

(1998) 11 OHC CK 0023

In the Orissa High Court

Case No : Civil Jurisdiction Case No. 12524 of 1997

Yash Granites

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 03-11-1998

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Mines and Minerals (Development and Regulation) Act, 1957 — Section 13

Orissa Minor Minerals Concession Rules, 1990 — Rule 5, 5(6), 6, 6(6)

Citation : AIR 1999 Ori 230 : (1999) 1 OLR 151

Hon'ble Judges : S.N. Phukan, C.J;P.K. Tripathy, J

Bench : Division Bench

Advocate : U.K. Sawal and B.R. Barik, for the Appellant; A.P. Das, Additional Government Advocate, Gangadhar Tripathy, Rajkishore Nayak, Ashok Kumar Swain, Aasmita Das, Bighnanarayan Dhol and Swapnajeet Lenka K. Bharat Jalli, for the Respondent

Final Decision : Allowed

Judgement

P.K. Tripathy, J.—In this writ application under Articles 226 and 227 of the Constitution petitioner has prayed to quash Annex-lire 13 in which Government's decision to grant a quarry lease of decorated stones for a period of ten years over an area of 22.023 hectares in village Kurlubhatta in Belangi district in favour of Opposite Party No. 5 was communicated to him.

2. Petitioner's case in brief is that on 6-6-1996 petitioner applied for a mining lease of decorative stones for an area of 10.615 hectares in village Kurlubhatta of Sindhakala Police Station in the district of Bolangir in accordance with Rule 6(6) of the Orissa Minor Mineral Concession Rules, 1990 (in short the Rules) along with requisite information. On 3-2-1997 opposite party No. 5 also applied for a mining licence under the same provision of law for an area of 22.023 hectare from out of the same area. Before that on 29-8-1992 the said area of 22.023 hectares had been leased out in favour of one Om Prakash Agarwalla but as the said lease holder did not operate the mines, therefore, the lease in favour of Shri

Om Prakash Agarwalla was cancelled. So far as that 22.023 hectares upon cancellation of the lease by the aforesaid order, was decided to be leased out in favour of opposite party No. 5.

3. In that connection petitioner's contention is that he has set up a factory for processing of coloured stones and has indented machineries for granite polishing and has got requisite clearance from all departments concerned including local revenue authority and the taxation department. His further case is that his application being earlier in point of time in comparison to that of opposite party No. 5 rejecting of this application is arbitrary and illegal. He has thus prayed to quash Annexure 13 and to issue appropriate direction to the State to lease out an area of 10.615 hectares, as applied for, in his favour.

4. Opposite party No. 5 has taken the stand that petitioner's application was never earlier in point of time and it could not have got precedence over the applications of opposite party No. 5. He has further stated that petitioner has also taken lease of a quarry at an area of 24.89 hectares in the same district and that part of the fact was suppressed by the petitioner in his writ application and that by manipulating the records he obtained favourable reports from the local authorities belonging to different departments. He has further stated that petitioner's application was deficient for not furnishing vital and important documents and that in the mean time he (opposite party No. 5) has already taken all the ancillary steps for operation of the quarry.

5. In their counter affidavit filed on behalf of opposite parties No. 1 and 2, representing the State, it has been asserted that the lease granted in favour of opposite party No. 5 as per Annexure 13 is not liable to be cancelled having been granted in accordance with the provision of law. It is further stated that petitioner applied for the quarry lease of decorative stones over an area of 10.615 hectares out of which 9.356 hectares were covered by the lease hold area of Om Prakash Agarwalla and therefore the balance area of 1.259 hectares was available in favour of the petitioner and in that connection his option was called for but petitioner did not submit anything in affirmative. Apart from that the petitioner has been granted with quarry lease for an area of 24.89 hectares for decorative stones in Salemdunga in the same district since 18-10-1996 . It is further stated that petitioner's application could not be regarded as earlier in point of time inasmuch as the date of the application (on 6-6-1996) the quarry lease granted in favour of Om Prakash Agarwalla had not been cancelled and the proceeding was pending and that the same was disposed of on 27-12-1996 and that application, of opposite party No. 5 was duly considered in accordance with the provision of Clause (iv) in Sub-rule (6a) of Rule 6 of the Rules,

