
(2006) 11 OHC CK 0026
In the Orissa High Court

Akuli Charan Das,

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 22-11-2006

Acts Referred:

Mines and Minerals (Development and Regulation) Act, 1957 — Section 9
Sales of Goods Act, 1930 — Section 64A

Citation : AIR 2007 Ori 97

Hon'ble Judges : S. Barman Roy, C.J;I. Mahanty, J

Bench : Division Bench

Judgement

I. Mahanty, J.—In this batch of writ applications common question of law, challenging the applicability of the Orissa Minor Minerals Concession Rules, 2004 to the contracts entered into by them prior to the promulgation of the said Rules has been raised by the petitioners for our consideration and therefore, the same are taken up together for disposal by this common judgment.

The petitioners in all the writ applications are contractors who are carrying on different construction work for various departments/agencies etc. such as contract under the Prime Minister Gramya Sadak Yojana, Nabard Finance and for the Railways.

2. Under the P.M.G.S.Y. agreement Clause No. 13.3 and 13.4 being relevant are quoted herein below:

13.3 All duties, taxes, royalties and other levies payable by the Contractor under the Contract, or for any other cause, shall be included in the rates, prices, and total Bid price submitted by the Bidder.

13.4 The rates and prices quoted by the Bidder shall be fixed for the duration of the Contract and shall not be subject to adjustment.

Under the NABARD agreement, the relevant Clause is 1.11 which is as follows:

1.11 All the rates and prices in the tender shall cover all taxes viz. Central or

State Sales Tax, Octroi, any other local taxes, ferry, toll charges and royalties and any other charges.

The contractors shall produce necessary receipts in support of payment of royalty and taxes for the materials supplied by them for the work failing which royalty taxes as applicable will be deducted from their bills.

In the Railway cases the terms of the contract stipulated "fixed rate contract" at a particular percentage above the scheduled rate.

3. For the sake of brevity we note here-under the salient facts of W.P.(C) No. 4246 of 2005. The main grievance of the petitioners is that they had entered into agreements with the respective Opp. Parties prior to 31-8-2001, i.e. the date of notification of the Orissa Minor Minerals Concession Rules, 2004, whereby substantial enhancement in royalty has been effected. The petitioners' further grievance is that the tenders had been floated prior to execution of the agreements, rates had been quoted by the contractors/bidders, on the basis of the existing "rates of royalty" and, therefore, the deduction of royalty from the bills of the petitioners at the enhanced rates in terms of 2004 Rules is challenged.

4. Mr. Panda learned Counsel for the petitioners placed reliance upon a judgment of the Madhya Pradesh High Court in the case of Prestigious Vs. M.P. Rural Road Development, , wherein a learned single Judge of Madhya Pradesh High Court allowed the writ application and directed the State not to insist upon production of certificate of proof with regard to payment of royalty for minor minerals which are employed by the petitioners-contractors in execution of the works awarded to them. It was further held that the authorities are not entitled to deduct any amount towards royalty from the running bills of the petitioners.

Mr. Panda further relied upon an earlier judgment of the Madhya Pradesh High Court in the case of M.P. Contractors Sangh, Indore and Others Vs. State of M.P. and Others, wherein a Division Bench of Madhya Pradesh High Court had held that the circular issued by the State of Madhya Pradesh stipulating production of proof of payment of royalty is unjustified in view of Section 9 of the Mines and Minerals (Regulation and Development) Act, 1957. Sri Panda, learned Counsel for the petitioners further stated that the judgment of Hon"ble Single Judge of Madhya Pradesh High Court has not been challenged before the Apex Court and in support of his submission, he has produced a true copy of the information obtained from the National Informatics Centre dated 1-3-2006. In the light of the aforesaid decisions, learned Counsel for the petitioners submitted that a similar direction be issued on the opposite parties not to insist upon production of the certificate of proof with regard to payment of royalty and not to deduct royalty from the pending bills of the petitioners.

