

(2006) 01 RAJ CK 0026
In the Rajasthan High Court
Case No : Civil Writ Petition No. 33 of 1985

Associated Cement Co. Ltd. (The) and Another	APPELLANT
Vs	
State of Rajasthan and Another	RESPONDENT

Date of Decision : 13-01-2006

Acts Referred:

Constitution of India, 1950 — Article 226, 246, 265, 366, 366(28)
Mineral Concession Rules, 1960 — Rule 31
Mines and Minerals (Development and Regulation) Act, 1957 — Section 13, 18, 9
Mining Lease (Modification of Terms) Rules, 1956 — Rule 6
Rajasthan Land Revenue Act, 1956 — Section 88, 88(3)

Citation : (2006) 2 RLW 1359 : (2006) 2 WLC 142

Hon'ble Judges : K.S. Rathore, J

Bench : Single Bench

Advocate : B.R. Zahiwal, H.D. Potit and M.D. Agarwal, for the Appellant; Mohd. Rafiq, AAG, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Rathore, J.—Brief facts of the case are that on 1.12.1913. a lease was executed for 30 years between the predecessor of the petitioner company and the erstwhile ruler of Bundi State for mining lime stone in the area measuring 101 sq. miles. Part II of the lease confers rights and privileges on the predecessor of the petitioner company. Clause 3 of Part II of the lease deed is reproduced hereunder:

3. Liberty and power to appropriate and use for any purpose connected with the said mines and quarries the water upon or within any of the said lands and to collect and impound the same in ponds reservoirs or otherwise for the purpose of working the said mines and quarries but so that in the exercise of this privilege the Lessees shall not deprive only lands villages houses or watering places for cattle of a reasonable quantity of water as before accustomed and do not in any way foul impregnate or otherwise deteriorate any springs or streams of water so as to render them useless or unprofitable.

2. In the year 1913-14, the petitioner established cement factory in the said area and constructed a dam at Sakhoda village in the year 1923-24. In the year 1931, another dam was constructed across the river mez and sanction for construction of the aforesaid dam was accorded by the erstwhile ruler of Bundi State vide letter No. 1048 of 1930-31.

3. The said lease was renewed on 28.7.1943 from time to time with the same rights and privilege including the right to use water. On 21.10.1956 and 23.11.1956, agreement was entered into between the petitioner company and the Government of Rajasthan to acquire the lands for the company for the purposes of construction of additional pipelines and increase in height of the said dam by the petitioner.

4. On 17.3.1959, Controller of Mining Leases, Government of India, modified the existing lease of 1.18.1943 by his order passed under Rule 6 of the Mining Lease Modification of Terms Rules, 1956. The area of the said lease was reduced to 20.5 sq. miles and the period of renewal was reduced to 20 years. In the order, it was clarified that royalty shall be payable in accordance with Section 9 of Mines & Minerals Regulation & Development Act, 1957.

5. Clause 2iv of the order is reproduced hereunder:

Except for the modifications made by this order, the lease shall be subject to the rules made or deemed to have been made u/s 13 and 18 of the Mines & Minerals Regulation & Development Act, 1957.

6. In the year 1975, the lease was renewed as per Model Form K of Mining Lease provided under Rule 31 of the Mineral Concession Rules, 1960 made under Mines & Minerals Regulation and Development Act, 1957 pursuant to the declaration made by the Central Government under list 1 Schedule 7 of the Constitution of India.

7. The controversy arise when in the month of September, 1974, the Audit Officer, Accountant General's Office objected that the petitioner company is liable to assessment for raw water charges from 1.11.1956, the date of enforcement of the Rajasthan Land Revenue Act, 1956. The said audit objection was forwarded to the petitioner company by the local Tehsildar by letter dated 17.9.1974.

8. The main grievance of the petitioner is that since the petitioner company is free to take the water and as per the agreement only surface rent is to be recovered till the right to use water under the agreement subsist and there is no provision to apply the provisions of subsequent Acts.

9. Vide letter dated 9.10.1975, the Collector, Bundi observed that it is clear from the report given by the Tehsildar that the ACC Lakheri is using water under the agreement with Bundi State and has constructed the dam itself for use of water. Therefore before levying water charges, the agreement made by Bundi State is to be cancelled by the Government and then only the provisions of the Land

Revenue Act can be enforced and the company can pay the water charges easily. Even then if levying of water charges is though proper, the water charges may be got determined by a technical hand from the concerned department.