6. Opposite party Nos. 3 and 4 did not file any counter or counter affidavits.

7. Reiterating the above noted facts and circumstances, it was argued on behalf of the petitioner that the conduct of opposite parties 1 and 2 in rejecting the application of the petitioner for the applied area and granting the lease in favour

of opposite party No. 5 is not only arbitrary and illegal but also against the provisions of law in the Rules. Accordingly he prayed to quash Annexure 13 and to direct the opposite party Nos. 1 to 3 to lease out the quarry area applied for by the petitioner.

8. Argument advanced by the opposite party members was that the decision of the State Government in granting lease in favour of opposite party No. 5 being neither illegal nor unjust, the same is not liable to be interfered with simply because the petitioner's application was not allowed in preference to that of opposite party No. 5. Learned Additional Government Advocate also further argued that for the sake of argument even if his application shall be treated as earlier in point of time, he is not entitled as a matter of right to claim for the lease over a portion from 22.023 hectares when it is convenient and beneficial for the Government to grant the lease of the entire area to the opposite party No. 5 who has applied for the lease accordingly.

9. Before dealing with the aforesaid controversy it is but prudent to quote the relevant provisions from Chapter II of the Rules :--

"5. Application for quarry lease -- Every application for a quarry lease shall be made to the competent authority in Form "A" in triplicate and shall be accompanied with the following documents and particulars;

(i) The Treasury Challan showing deposit of two hundred rupees towards the application fee;

(ii) Name, nationality, profession and address of the applicant;

(iii) Plan and description which would facilitate easy identification of the area applied for;

(iv) Name of the minor mineral/minerals, which the applicant intends to extract and/or move;

(v) Purpose of which the minor mineral (s) would be used;

(vi) Period for which the lease is required;

(vii) An affidavit stating the total area held by the applicant or with any other person(s) having joint interest by way of quarry lease within the State;

(viii) Whether the land applied for belongs to private persons, consent of all such persons for grant of lease;

(ix) Attested copies of up-to-date Income Tax and Sales tax clearance certificate or non-assignment certificate, as the case may be;

(ix-a) Where the applied quarry lease relates to any type of rock used for decorative, industrial or export purpose including dimension of stones-

(a) a solvency certificate and a list of immovable properties from the concerned

revenue authority; and

(b) a certificate from his banker stating the extent of his credit-worthiness;

(x) Any other information which the applicant intends to furnish, such as, technical knowledge experience, financial position and the like.

6. Disposal of the applications -- (i) All applications received by the competent authority shall be entered in the Register of Applications for quarry leases which shall be maintained in Form "C" appended to these rules.

(2) As soon as an application is received, it shall be acknowledged to the applicant in Form "B". If the application is refused, an intimation which would contain the reasons for refusal, shall be sent to the applicant.

(3) x x x x x x x x x x) (4) No application shall be granted unless the applicant submits the Income Tax and Sales tax clearance certificates in original or non-assessment certificates in original.

(5) Subject to the provisions of Sub-rules (6) and (6-a), where two or more persons have applied for a quarry lease in respect of same land or area, the applicant whose application was received earlier shall take precedence in consideration for the grant over an applicant whose application was received later.)

(6) xxx xxx xxxx (not relevant) (6-A) Notwithstanding anything contained in Sub-rule (6), in respect of all types of rocks used for decorative industries or export purpose, including dimension stones the priority shall be in the following order, namely;

(a) a person who has already set up an industry for processing of such minor minerals in the State;

(b) a person who has a definite plan for setting up of an industry in the State for processing of such minor minerals within three years, if he has furnished a copy of his project report on the proposed processing industry and also a letter from the financing institution, issued by the Chief Executive of such institution to the effect his project report is being appraised by such financing institution;

Provided that -

(i) the lease shall be granted only when the processing plant is ready for operation within three months and confirmation to that effect has been received from the concerned financing institution, if any;

(ii) the competent authority, on receipt of the documents mentioned above and on being satisfied that the applicant will be able to invest or arrange sufficient funds for establishment of the processing industry, has issued a letter of assurance for grant of lease, which shall be initially valid for one year and shall be renewable for good and sufficient reasons, from time to time not exceeding three years in the aggregate;

(iii) a person who is a raiyat of the land; (iv) any other category;

Provided that in the case of an applicant under category (iii) or (iv) the lease may be granted by the competent authority on being satisfied that the applicant shall be able to invest or arrange sufficient funds to carry on his quarrying activity in a proper, skilful and workmen like manner.)

