

(2009) 07 OHC CK 0021

In the Orissa High Court

Case No : Writ Petition (C) No's. 7744, 7746, 7748, 7749, 7754, 7755, 7880, 7882, 7883, 7884, 7885, 7886, 7887, 7890, 7891, 7904, 12448, 13324, 13325, 7751, 7888, 7894, 7895, 7897, 12447, 13299, 13300, 13301, 13302, 13323 and 13326 of 2008, 17, 3806 and 3808 of 20

Arss Infrastructure Projects

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 07-07-2009

Acts Referred:

Sales of Goods Act, 1930 — Section 64(A)

Citation : (2009) 108 CLT 608 : (2010) 1 ILR (Ori) 18 : (2009) 2 OLR 942 Supp

Hon'ble Judges : B.P. Ray, J;B.P. Das, J

Bench : Division Bench

Judgement

B.P. Das, J.—In all these writ petitions, the relief claimed by the Petitioners being the same and similar, they were heard together and are being disposed of by this common judgment.

2. The Petitioners in these writ petitions are all contractors and they had entered into different contracts with the State Govt./Rail Vikash Nigam Ltd. for executing different types of construction works under the State Govt./Rail Vikash Nigam Ltd. The Petitioners have prayed for a direction to the opposite parties not to deduct royalty from their running account bills in excess of the rates fixed at the time of signing the agreements.

3. For the sake of brevity, we indicate the facts of W.P. (C) No. 7744 of 2008. Here, the Petitioner had entered into an agreement with the opposite party State Govt. after being successful in the competitive bid in respect of the work "Improvement to Cuttack Govindpur Banki Simor Road (M.D.R. 77) From 5/0 to 10/0 KM., 15.820 to 16/260 KM & 17/0 to 17/500 KM under 12th FCA for the year 2006 07". As per the terms and conditions of the said agreement, the Petitioner had to bear all taxes, including VAT, income tax, royalty, fair weather charges, tollage, where necessary. While preparing the estimate for the aforesaid

work, the opposite parties also prepared a Lead Statement wherein the amount of royalty payable by the contractor was incorporated/According to the Petitioner, a contractor while quoting the rates and prices in the bid for a particular work usually quotes such rates and prices after taking into account the amounts to be paid-by him towards taxes, duties, royalties and other levies. It is alleged that the opposite parties while effecting payment of the 7th running account bill of the Petitioner deducted huge amount towards royalty, in excess of the amount which was to be paid by the Petitioner in terms of the Lead Statement, vide Annexure 1. It is stated that while the Petitioner was made to pay Rs. 3,38,781/ as royalty out of the total sum of Rs. 84,62,510/ as per the 4th running account bill, in the 7th running account bill the opposite parties deducted a sum of Rs. 2,14,283/ out of the total sum of Rs. 3,94,030/ payable to it. According to the Petitioner, the amount of royalty deducted from its 7th running account bill was more than 50% of the total bill amount and, therefore, the same was in excess and in contravention of the Lead Statement in Annexure 1.

The Petitioner averred that it was justly liable to pay the royalty as per the rates fixed at the time of submitting the tender and signing the agreement and the opposite parties could not have resorted to enhance the rate of royalty after the agreement was executed between the parties and the same could not be increased during the course of execution of the work.

4. The counter affidavit filed by opposite party No. 3 Executive Engineer, Jagatsinghpur (R&B) Division, in W.P. (C) No. 7890 of 2008 has been adopted by his counterparts as well as opposite party No. 1 Secretary to the Govt. in Works Department in all other writ petitions, as would appear from the orders dated 12.2.2009 and 24.3.2009 passed in W.P. (C) No. 7744 of 2008.

The opposite parties have taken a stand that the agreement executed between the parties clearly indicated that the contractor was to bear sales taxes, octroi taxes and all other required materials at its own cost as per the Orissa Minor Minerals Concession Rules, 2004 (hereinafter called "2004 Rules") in vogue at the time of signing the agreement. It is also clearly stipulated in the agreement that the rates of royalty would be increased by 40% automatically with effect from the 4th year in case the said rate is not revised after expiry of three years from the date when the rate was last fixed due to any reason. The Govt. of Orissa in the Department of Steel and Mines by notification dated 31.8.2004 revised the rates of royalty increasing the same by 40% automatically with effect from 31.8.2007. As the enhancement in the rate of royalty was made effective from 31.8.2007, according to the opposite parties, the Petitioner/contractor should have kept it in mind and it was well within his knowledge that the rates of royalty had been increased with effect from 31.8.2007 and he had to bear the same and accordingly the tender contemplating such enhanced cost must have been given by him keeping the aforesaid aspect in view and as all his working period pervades after such enhancement. Therefore, the deponent/opposite party No. 3 being the incumbent was correct to recover the amount of royalty

and has recovered the same from the bill of the contractor as per the agreement.