5. Opposite parties 1, 2 and 3 have filed their counter affidavit in W.P.(C) No. 4246 of 2005, inter alia, denying the contentions raised by the petitioners and averred that the agreements dated 12-7-2004 contemplated a "fixed rate" for the entire duration of the contract in terms of Clauses 13.3 and 13.4 of the

tender document and therefore, contended that "this Department has got no relation to the increase/decrease in the rate of any material/labour/taxes, royalty etc.. This enhanced rate of royalty is to be borne by the petitioners (Contractors)...." It is further averred in the counter-affidavit that the notification dated 31-8-2004 wherein the rate of royalty has been enhanced by the Government, is binding on the petitioners and the Government is legally justified in "recovering royalty" as per the new notification dated 31-8-2004. The stand taken by the opposite parties in the counter is that "making profit or loss by the contractors is not the look out of the Government. The contractors are to complete the work as per the agreement and also as per their quoted rates and the Government is only to ensure timely completion of work for public utility."

In a further counter-affidavit filed in W.P. (C) No. 15694 of 2005 the State has placed reliance upon Clause 41.1 of the agreement entered into in the said case and has contended that the State does possess the authority to deduct royalty as prevalent on the date of lifting the minor minerals. It is further averred that the opposite parties are also entitled to deduct such taxes at the source as per law which requires that royalty is required to be paid immediately prior to lifting of minor minerals and only if the petitioners failed to produce royalty receipts, i.e. "K" forms at the time of passing of working bills the royalty as per the prevailing rate at the time of lifting of minor minerals has to be recovered from the bill of the petitioners for crediting the said amount to the Revenue Authorities. It is further averred that the opposite parties never deducted royalty from the running bills of the petitioners for the minerals which have been lifted by the petitioners prior to the date of notification, i.e. 31-8-2004, but as per the agreement the opposite parties are entitled to deduct royalty from the source as per the applicable law and therefore, after the notification the opposite parties are entitled to recover royalty at the new rate as per the Gazette notification.

6. In the counter affidavit the opposite parties have placed reliance on a letter issued by the Commissioner-cum-Secretary to the Government of Orissa, Revenue Department dated 14-2-2003 (Annexure-B/3) wherein a reference has been made to an earlier judgment of this Court in O.J.C. No. 1961 of 2001 in which this Court held that "earth" is a minor mineral and the Hon"ble Apex Court in the case of State of Orissa v. Union of India, Civil Appeal No. 2235 of 1996 reported in AIR 2001 SC 410 confirmed the finding of this Court in that regard. Referring to the aforesaid judgments in Annexure-B/3, the earlier Notification No. 46714/ R, dated 25-10-1991 declaring that earth/ordinary earth does not qualify for imposition of royalty, stood withdrawn and direction was issued that royalty should be imposed and collected on earth from 14-2-2003 onwards i.e. from the date of withdrawal of the earlier exemption notification.

This aspect of contention raised by the State need not detain us any further in view of the categorical stand taken by the State in the counter-affidavit filed in W.P. (C) No. 15694 of 2005. In Paragraph 8 of the said counter the opposite parties have averred as follows:

xxx xxx The opposite parties never deducted the royalty from the running bill of the petitioner for the minerals which have been lifted by the petitioner-Contractor prior to the date of notification, i.e. 31-8-2004.

In view of the aforesaid categoric averments, we are no longer required to express our view on the status of "earth" for the purpose of levy of royalty under the Orissa Minor Minerals Concession Rules, 1990, since repealed.

It is also clarified herein that the issue whether the "earth" is a minor mineral or not having been settled by this Court and having been concurred by the Apex Court, in the judgment referred to above, has not been raised in the present case nor does the said question arise for our consideration in the present case.

7. The next stand of the State that it has no liability whatsoever with the increase/ enhancement of royalty on account of 2004 Rules and that the enhancement has to be borne by the contractors/petitioners, is based upon Clauses 13.3 and 13.4 which are quoted herein below:

13.3 All duties, taxes, royalties and other levies payable by the Contractor under the Contract, or for any other cause, shall be included in the rates", prices, and total bid price submitted by the Bidder.

