

GAHC010236092022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : W.P.(C) NO. 7474/2022

Saha Alom Laskar,
Fair Price Shop Dealer [Licence No. 2645],
C/o The Secretary,
M/s Mongalpur-Bowaliharwar Cooperative Society Ltd.
Cachar, Silchar.

.....Petitioner

-Versus-

1. The State of Assam
To be Represented by the Commissioner and Secretary
To the Government of Assam,
Food and Civil Supplies and
Consumers Affairs Department,
Dispur, Guwahati-6.
2. The Director,
Food Civil Supplies and
Consumer Affairs Department, Bhangagarh,
Guwahati-5.
3. The Superintendent,
Food Civil Supplies and
Consumer Affairs Department,
Cachar, Assam.
4. The Deputy Commissioner,
Cachar, Assam.

5. The Inspector of Food Civil Supplies
and Consumer Affairs,
Silchar, Cachar.

6. The Area Officer,
Food Civil Supplies and
Consumer Affairs Department,
Cachar, Assam.

.....Respondents

Advocates :

Petitioner

Mr. A.M. Barbhuiya, Advocate

Respondents

Mr. N. Goswami, Junior Government Advocate, Assam

Date of Hearing and Judgment & Order : 22.03.2023

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
JUDGMENT & ORDER

The petitioner has instituted this writ petition under Article 226 of the Constitution of India assailing an order dated 10.11.2022 passed by the respondent no. 3 whereby the Retail Licence bearing no. 2645 issued to the petitioner earlier as a retail licensee to operate a Fair Price Shop [FPS] has been cancelled. By the impugned order dated 10.11.2022, the respondent no. 3 as the Licensing Authority, in exercise of the power conferred by Clause 15[2] of the Assam Public Distribution of Articles Order, 1982 [the APDA Order, 1982', for short], has cancelled the aforesaid retail licence issued to the petitioner and the beneficiaries tagged with the Fair Price Shop [FPS] of the petitioner are allowed

to continue with another Fair Price Shop [FPS] owned by one Sri Eyam Uddin Mazumder.

2. It is the case of the petitioner that he was issued a retail licence bearing no. 2645 and FPS Code no. 1316001011600 under the APDA Order, 1982 to operate a Fair Price Shop [FPS] under a registered cooperative society viz. M/s Mongalpur Boalihawar Cooperative Society Ltd., Cachar. The petitioner used to operate his Fair Price Shop [FPS] at Village – Dakshin Mohanpur Part-V. Earlier, the licence was in the name of the petitioner's father since 1964 and after the death of the father, the licence stood transferred to the petitioner and he was operating the Fair Price Shop [FPS] for last 26 years. It is the further case of the petitioner that the respondent no. 5 i.e. the Inspector, Food, Civil Supplies & Consumer Affairs, Silchar, Cachar carried out an inspection in the Fair Price Shop [FPS] of the petitioner on a day when the petitioner was absent in the shop due to personal reason. After carrying out the inspection, the respondent no. 5 had submitted an Enquiry Report recording his findings after verification of the records related to the Fair Price Shop [FPS] of the petitioner during his visit. On the basis of the Enquiry Report dated 04.05.2022 submitted by the respondent no. 5, the respondent no. 3 as the Licensing Authority passed an order dated 07.05.2022 under Clause 15[1] of the APDA Order, 1982 whereby he suspended the retail Licence of the petitioner on the purported ground that there were contraventions of the terms and conditions nos. 2[b], 3[a], 7, 8[1], 8[2] & 9 of the retail licence issued under the APDA Order, 1982 as well as the provisions contained in Clauses 10, 14, 18, 20, 25 & 26 of the APDA Order, 1982 r/w Clause 11[3] of the Targeted Public Distribution System [Control] Order, 2015 [the TPDS [Control] Order, 2015', for short] and the National Food Security Act,

2013. Along with the order of suspension, the petitioner was also served show cause notice of even date. As per the show cause notice, when the respondent no. 5 visited the Fair Price Shop [FPS] of the petitioner on 04.05.2022, he found the following anomalies/mismanagement on the part of the petitioner :

1. The Fair Price Shop [FPS] owned by the petitioner was functioning without displaying any sign board, stock board.
2. The petitioner had stored schematic rice unauthorisedly at his residence with mala fide intention of diversion.
3. The petitioner has stored Govt. schematic rice [75 qtls.] in an abandoned place in deteriorated condition without distributing it by depriving poor beneficiaries with an intention of making personal profit.
4. The petitioner has personally not available during investigation and not cooperated with the Inspecting Officer in investigation.

