

**Chaitram Vs. Superintendent of Excise and ors.**

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**Court :** Orissa

**Decided On :** Feb-06-1973

**Reported in :** AIR1974Ori31; 39(1973)CLT271

**Judge :** R.N. Misra and ;B.K. Ray, JJ.

**Acts :** Bihar and Orissa Excise Act, 1915 - Sections 22(2) and 42(1); Board's Rules, 1965 - Rule 118

**Appeal No. :** O.J.C. No. 91 of 1973

**Appellant :** Chaitram

**Respondent :** Superintendent of Excise and ors.

**Advocate for Def. :** Addl. Govt. Adv.

**Advocate for Pet/Ap. :** R. Mohanty, ;P.K. Sengupta, ;B.C. Das, ;S. Biswal and ;N. Patra, Advs.

**Disposition :** Petition allowed

**Judgement :**

ORDER

1. The petitioner was granted exclusive privilege in respect of four outstill liquor shops at Jatni, Naharpara, Daspalla and Chandka all located in the district of Puri under Section 22 of the Bihar and Orissa Excise Act for the year 1972-73 on a

monthly consideration of Rs. 50,500/- by the State Government. Licenses were issued as required under Section 22 (2) of the Act to the petitioner. The petitioner had, as required under the rules, deposited a sum of Rs. 1,01,000/- being the sum equal to two month's consideration money and had undertaken to pay every month's consideration money on the first day of the subsequent month. He filed O. J. C. No. 633 of 1972 in this court challenging the vires of some of the provisions of the Act and the Rules made thereunder, and applied for interim orders. On 24-8-72, this Bench gave the following directions:--

'Issue notice of admission and hearing. There shall be stay of realisation of the amount on the following conditions:--

The petitioner shall be called upon to pay out of the entire dues payable upto March, 1973 dues of the three months. The first instalment would be payable by the end of September, 1972 and the second by the end of November, 1972 and the third by the end of January, 1973. It is stated that two month's licence fee is already in deposit. That would be held by Government under the arrangement already entered into. Expedite hearing of this case. Failure to pay any of the instalments as directed would entail withdrawal of the orders of stay without further reference to the Bench.'

The petitioner paid the instalment due by 30-9-72 in time. On 30-11-72 he got a chalan for Rs. 50,500/- passed by the Sub-Inspector of Excise, Jatni and along with a cheque for the said amount drawn on the Union Bank of India, Cut-tack, made over the treasury chalan to the State Bank of India at Khurda for crediting to the Government account. On 1-12-72, he intimated the Superintendent of Excise at Puri of the action taken by him on the previous day said to be in compliance with the directions of this Court. On 15-12-72, the Additional District Magistrate, Puri wrote the following letter to the petitioner,

'It is learnt from your letter under reference that you submitted a cheque bearing No. CT 104031 dated 30-11-72 at the State Bank of India, Khurda on 1-12-72 towards payment of the second instalment payable by the end of November, 1972.

Therefore, it is evident that you have not paid the consideration money in time as provided under Rule 118 of the Board's Rules, 1965 and further disobeyed the direction of the Hon'ble High Court of Orissa given on 24-8-72 in O. J. C. No. 683 of 1972.

Failure of payment of this instalment payable by the end of November, 1972 as directed thus amounts to withdrawal of the orders of stay without further reference to the Bench.

Please, therefore, take notice as to why the grants of the above four shops should not be cancelled as provided under Section 42 (1) (b) of the Orissa Excise Act. X X X X'

The petitioner on 23-12-72 wrote back to the Additional District Magistrate saying that he had actually made over the cheque along with the requisite chalan on 30-11-72 and not on 1-12-72 as indicated in the notice to show cause. The petitioner contended that he had complied with the directions of this Court. On 1-1-73, the Superintendent of Excise, Puri informed the petitioner that the Collector of Puri had cancelled the outstill liquor licenses held by the petitioner for the year 1972-73 for non-payment of monthly consideration money. For the remaining period of the year the outstill shops in question were directed to be put up for auction on 27-1-73. The petitioner thereupon filed this writ application. On 25-1-73, we directed issue of notice of admission and hearing and called upon the Collector not to re-settle the shops in the meantime.

2. In the counter-affidavit of the Deputy Commissioner of Excise it has been contended that there was no compliance with the direction dated 24-8-72. The Government account is said to have been credited only on 19-12-72 when the cheque given by the petitioner was encashed. According to the opposite parties, therefore, for non-compliance with the conditions indicated in the order of 24-8-72 there has been an automatic vacation of the stay. Consequently the cancellation is justified and the petitioner is not entitled to any relief.