13.4 The rates and prices quoted by the Bidder shall be fixed for the duration of the Contract and shall not be subject to adjustment.

A similar Clause though a little differently has been relied upon in the counter affidavit filed in W.P.(C) No. 15694 of 2005 and the relevant Clause is Clause 41.1 which is quoted hereinbelow:

41.1 The rates quoted by the contractor shall be deemed to be inclusive of the sales and other levies, duties, royalties, case, toll, taxes of Central and State Governments, local bodies and authorities that the Contractor will have to pay for the performance of the contract.

8. Learned Government Advocate in the written submission filed on behalf of the State has placed reliance on the judgment of the Hon"ble Apex Court in the case of State of Orissa and Ors. v. Union of India and Anr. AIR 2001 SC 410 and advanced contention that the petitioners have entered into contracts for various types of construction for which they are liable to pay royalty for the use of minor minerals as held by the Hon"ble Apex Court in the judgment referred to above.

9. In view of the aforesaid rival contentions in the present proceeding, the same have given rise to the following issues for consideration:

(1) Whether the Orissa Minor Minerals Concession Rules, 2004 published in the Official Gazette on 31-8-2004 would apply to an agreement entered into before the said date?

(2) Whether the opposite parties are justified in claiming that the enhancement of royalty is to be borne by the contractors and the Department has got no

relation to the increase/decrease in the rate of royalty OR whether in view of the promulgation of the Orissa Minor Minerals Concession Rules, 2004, the contractors are entitled to claim reimbursement on the basis of the new schedule rate?

(3) Whether the opposite parties are justified in claiming that they are entitled to deduct royalty at the time of effecting payment to the contractors if no receipt of payment of royalty is provided by the contractors at the time of raising such bills.

10. For effective adjudication of the present batch of writ applications certain admitted facts need to be taken into consideration which are as follows: (From W.P. (C) No. 4246 of 2005).

(A) The agreement/work-order in the present case was signed on 12-7-2004.

(B) On such date the Orissa Minor Minerals Concession Rules, 1990 was in force.

(C) It is contended by the petitioners that under the 1990 Rules, "earth" was an exempted item.

11. There is no dispute that the Orissa Minor Minerals Concession Rules, 2004 came into force with effect from 31-8-2004 being published in the Official Gazette on the said date. There is also no dispute that the agreement in the present case had been entered into on 12-7-2004, i.e. prior to promulgation of 2004 Rules. It has also been admitted by the State that it has not collected any royalty for any period prior to 31-8-2004. But the question still remains as to whether the petitioners' contract period which continued beyond 31-8-2004 would be covered under 2004 Rules or not.

In this regard, it is clear that 2004 Rules have come into force with effect from 31-8-2004 and on and from the said date of publication, the "royalty" shall be charged and livable in accordance with the said notification. Therefore, if any minor mineral is procured by any person including the present petitioners on or after 31-8-2004, in terms of Rule 23, the holder of mining lease shall be liable to pay royalty at the rate specified in Schedule-1. Obviously, therefore, the holder of a mining lease, in terms of the 2004 Rules, is required to collect and deposit royalty with the revenue authorities. The royalty, if at all is payable, only on procurement of minor minerals which were used by the petitioners for the purpose of the contract and, therefore, there is no substance in the contention of the learned Counsel for the petitioners that since the agreement had been signed prior to 31-8-2004, the said Rule would have no application to the petitioners. While 2004 Rules, obviously, have no retrospective effect, yet the said rules do have prospective effect and would govern any procurement of minor minerals made by the petitioners on or after 31-8-2004.

Therefore, the first issue is answered in the negative and we hold that 2004 Rules would apply to all procurements of minor minerals made by the petitioners (contractors) on or after 31-8-2004 irrespective of the date on which the agreements were signed.