10. The petitioner company in response to the aforesaid letter submitted before the Controller pointing out the provisions of Clause 3, Part II of the lease deed and the particulars of the dam, which was built by the company.

11. On 27.1.1984, the Collector, Bundi issued the notice of demand purported to be u/s 88 of the Rajasthan Land Revenue Act stating that the petitioner company is regularly using every year 38, 82, 38, 4000 gallons of raw water. It was further stated in the notice that according to the terms of the agreement, the company is liable to pay water charges and demands a sum of Rs. 64,15,93,3607- at the rate of 6 paise per gallon for the period 1956 to 1983.

12. The petitioner company submitted an application for furnishing the copies of the agreement referred in the notice, but no copy of the agreement was supplied to the petitioner. Since no response was received by the Collector, the petitioner served the notice for demand of justice, but no reply was received, therefore, the present writ petition is preferred by the petitioner challenged the impugned notice for demand.

13. Learned counsel for the petitioner referred provisions of Article 265 of the Constitution of India which includes not only "taxes" but also includes any imposition cess or fees, therefore, the duty, cess or fee cannot be levied without specific statutory authority. Learned Counsel further referred Article 366 28 of the Constitution. As per Article 366 28, taxation includes the imposition of any tax or impost, whether general or local or special and tax shall be construed accordingly. In support of his submissions, he placed reliance on the judgment rendered in case of D.G. Ghouse and Co. v. State of Kerala and Ors. wherein Hon"ble Supreme Court has held as under:

The word "tax" in its widest sense includes all money raised by taxation. It therefore includes taxes levied by the Central and the State Legislature, and also those known as "rates", or other charges, levied by local authorities under statutory powers. "Taxation" has therefore been defined in Clause 28 of Article 366 of the Constitution to include "the imposition of any tax or impost, whether general or local or special", and it has been directed that "tax" shall be construed accordingly".

14. It is further submitted that the notice issued u/s 88 of the Rajasthan Land Revenue Act, 1956 is a declaratory provision and is in no way a charging section for levying of any water charges. This Section is interpreted in various Division Bench decisions of Bombay High Court u/s 37 of the Bombay Land Revenue Code, which is para materia with Section 88 of the Rajasthan Land Revenue Act as held in case of Nawab Sardar v. Secy of State for India reported in XLHI Bombay Law Reporter 167.

15. Learned Counsel further submits that since Section 88 is not a charging section, therefore, no charge on water use can be imposed in the garb of Section 88. That has also been noticed in case of Commissioner of Central Excise, Pondicherry Vs. ACER India Ltd.,

16. For levy of tax statute should clearly and unambiguously convey the three components of the tax law, i.e., the subject of the tax, the person who is liable to pay tax and the rate of which the tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law. Then it is only for the legislature to do the needful as held in the case of Mathuram Agrawal Vs. State of Madhya Pradesh,

17. Thus, the notice issued by the Collector, Bundi u/s 88 of the Rajasthan Land Revenue Act is without jurisdiction and in violation of Article 265 of the Constitution of India as it is a demand of tax/fee without the authority of law.

18. It is also contended that the alleged lease deed is not available in the record as the Collector had requested the Department of Old Records, Bikaner to supply a copy of lease deed, but the same is not traceable in the old records of Bikaner. It is given out that the petitioner himself supplied the copy of lease deed Annexure-1, therefore, it was not necessary to obtain a copy of him. It is further contended the company is utilising water from river, which is flowing from the area held under mining lease and it had made its own arrangements at its own cost for impounding the water. The details of consumption is not relevant for demand of water charges and there is no basis or foundation of law to demand water charges 0.06 paise per gallon. In the impugned notice, the demand was raised of Rs. 64 crores where as per audit objection it comes to Rs. 64 lacs, which shows that the impugned notice has been issued without any application of mind.

19. With regard to availability of alternative remedy, learned Counsel for the petitioner submits that there is no question of alternative remedy as the writ petition is pending for last twenty years. In support of his submissions, he placed reliance on the judgment rendered in case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, , Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, , Smt. Kanak and Another Vs. U.P. Avas Evam Vikas Parishad and Others, , Dr Bal Krishna Agarwal Vs. State of U.P. and Others, and Glaxo v. A.V. Venkateswaran reported in 61 Bom. L.R. 1.