3. By the show cause notice dated 07.05.2022, the petitioner was asked to show cause as to why the retail licence issued in his name under the APDA Order, 1982 should not be cancelled for contraventions of the mentioned clauses contained in the APDA Order, 1982. The petitioner was given 7 [seven] days' time from the date of receipt of the show cause notice to submit his reply showing cause. On receipt of the show cause notice, the petitioner stated to have submitted his reply to the show cause notice on 23.05.2022. By a notice dated 01.09.2022, the respondent no. 3 asked the petitioner to appear before the Assistant Commissioner & Executive Magistrate, Silchar, O/o Deputy Commissioner, Cachar at 11-00 a.m. on 03.09.2022 for a hearing in connection

with the retail licence of the Fair Price Shop [FPS]. The petitioner had accordingly appeared before the Assistant Commissioner & Executive Magistrate, Silchar on 03.09.2022 for the hearing. On his appearance, the said authority proceeded with the hearing and finding that the petitioner did not produce certain materials, provided another opportunity to the petitioner to appear for hearing again on 16.09.2022 along with the documents. The petitioner appeared before the said authority accordingly on 16.09.2022 along with documents. After conducting the hearing, the Assistant Commissioner & Executive Magistrate, Silchar had submitted an Enquiry Report on 21.10.2022 in connection with the retail licence of the petitioner before the Additional Deputy Commissioner, Cachar and In-Charge, Food, Civil Supplies & Consumer Affairs, Silchar. Thereafter, on 10.11.2022, the respondent no. 3 had passed the impugned order in exercise of the power conferred under Clause 15[2] of the APDA Order, 1982 cancelling the retail licence of the petitioner.

4. I have heard Mr. A.M. Barbhuiya, learned counsel for the petitioner and Mr. N. Goswami, learned Junior Government Advocate, Assam for all the respondents.

5. Mr. Barbhuiya, learned counsel for the petitioner has confined his submission on the aspect of violation of one of the facets of the principles of natural justice. It is submitted by him that the impugned order has suffered from the violation of the principles of natural justice in that the respondent no. 3 did not conduct the hearing himself but had made the Enquiry Report submitted by the Assistant Commissioner & Executive Magistrate, Silchar as the basis of the impugned order of cancellation. It is his submission that though a alternative remedy of appeal under Clause 29 of the APDA Order, 1982 is available to the petitioner,

the petitioner has approached this Court on the limited ground that before acting on the basis of the findings recorded in the Enquiry Report submitted by another authority, the petitioner was not given any effective opportunity of being heard by allowing him to furnish his explanations qua the findings arrived at by the said authority in the Enquiry Report dated 21.10.2022.

6. In response, Mr. Goswami, learned Junior Government Advocate, Assam has submitted that since the petitioner had appeared and participated in the proceedings leading to the submission of the Enquiry Report, it cannot be said that there was any kind of violation of the principles of natural justice.

7. I have considered the submissions of the learned counsel for the parties and have also gone through the materials on record.

8. The sequence of events leading to the passing of the impugned order dated 10.11.2022 has already been narrated above. From a perusal of the impugned order dated 10.11.2022, it is noticed that the respondent no. 3 has mentioned that the hearing took place before the Assistant Commissioner & Executive Magistrate, Silchar on 03.09.2022 and 16.09.2022. The order has further recorded that during the hearing, the petitioner had admitted about certain allegations. Making the Enquiry Report submitted by the Assistant Commissioner & Executive Magistrate, Silchar the basis of the impugned order, the respondent no. 3 had proceeded to cancel the retail licence of the petitioner in exercise of powers vested in him as the Licensing Authority under Clause 15[2] of the APDA Order, 1982.

9. As per sub-clause [1] of Clause 15 of the APDA Order, 1982, if any licensee or his agent or servant or any other person acting on his behalf contravenes any of the terms and conditions of the licence, then without prejudice to any other action that may be taken under the Essential Commodities Act, 1955 his licence can be cancelled or suspended by any order in writing of the Licensing Authority and an entry will be made in his licence relating to such suspension or cancellation. Clause 15[2] has provided that no order of cancellation shall be made under the clause unless the licensee has been given reasonable opportunity of stating his case against the proposed cancellation but during the pendency or in contemplation of the proceedings of cancellation of the licence, the licence can be suspended for a period not exceeding 90 days without giving any opportunity to the licensee of stating his case.