12. The second question framed herein-above is based on the contention of the State the enhancement of royalty is to be borne by the contractors and the Department has got no relation to the increase/decrease in the rate of royalty. This question is answered by the stipulations contained in Section 64A of the Sale of Goods Act, 1930 which is quoted herein below:

64A. In contracts of sale, amount of increased or decreased taxes to be added or deducted- (1) Unless a different intention appears from the terms of the contract, in the event of any tax of the nature described in Sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax-paid where tax was chargeable at that time.--

(a) if such imposition or increase so takes effect that the tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and to sue for and recover such addition; and

XXX XXX XXX (2) The provisions of Sub-section (1) apply to the following taxes, namely:

(a) any duty of customs or excise on goods;

(b) any tax on the sale or purchase of goods.

In terms of the aforesaid provisions, it is clear that by enactment of 2004 Rules and the levy/enhancement of royalty clearly attracts the mandate of Section 64A(l)(a) since imposition or increase of any tax entitled the seller to add so much to the contract price as would be equivalent to the amount paid or payable in respect of such increase and seller is entitled to be paid and to sue for and recover such addition.

Sub-section (2) of Section 64-A stipulates that provisions of Sub-section (1) would apply to the taxes on the sale or purchase of goods. Therefore, when a contractor purchases minor minerals for being used in the work of contracts, the royalty payable on such purchase of minor minerals has to be borne by the contractors and when such minor mineral is used by the contractors in the work of the State, the contractors are justified in law to claim reimbursement of such payment of royalty and hence we are of the view that the stand taken by the State that the increase of royalty is of no concern to the State, is hereby rejected and we are of the view that the increase or new imposition of royalty would have to be borne by the State being the ultimate buyer.

As a consequence of the aforesaid findings, we are of the further view that the contractors are Justified in their claim for reimbursement of royalty at the rate stipulated in 2004 Rules on and from the date 31-8-2004, i.e. the date of

promulgation.

13. Insofar as the third question is concerned, in the counter-affidavit filed in W.P. (C) No. 15694 of 2005 in this regard, the opposite parties claimed that as per the stipulation contained in Clause 41.1 of the agreement, the opposite parties are entitled to deduct such tax at the source as per law and in paragraph 8 of the counter-affidavit, the State admits that "as per Rules" royalty ought to be paid directly to the Revenue Authorities prior to lifting of minor minerals but if the contractor fails to produce royalty receipts at the time of passing of the bills, the royalty as per the prevalent rate at the time of lifting of minor minerals has to be recovered from the bills of the petitioners for crediting the same in favour of the Revenue Authorities. It is further averred that "as per the agreement" the opposite parties are entitled to deduct royalty at the source as per the applicable law and therefore, after the notification dated 31-8-2004 the opposite parties are entitled to recover the royalty at the new rate.

In course of hearing, learned Counsel for the State was asked to point out which is the applicable law and/or the particular term in the agreement that entitles/authorises the State to deduct royalty at the source. Unfortunately, no such law nor Clause in the agreement was pointed out and instead reliance was once again placed on Clause 41.1 of the agreement as quoted hereinabove.

In terms of Clause 41.1 the employer will perform the duties in regard to the deduction of such taxes at source as per the applicable law. Obviously, therefore, this undertaking has to rest on some legal obligations for the purpose of its enforcement. Such a legal obligation does exist in Sales Tax Law as well as in Income Tax Law which stipulates deduction at source but vis-a-vis royalty and its deduction at source, no specific applicable law was pointed out in course of hearing and, therefore, we do not find any alternative other than to hold that there exists no stipulation either in the agreement or in 2004 Rules authorizing deduction of royalty from the contractor's bills and, therefore, answer this question in negative and against the State.

