it necessary well ahead of the tragic event, to be precise on 1st December, 1991, to bring to the notice of the Collector, Cuttack by writing a D.O. letter to him as per Annex.-2 of O.J.C. No. 3820 of 1992 that it had been learnt by him that a large number of illicit liquor shops had sprung up in Cuttack town because of which the Police Chief expressed his apprehension that there was "possibility of deaths by drinking poisonous liquor". The Collector was, therefore, requested to assess the problem and chalk out a joint action programme with excise and police. The State's case is that after receipt of this communication, intensive raids were taken up from 4-12-1991 to 11-12-1991 by the excise officers and field staff. 50 cases were booked and 46 persons arrested. Raids were also arranged from 19-1-1992 to 24-1-1992 following which 25 cases were booked and 20 persons arrested. On both the occasions a huge quantity of illicit liquor also came to be seized. In the month of May also, raids were organised jointly by flying squad and district preventive staff leading to seizure of various quantities of spirit.

37. The Revenue Divisional Commissioner, however, after having inquired into the matter, came to the conclusion that excise enforcement work at Cuttack "had no direction, no focus and no particular scheme of priorities". The further finding in this regard are:

"There was a progressive general slackening of enforcement work over the last three years. It was mostly directed against the party paddlers of illicit liquor and occasionally against illicit distillation. No serious effort was made to identify the source from which illicit liquor was flowing to the petty paddlers so that an attempt could have been made to strike at the root of the problem."

(See p. 114 of the report)

Another finding of the Commissioner to which we may advert is relating to there being no special or worthwhile effort to detect sale of poisonous illicit liquor. (The deaths in the present case were due to consumption of poisonous liquor.) The Commissioner further opined that the nature and quantity of enforcement work was not such as could have forewarned the Excise Administration about the possibility of a disaster far less to prevent it or to minimise its impact. It may be stated that the report of the Revenue Divisional Commissioner containing the aforesaid findings has been accepted by the Government. It can thus safely be said (on the basis of materials available before us) that the negligence of the concerned Government officials was one of the main reasons of the tragedy which had left a large number of families grief-stricken and many of them even destitute.

38. On the facts as they are, a case for compensation has, therefore, been made out. Before we quantify compensation, we should like to say something about the desirability of awarding compensation. The same lies in making it known to the State Government that in such cases they can be called upon to pay compensation. This realisation seems necessary because of large number of deaths in hooch tragedies taking place throughout the length and breadth of the country. We hope that the act of calling upon the State Governments to pay compensation in such cases would result in greater vigilance by their officials, which is absolutely necessary in view of what is happening in the country. We think that one of the ways in which such gruesome tragedies can be prevented is to "mulct" the State Governments. (This is the word used by Chandrachud, C.J. in *Rudul Sah Vs. State of Bihar and Another*, a path-setting judgment, while stating that one of the telling ways in which violation of Article 21 can reasonably be prevented is to award compensation when it is violated. We think that in cases of the present nature also, the State Governments should be mulcted.)

39. What should be the quantum of compensation? In this connection, we have borne in mind that compensation would be required to be paid to the kith and kin of 124 families (we have taken this figure from paragraph 4 of the counter-affidavit of opposite parties 1 to 4 filed in O.J.C. No. 3620/92) and the present financial position of the State may not be able to bear large drain on its exchequer. That this is a relevant consideration would appear from *Dr. P. Nalla Thampy Thera Vs. Union of India (UOI) and Others*, .

40. Before fixing the quantum, we would refer to a Bench decision of this Court in O.XCs. Nos. 9517 of 1988 and 525 of 1989 disposed of on 12-2-1992 (known

as Kala-handi case) wherein compensation to the dependants of five persons who had died out of starvation was fixed at a sum of Rupees 25,000/- which had been done after taking note of the submission of the State that while directing payment of compensation, availability of resources must be borne in mind. In this connection, we would also refer to Peoples' Union for Democratic Rights Vs. State of Bihar and Others, , wherein to the victims who had succumbed to the injuries sustained in the police firing, the compensation awarded was Rupees 20,000/-. The Court did not feel inclined to limit the quantum of compensation to Rupees 10,000/- by stating that ordinarily in the case of death, compensation of Rs. 10,000/- is paid. May we also say that while thinking of quantifying the compensation to be paid in the present cases, we have presumed that most of the victims were from the lower strata of the society to whom even a moderate sum has much meaning.

41. Keeping in view all the above, we would have ordered for payment of compensation of Rs. 20,000/-. But we are not doing so, because the victims had consumed the liquor from unlicensed shops, as found by the Revenue Divisional Commissioner, may be because the stuff was cheaper there. Even so, they had aided an illegal act, which requires scaling down of the quantum. So, we fix the amount of compensation to be paid to the kith and kin of each of the victims at Rupees 15,000/-. Our desire to award compensation " Rs. 20,000/- may not be taken as an indication of the fact that, according to us, life of even a poor man in a poor State like Orissa is worth only Rs. 20,000/-. Even so, we thought of Rs. 20,000/-, as awarding of compensation by a writ court in such cases is really to be taken in the nature of a "palliative" as stated by Chandrachud, C.J. in Rudul Sah Vs. State of Bihar and Another, , by observing that a victim of the present kind cannot be left penniless until the end of his suit, the many appeals and the execution proceedings, which would take place if the concerned person could approach a court by filing compensation suit which proceeds leisurely.

42. Before parting with this facet of the case, may we observe that it may not be taken that we have endorsed the drinking habit of the victims, which alone must have driven them to go in for cheap liquor. The Constitution requires prohibition. The State has, however, allowed opening of liquor shops to invite people to consume liquor. Had the State thought it fit to enforce prohibition, it may as well be that we would have further reduced the quantum of compensation, or even denied it.

43. In the result, the petitions are allowed by directing to issue a writ of mandamus on the State Government to appoint a Commission of Inquiry under the Commission of Inquiry Act, 1952, and to pay compensation to the kith and kin of each of the victims. The payment as ordered by us shall be made within a period of two months from the date of receipt of this Court's writ. While doing so, it would be open to deduct any sum of money earlier paid even as ex gratia, but not what was paid to meet the medical and/or funeral expenses.

B.N. Dash, J.—44. I agree