5. Learned Counsel appearing for the Petitioners have, however, submitted that similar question came up for consideration before a Bench of this Court in W.P. (C) No. 4246 of 2005 and its batch of writ petitions, judgment in which was delivered on 22.11.2006 and reported in 2006 (II) O.L.R. 672: Akuli Charan Das etc, etc. v. Commissioner-cum Secretary, Department of R & B, Orissa, etc. etc. In the aforesaid decision it was held that in cases where agreements were signed before 31.8.2004, i.e., the date of promulgation of the Orissa Minor Minerals Concession Rules, 2004, the Petitioners were entitled to reimbursement on the basis of the revised rate stipulated in the 2004 Rules.

Countenancing the argument of the learned Counsel for the Petitioners that these cases are covered by the decision of this Court in Akuli Charan Das case (supra), it is submitted by the learned Counsel for the opposite parties that the said decision has no application to the present cases because in the case of State of West Bengal v. Kesoram industries Ltd., etc. etc. AIR 2005 SC 1646, the apex Court held that "royalty is not tax. Royalty is paid to the owner of kind who may be a private person and may not necessarily be State. A private person owning the land is entitled to charge royalty but not tax. The lessor receives royalty as his income and for the lessee the royalty paid is an expenditure incurred. Royalty cannot be tax".

Then reference was made to the decision rendered by the apex Court in State of H.P. and Others Vs. Gujarat Ambuja Cement Ltd. and Another, , wherein the definition of "royalty" has been indicated.

6. According to the learned Counsel for the opposite parties, in Akuli Charan Das case, relief was granted to the Petitioner basing upon the provisions of Section 64A of the Sale of Goods Act, 1930, which only apply to the case of tax on sale or purchase of goods, duty of customs or excise on goods. Here is a case where the royalty collected is not a duty of customs or excise on goods, or tax on sale or purchase of goods. So, the Petitioners cannot get the benefit of the aforesaid decision.

7. In the aforesaid factual background, before going into the merit of the case, let us have a look at the relevant part of the contract agreement, which has been annexed to the counter affidavit filed by the opposite parties as Annexure A/3.

Clause 45 of the Contract Agreement deals with Tax and Clause 45.1 thereof provides as follows:.

The rates quoted by the Contractor shall be deemed to be inclusive of the sales and other taxes that the Contractor will have to pay for the performance of this Contract. The Employer will perform such duties in regard to the deduction of such taxes at source as per applicable law.

Thus it says that all duties, taxes 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. According to the opposite parties, in view of the aforesaid clause, the Petitioners are liable to pay the royalty and their prayer to reimburse such royalty deducted from them is not sustainable in law.

When the learned Counsel for the Petitioners strongly placed reliance on the decision of this Court in Akuli Charan Das case, let us examine if the ratio decidendi of Akuli Charan Das case is at all applicable to the case of the Petitioners. The same stand was also taken by the State in paragraph 7 of the judgment rendered in Akuli Charan Das case and the same is extracted hereunder:

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 41.1 which is quoted herein below:

41.1 The rates quoted by the contractor shall be deemed to be inclusive of the sales and other levies, duties, Royalties, Cess, 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. In the aforesaid Akuli Charan Das case, on the basis of the contentions advanced by the parties, the following three issues arose for adjudication:

(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."

The first issue was dealt with in paragraph 11 of the judgment and was answered in the negative holding that the 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. So, the argument advanced by the learned Counsel for the Petitioners that the Petitioners are not the lessees or they are not raising minerals for which they are not liable to pay the royalty, does not hold good.

The second issue was dealt with in paragraph 12 of the judgment and taking aid of Section 64A of the Sale of Goods Act, 1930, their Lordships held that the contractors were justified in their claim for reimbursement of royalty at the rate stipulated in the 2004 Rules and on and from the date 31.8.2004, i.e., the date of promulgation.

So far as the third issue is concerned, it was held that any claim for reimbursement towards royalty would be justified if evidence of payment of such royalty is furnished.

9. In paragraph 19 of the judgment in Akuli Charan Das case, it was held thus:

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 Head 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.

Let us see whether the provisions of Section 64A of the Sale of Goods Act, 1930 can be of any help to the Petitioners. The said Section 64A is quoted hereunder:

64A. In contracts of sale, amount of increase 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 to 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.

10. It is true that Section 64A of the Sale of Goods Act deals with tax on sale or purchase of goods and duty of customs or excise on goods. We have not been called upon in this proceeding to answer whether royalty is a tax. The question here is whether the Petitioners, who have suffered royalty once after payment of the same to the mine owners, should they be forced to pay royalty again and if the same has already been deducted from the running bills of the Petitioners, are they entitled to get refund of the same ? The answer is in affirmative as these cases are squarely covered by the principle decided by this Court in Akuli Charan Das case (supra).

11. Accordingly we dispose of all these writ petitions with the direction that if the Petitioners have already paid the royalty, on production of evidence of such payment, the opposite parties shall refund the amount so collected by them as royalty to the Petitioners.

No costs.