14. Learned Counsel for the petitioners placed reliance on the judgments of the Madhya Pradesh High Court in Prestigious Vs. M.P. Rural Road Development, and M.P. Contractors Sangh, Indore and Others Vs. State of M.P. and Others, . In the facts of the said case, Clause 6.2.1 of the agreement being considered therein contemplated production of "no dues" certificate from the Collector with regard to payment of royalty and such stipulation was held to be purely contrary to the statutory provisions because the Collector cannot issue certificate with regard to payment of royalty, if the royalty is payable by the contractors. The learned single Judge taking into consideration the fact that the contractor may be purchasing material from various suppliers, the said contractor cannot be expected to run from the pillar to post to find out the extraction and the mineral consumed by him and then produce the certificate. Such a condition was held to be impracticable and inconsistent to the statutory provision.

In the case at hand, no such stipulation similar to Clause 6.2.1 as noted hereinabove exists nor is the subject of challenge. What has been pointed out by the State in its counter-affidavit is that wherever contractors provide the evidence of payment of royalty in form "K" the same is reimbursed to the contractors and it is only in case where such evidence is not furnished by the contractors that the State with-holds the royalty amount from the contractors' bill and deposits the same with the Revenue Authority.

We are of the view that the subject-matter of challenge and the practice being adopted in Orissa as pointed out in the counter-affidavit filed by the State is distinctly different from the facts that arose for consideration before the Madhya Pradesh High Court.

15. It is extremely important to take note of the fact that contracts issued under the PMGSY tender document where the bidders are to make bids on the basis of "Percentage rate tender" are annexed as Annexure-A/3 to the counter-affidavit. In other words, the State has prepared "abstract of estimate" which finds mention as document No. 7 in Clause 8.1 of the tender document and on the basis of such "abstract of estimate" a bidder was required to submit "percentage rate tender". In other words, a bidder could not make any change in the rates and the only right that the bidders possess is to suggest the "percentage" relatable to the rates prescribed under the "abstract of estimates".

This aspect would be important inasmuch as the petitioners have also averred as follows:

xx xx xx the petitioner had quoted his rates for the work in accordance with the schedule of rates and royalty charges that were prevalent at the time of floating the tender.

16. Further, in rejoinder-affidavit the petitioner has annexed a "lead statement" as Annexure-4. In terms of the said lead statement, it is averred by the petitioner that the contracts i.e. the State had submitted in a separate column the amount of "royalty" chargeable for various items of minerals and that the present levy or deduction being more than the said amount, is liable to be either quashed or reimbursed. Admittedly, in terms of Annexure-4, certain figures have been indicated pertaining to the royalty. "Royalty" in terms of Rule-24 of 2004 Rules, is the entitlement of the State, yet in the abstract of estimate such royalty has been taken into account. In other words, while "Royalty" does find mention in the "Abstract of Rates", yet the payment of the same cannot be treated as a payment to the contractor towards his profits but only as a "reimbursement" towards the royalty borne by him, and is a separate and distinct head for computation of costs.

Therefore, if a direction is given to release the payments towards "Royalty" without the petitioners providing evidence of payment of Royalty, the same would amount to unjust enrichment; at the cost of the State Revenue.

Hence, the first thing that would be clear there from is that while the State is liable to reimburse the royalty to the petitioners-contractors, at the increased rate in terms of 2004 Rules but any claim of reimbursement towards royalty would only be justified if evidence of payment of such royalty is furnished. We are of the view that whereas the petitioners are justified in their claim for enhancement of royalty on account of 2004 Rules, yet such entitlement can only be enforced by the petitioners-contractors by providing the necessary evidence of payment of such royalty and not otherwise.

17. It is the admitted case that the bills have been raised by the petitioners on the basis of rates stipulated in the agreement entered into prior to 2004 Rules. The petitioners are entitled to revise their bills appropriately indicating the enhancement of royalty, if any effected pursuant to 2004 Rules. On such revised bills being submitted, in terms of Section 64-A of the Sale of Goods Act, 1930, the State is bound in law to effect such enhancement of cost on account of revised royalty, but, the payment towards the same is only to be released on petitioners-contractors providing evidence of payment of royalty. We are of the view that under 2004 Rules, although no obligation is cast on the State to effect deduction of royalty from the bills of the petitioner, but before releasing the bills of the petitioners the State is justified in seeking evidence of such payment of royalty, since the payment claimed by the petitioners on account of "royalty", is clearly in the nature of a reimbursement and therefore, any claim for reimbursement has to be claimed upon furnishing evidence of payment and not otherwise. We are not in respectful agreement with the learned single Judge of the Madhya Pradesh High Court in the case of Prestigious Vs. M.P. Rural Road Development, to the extent of holding that such a requirement i.e. the requirement of evidence of payment as impracticable and inconsistent with any statutory provision. Any other interpretation, in our view, would obviously result in great public loss of revenue which cannot ever be in public interest nor in the interest of the State and would also result in unjust enrichment to the petitioners.