7. xxx xxx xxx (not relevant)

8. Extent of area to be granted under quarry leases -- (1) The area to be granted under one lease shall be for a compact block and the extent of such area shall not exceed one hundred hectares.

(2)(a) No person, by himself or with any person having joint interest, shall, save as provided in Clause (b), hold more than three square kilometres of area under lease in the State of Orissa,

(b) In the case of quarry lease relating to any type of rocks used for decorative, industrial or export purpose including dimension stones, the maximum area shall, in the case of an applicant-

(i) be one hundred and fifty hectares if the applicant comes under category (i) or (ii) of Sub-rule (6-a) of Rule 6, and

(ii) fifty hectares, if the applicant comes under category (iii) or (iv) of Sub-rule (6-a) of Rule 6;

Provided that when more than one application relating to any of the categories (i) and (ii) of Sub-rule (6-a) of Rule 6 is received for the same area the inter se priority shall be decided as the basis of the installed capacity).

(3) The boundaries of the area covered by a quarry lease shall run vertically downwards below the surface.

The above quoted rules speak for themselves the procedure to be followed and the manner in which applications for quarry leases should be disposed of.

10. In this case the stand of opposite parties 1 and 2 that by 6-6-1996 the cancellation proceeding of the lease hold area of Omprakash Agrawal being still pending, the petitioner's application for lease of an area of 10.615 hectares was not eligible for consideration inasmuch as out of the same an area of 9.356 hectares was overlapping with the area leased out to said Omprakash Agrawal and for that the available area of 1,259 hectares was offered to be leased out from out of the applied area. The contention of opposite party Nos. 1 and 2 is only on the basis of that such an option was called for because the lease granted to Omprakash Agrawal had not been cancelled. This is factually incorrect inasmuch as the application filed by the petitioner was processed in the connected file IV (sic) SM 12/97 only in January, 1997 by which date admittedly the lease granted in favour of Omprakash Agrawal had already been cancelled with effect from 29-2-1993, vide order dated 27-12-1996. It is also seen from

the note-sheets in that file that no proper reason was assigned justifying the suggestions for turning down the application for grant of lease over the 10.615 hectares of the area in favour of the petitioner. Apart from that though it appears in the above mentioned file produced for perusal, that the case of opposite party No. 5 was positively considered for grant of lease in his favour in respect of 22.023 hectares but the said file does not contain the application or any other documents or paper, filed by opposite party No. 5, if any. In that connection, Annexures B to H filed by opposite party No. 5 also do not contain copy of the application (if made) under Rule 5 of the Rules.

11. It appears from the above quoted rules that Rule 5 prescribes the particulars to be furnished in the application for a quarry lease. In that connection, Sub-rule (6-a) provides the order of priority specifically with respect to applications received relating to all types of rocks used for decorative, industrial or export purposes including dimension stones and accordingly a person who has already set up an industry for processing minor mineral stones in the State shall get priority over a person who has a definite plan for setting up on an industry in the State for processing of minor minerals within 3 years and has furnished a copy of his project report etc. However, the priority as prescribed in Clause (b) of Sub-rule (6-a) is subject to the proviso (i) to (iv) as incorporated therein. It does not appear from the Government file produced for perusal that required scrutiny of the application of the parties i.e. petitioner and opposite party No. 5 was properly made keeping in view the aforesaid provisions of law in the Rules. On the other hand, it appears that a whimsical decision was taken for grant of the lease in favour of opposite party No. 5.