10. A reading of Clause 15[2] of the APDA Order, 1982 makes it explicit that it is incumbent on the part of the Licensing Authority to give reasonable opportunity to the licensee for stating his case against the proposed cancellation, before he takes a decision to cancel a licence. It is also a settled position in administrative law that an statutory authority cannot base its decision on any material or document unless the person against whom it is sought to be based for any action, more particularly, any adverse action, has been apprised of it and is given an opportunity to respond to it. It is also settled that if an authority is going to rely on any material or document for its decision against a person, then such material or document is required to be brought to the notice of such person and such person is to be given an opportunity to respond to or rebut it. The procedure is a fundamental principle of natural justice that no material or document is to be used against a person without giving such person

an opportunity to respond to or rebut it. If without bringing such material or document to the notice of a person who is likely to be adversely affected if an order is passed against him on the basis of such material or document, by taking such material or document into consideration and decide an issue against the person, then such decision will suffer on the premise of denial of an opportunity of being heard and in such situation, the decision is liable to be interfered with.

11. A submission is advanced from the respondents' side that since there is an alternative remedy of appeal available to the petitioner under Clause 29 of the APDA Order, 1982 against the order of suspension dated 10.11.2022, this Court may not entertain the instant writ petition under Article 226 of the Constitution of India. By a catena of decisions, it is held that the High Court may not entertain a writ petition under Article 226 of the Constitution of India on the ground of availability of an alternative remedy, but the said rule cannot be said to be of universal application. The rule of exclusion of writ jurisdiction due to availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of the availability of an alternative remedy, a writ court may still exercise its discretionary jurisdiction of judicial review, in at least three contingencies, namely, [i] where the writ petitioner seeks enforcement of any of the fundamental rights; [ii] where there is failure of principles of natural justice or [iii] where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. In these circumstances, an alternative remedy does not operate as a bar. [Ref:- **Whirpool Corporation vs. Registrar of Trade Marks**, reported in [1998] 8 SCC 1; **Harbanslal Sahnia & another vs. Indian Oil Corporation Ltd. & others**, reported in [2003] 2

SCC 107; State of H.P. vs. Gujarat Ambuja Cement Ltd., reported in [2005] 6 SCC 499; Sanjana M. Wig Vs. Hindustan Petroleum Corporation Ltd., reported in [2005] 8 SCC 242; and M.P. State Agro Industries Development Corporation Ltd. vs. Jahan Khan, reported in [2007] 10 SCC 88.

12. A specific query was made to the learned Junior Government Advocate, Assam as to whether the copy of the Enquiry Report dated 21.10.2022 submitted by the Assistant Commissioner & Executive Magistrate, Silchar was furnished to the petitioner seeking his explanations to the findings arrived at in the said Enquiry Report by the said authority, at any time anterior to the passing of the impugned order dated 10.11.2022. The answer is not in the affirmative. Meaning thereby, the petitioner did not get any prior opportunity to furnish his explanations to the findings arrived at in the Enquiry Report dated 21.10.2022 at any prior point of time before passing of the impugned order dated 10.11.2022. As the respondent no. 3 as the Licensing Authority did not hear the petitioner as the licensee and made the said Enquiry Report as the basis of his decision to pass the impugned order of cancellation, this Court is of the considered view that the passing of the impugned order dated 10.11.2022 is in violation of the principles of natural justice and the same is liable to be set aside on that ground. The impugned order dated 10.11.2022 is accordingly set aside.

13. As the impugned order has been set aside at the stage subsequent to the submission of the Enquiry Report dated 21.10.2022, the respondent no. 3 as the Licensing Authority shall now proceed from the stage of interference by furnishing a copy of the Enquiry Report dated 21.10.2022 to the petitioner

forthwith to enable the petitioner to provide his explanations as regards the findings recorded therein within a period of 15 [fifteen] days from the date of receipt of the Enquiry Report. In the event the petitioner submits his explanations to the Enquiry Report within the period of 15 [fifteen] days, the respondent no. 3 as the Licensing Authority shall proceed to consider the same and pass a speaking order to bring the process initiated by the show cause notice dated 07.05.2022 to its logical conclusion within a reasonable period of time, preferably within a period of 1 [one] month from the date of receipt of the explanations from the petitioner, if so submitted. In the event the petitioner does not respond to the Enquiry Report with such period of 15 [fifteen] days, the respondent no. 3 shall proceed to decide the matter on the basis of the materials available before him. The speaking order to be passed shall also be communicated to the petitioner forthwith. In the event the petitioner is aggrieved by such speaking order, the petitioner is at liberty to avail the remedy of appeal available under the APDA Order, 1982 in accordance with law. The writ petition stands allowed to the extent indicated above. There shall, however, be no order as to cost.

14. A copy of this order is to be furnished to Mr. N. Goswami, learned Junior Government Advocate, Assam for doing the needful from his end.

JUDGE

Comparing Assistant