We are also of the view that the judgment rendered by the Madhya Pradesh High Court in the case of M.P. Contractors Sangh, Indore and Others Vs. State of M.P. and Others, cannot apply to the facts of the present case inasmuch as unlike the case of Madhya Pradesh where a circular issued by the Government was under challenge. In the present case at hand, there, in fact, no such circular is the subject-matter of challenge and therefore, we are constrained to hold that this judgment has no application to the facts of the present case.

18. Learned Government Advocate in the written submission filed on behalf of the State has placed reliance on the judgment of the Hon"ble Apex Court in the case of State of Orissa and Ors. v. Union of India and Anr. AIR 2001 SC 410 (supra). We are of the view that the said judgment has no application to the facts of the present case inasmuch as, the Hon"ble Apex Court was dealing with a plea raised by the Railway Administration, that there being no lease under the Orissa Minor Minerals Concession Rules in favour of the Railway Administration, it

was not bound to pay any royalty for extraction of minerals from the land. The plea of the Railway Administration was that it was not obliged to pay any royalty for utilization of certain minor minerals like the rock cut spoils and earth since the said minor minerals was acquired for laying the railway line, was negatived by the Hon"ble Apex Court wherein the Supreme Court has held that even if the Railway Administration utilizes minor minerals from its own leased lands and uses the same for the railway track, it is liable to pay royalty chargeable under the Minor Mineral Concession Rules. Neither the facts of the present case nor the contentions raised for consideration, has any connection with the issue that had been decided by the Hon"ble Apex Court and, therefore, we are constrained to hold that the citation relied upon by the State is of no consequence for adjudicating the present its.

19. We are clearly of the view that the stand of the State that the evidence of payment of royalty is required, is wholly justified since the "royalty" as a computation of costs has been admittedly taken into consideration while arriving at "abstract of estimate" as well as "lead statement". Therefore, for a contractor to claim reimbursement of royalty, obviously, the evidence of such payment of royalty has to be furnished. A contractor cannot be permitted to gain at the cost of the State and, therefore, the only extent of his right extends to seeking "reimbursement" alone and such claim of reimbursement obviously has to be preceded by payment and production of evidence thereof.

20. Out of this batch of cases in some cases agreement between the parties have been signed after 31-8-2004 and, therefore, the petitioners of those cases cannot obviously claim the benefit of Section 64A of the Sale of Goods Act, 1930 since they have entered into the contract, after the promulgation of 2004 Rules and, therefore, are to be presumed in law to be conscious/aware of the implication of 2004 Rules. Therefore, those writ applications where agreements have been signed after 31-8-2004, the order passed herein will, obviously, not be applicable.

21. Under the circumstances, the writ applications, where agreements have been signed before 31-8-2004 i.e. the date of promulgation of the Orissa Minor Minerals Concession Rules, 2004, are disposed of with the following directions:

- (1) It is hereby declared that the petitioners are justified in their claim for reimbursement on the basis of the revised rate stipulated in 2004 Rules.
- (2) The petitioners may revise their bills to incorporate such enhanced claim on account of revised royalty.
- (3) The State is to effect reimbursement/ payment towards royalty subject to the petitioners furnishing evidence of payment of such royalty.

With the aforesaid observations and directions, the writ petitions are disposed of.

S.B. Roy, C.J.

22. I agree.