12. During the course of hearing learned Addl. Government Advocate argued that, executive decision of the Government, in the absence of allegation of mala fide or impropriety in decision making process is not liable to be interfered with in exercise of the writ jurisdiction under Articles 226 and 227 of the Constitution. The issue raised is no more res nova. Relating to judicial review in matters of administrative decisions, in the case of *Rashtriya Pari Yojana Nirman Nigam Limited Vs. Orissa Water Supply and Sewerage Board and Others*, , Division Bench of this Court held that at page 14-15 :--

"(1) "Judicial review", as the words imply, is not an appeal from a decision, but a review of the matter in which the decision was made.

(2) It is not for the Court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fait. The Court is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) **Illegality**; This means the decision maker must understand correctly the law that regulates his decision making power and must give effect to it.

(ii) Irrationality, "namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

(3) The Court must, while adjudicating validity of an executive decision grant a certain measure of freedom of play in the hands of the executive. The problems of the Government are practical ones and may justify the action. Mere errors of the Government are not subject to judicial review.

(4) Courts stand between the executive and the subject alert to see that discretionary power is not exceeded or misused.

(5) If the power has been exercised on a non consideration or non application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous, and if a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated.

(6) The authority must genuinely address itself to the matter before it, and it must not act under the dictates of another body or disable itself from exercising a discretion in each individual cases. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the latter and must not act arbitrarily or capriciously, In other words, Court has to see whether there was a failure to exercise discretion and excess or abuse of discretionary power."

In the case of *Parsman Pharmaceuticals v. State of Orissa* 85 (1995) CLT 21, this Court held that :--

"(i) The State or any public authority under the control, management or supervision of the State is subjected to the writ jurisdiction relating to any executive decision taken.

(ii) While exercising the writ power, the Court is to find out whether the decision making process has proceeded on the basis of principle of law and reasonableness and the principle of natural justice was duly complied with.

(iii) Whether the action of the State or the public authority was done in safeguarding and due regard to the public interest.

(iv) Whether the State or the public authority granted equal treatment and made a fair play in the whole of the transaction.

(v) Whether the State or the public authority acted mala fide in dealing with the subject.

(iv) Deviation, if any, made is whether illegal or irregular and in that connection, whether allowances can be made in favour of executive discretion."

Thus, it is the settled position of law that judicial review of executive actions or administrative decision is amenable to writ jurisdiction but in appropriate cases,

as indicated above.

13. Keeping in view the aforesaid legal parameter legality and correctness of the decision taken by the Government is to be judged from the facts and circumstances already noted. It appears therefrom that though in this case petitioner has not advanced the allegations of mala fide but he has alleged about illegal, arbitrary and whimsical action by the authority in not considering the applications in accordance with law. That allegation is made out inasmuch as when the application filed by the petitioner was taken up for consideration after cancellation of the lease granted to Sri Omprakash Agrawal, there was no legal, valid and justifiable ground to reject the pending application of the petitioner on the ground that it is precocious. Petitioner's application was not scrutinised in accordance with the legal procedure prescribed in the above quoted rules. It is true that Government may decide not to grant the lease in favour of the petitioner, but there must be cogent reasons to reject his application. At the risk of repetition it is recorded that no such reason was assigned. Therefore, the authority vested with the opposite party Nos. 1 and 2 was abused and not legally exercised while refusing to grant lease in favour of petitioner and allowing substantial part of that area to be leased out to opposite party No. 5. In that connection, as already noted, it is found that application, if any, made by the opposite party No. 5 is neither in the connected file which has been produced for perusal of the Court nor the opposite party members filed such application for perusal of the Court. It does not reveal from the Note sheets in the concerned file of the opposite party Nos. 1 and 2 that such application of opposite party No. 5, if any, was scrutinised, keeping in view the requirement of law in Rules 5 and 6 (as detailly quoted earlier) and other relevant provisions of law visa-vis the public interest or the interest of the State. Under such circumstance while quashing the Annexure 13 it is felt expedient in the interest of justice and propriety of the administration that opposite parties 1 and 2 shall afresh consider the applications of the petitioner and opposite party No. 5 and dispose of the same in accordance with the provisions of law in the Rules and pass a speaking order.

14. The writ application is allowed accordingly. Parties are to bear their respective cost of litigation.