3. During the hearing of the petition, Mr. Mohanty relying on the decision of the Supreme Court in : [1954]25ITR529(SC) (Commr. of Income-tax v. Ogale Glass

Works Ltd.) submitted that when the cheque was not dishonoured on presentation it must be taken to have been a payment on the date when the cheque was accepted by the State Bank. The State Bank was the agent of the State Government and when the cheque was accepted on the last day indicated in this Court's order, there must be taken to be a full compliance with the direction because notwithstanding the actual date of encashment which is a subsequent event, payment must be taken to relate back to the date of receipt of the cheque. The learned Additional Government advocate appearing for the opposite parties disputes this contention. According to him, the petitioner has not been able to show that payment by cheque was acceptable either under the rules or in terms of this Court's order. In : [1954]25ITR529(SC) referred to above admittedly payment by cheque was in terms of the agreement. The rules in question which can be taken to represent the usual practice of the department do not contemplate payment by cheques, nor did our order direct payment by such method. We accept the learned Additional Government Advocate's contention that tender of the cheque to the State Bank of India on the last date fixed for compliance, particularly when indisputably the payment was actually received, on 19-12-72 would not amount to compliance with our order.

4. The next contention of Mr. Mohanty is that the cancellation by the Collector is an act without jurisdiction. Admittedly the exclusive privilege granted to the petitioner is in terms of Section 22 (1) of the Act. Sub-section (2) of Section 22 provides that no grantee of any exclusive privilege would exercise the same unless or until he has received a licence in that behalf from the Collector. Section 42 vests power of cancellation. Under Sub-section (1) thereof.

'Subject to such restrictions as the State Government may prescribe, the authority who granted exclusive privilege, licence, permit or pass under this Act may cancel or suspend it-

X X X (c) in the event of any breach by the holder thereof or by any of his servants, or by any one acting on his behalf with Ms express or implied permission, of any of the terms or condition thereof, or x x x'

Mr. Mohanty contends that the State Government having granted the exclusive privilege the authority competent to cancel the privilege would be the State Government and not the Collector. In this case it appears from the documents appended to the counter-affidavit that on 10-1-73 the Commissioner of Excise brought the fact of the Collector's cancellation of the petitioner's exclusive privilege to the notice of the State Government and the State Government in their letter of 20-1-73 approved the action of the Collector. It is the contention of Mr. Mohanty that 'exclusive privilege' and 'licence' are two different things. The grant is of the exclusive privilege and the licence is a document in evidence of such grant. If the State Government has granted the exclusive privilege the petitioner is entitled to a licence and the Collector would not be justified in withholding it. In case there has not been a grant under Section 22

(1) of the Act it shall never be possible for the Collector to grant a licence under Sub-section

(2) thereof. In view of the language in Sub-section

(1) of Section 42 of the Act the State Government would be the only appropriate authority to cancel the grant of exclusive privilege and that power cannot be exercised by reading the provisions of Section 22

(2) of the Act into Section 42

(1) of the Act We accept Mr. Mohanty's contention that the Collector of Puri had no jurisdiction to cancel the exclusive privilege granted to the petitioner. The exercise of such power by the Collector of Puri is, therefore, without jurisdiction. This fact seems to have been realised later on by the authorities and accordingly the ex post-facto approval was obtained from the Government as indicated above. That, however, would not cover up the defect which is an act vitiated by want of jurisdiction. It is quite possible that left to themselves Government may not have at all rescinded the grant.

5. The cancellation being without jurisdiction the petitioner would be entitled to restoration of the status quo before 1-1-73. This would, however, be on the

express stipulation that the petitioner shall pay the dues for the months of February and March, 1973 which are the remaining two months under the settlement made with him for the year 1972-73.

6. Under our earlier order one instalment was due by the end of January. 1973. As indicated above, two months' further dues would be there, namely, for the months of February and March, 1973. On our finding that the Collector had without jurisdiction cancelled the settlement for the month of January it would follow that nothing is payable for the month of January as admittedly the petitioner had not run the business.

7. Admittedly there has been a default in compliance of our order inasmuch as the petitioner defaulted to pay the second instalment on or before 30-11-72. But by now the said amount has been paid. The cancellation has been found to be without jurisdiction. We shall, therefore, now direct that if the petitioner has complied with the direction for payment of the third instalment by 31-1-73 and pays the instalment due for the month of February, 1973 on or before 10-2-73 he shall be entitled to run his business, under the Exclusive privilege granted by Government. He shall also be liable to pay for the month of March in terms of the rules. In the event of failure to make the payment as directed by 10-2-73 for the month of February and produce evidence regarding compliance in the matter of payment of the third instalment as directed by order dated 24-8-72, the Collector shall be free to re-settle the shop. If, however, there is payment made as directed it shall be open to the petitioner to run his business as before and the Collector shall be obliged to grant the necessary licence which he had unauthorisedly revoked. The petition succeeds. Both parties are directed to bear their own costs.

**B.K. Ray, J.**

8. I agree.