20. Per contra, learned Additional Advocate General submits that this writ petition is not maintainable as the petitioner has remedy before the Collector, who has issued the notice u/s 88. If any adverse order is passed against the petitioner then he has right of appeal or revision under the Rajasthan Land Revenue Act. The petitioner has also right of civil suit u/s 88 3 of the Rajasthan Land Revenue Act, 1955.

21. Learned Additional Advocate General further submits that the petitioner company is utilising the water from natural resources which vests in the State

and the State Government is competent to recover the water charges under the provisions of Section 88 of the Rajasthan Land Revenue Act, 1956. The lease deed as alleged by the petitioner only prescribed the method for payment of rent and royalty under the provisions of Minor & Mineral Regulation Act and the rules made thereunder. Water flowing through and stored in dam is regulated by the provisions of the Rajasthan Land Revenue Act, therefore, the State is competent to recover the water charges.

22. In support of the reply to the writ petition, an additional affidavit is submitted by the SDM, Bundi, which also reveals that it was enquired from the petitioner as to what quantity, they are making use of water for industrial and domestic purposes. In answer thereto, the petitioner vide letter dated 12.6.1982 addressed to the Tehsildar, Keshavraopatan, District Bundi informed that they were making use of 17,64,720 gallon per annum and the said fact is further confirmed by the petitioner company vide their letter dated 4.1.1984 addressed to the Collector, Bundi.

23. It is submitted that the petitioner have absolute right over the dam alleged to be constructed by the predecessor of the petitioner. It is also alleged that sanction was accorded by the Nayab Tehsildar whereas Nayab Tehsildar has not jurisdiction to issue such letter to construct the dam. The petitioner is enjoying the use of land measuring 340 Bigha whereas it was allowed to use only 286 Bighas 12 Biswa, therefore, 53 Bigha 8 Biswa was in possession of the petitioner unauthorisedly. It is stated on behalf of the respondents that water charges are recoverable from the petitioner u/s 88 of the Rajasthan Land Revenue Act, 1956 because all rivers vests in the State Government, therefore, the State Government is entitled to recover charges of use of water from natural resources or any other resources in which natural water is restored.

24. In support of his submissions, learned Counsel for the respondents placed reliance on the judgment rendered by Hon"ble Supreme Court in case of M/s. R.S. Rekchand Mohota Spinning and Weaving Mills Ltd. Vs. State of Maharashtra, wherein it was held as under:

Section 20 of the Code clearly includes flowing water, as investing title thereof in the State as integral part of the land. The definition "land" includes the right to the water flowing therefrom as in the definition in the Transfer of Property Act. Therefore, when the cess has been imposed by virtue of power vested u/s 70 of the Code by the State Government by way of legislation, the power of the State is traceable to the legislative Entry under Entry 45 of List II of the Seventh Schedule to the Constitution. Therefore, the demand of water cess is within the legislative competence and the legislature is competent to enact law in exercise of the power under Article 246. The Government have power u/s 70 read with Section 20 for levy water cess of the use of water by the Resolution which came to be passed by the State Government determining the rate at which water cess is cessable on use of water for industrial purpose. It would accordingly be exigible for levy of tax. It is true that the appellant has -been suing the water for

over 70 years but that cannot be construed to mean that it has a right to draw water by artificial contrivance from the flowing river for use in its factory for industrial purpose. Having used the water for industrial purpose, it is taxable as incidence on cess on water as land cess and, therefore, it is liable to pay water cess at the rates prescribed by the Government.

25. So far as the maintainability of the writ petition is concerned, learned Counsel for the respondents places reliance on the judgment rendered by Hon'ble Supreme Court in case of *The Special Director and Another Vs. Mohd. Ghulam Ghouse and Another*, wherein Hon'ble Supreme Court has held "writ petition is not maintainable against the show cause notice issued by statutory functionaries for violation of the provisions of relevant Acts. Unless the High Court is satisfied of the nullity of the show case notice for want of jurisdiction of the authority concerned to even investigate the facts and the writ petition challenging the show cause notice should not be entertained as a matter of routine.

26. Here in the instant case, the petitioner has challenged the show cause notice by which it was called upon to make the payment of water charges.

27. Learned Counsel further placed reliance on the judgment rendered by Division Bench in case of *Allied Domeeq Spirits & Wine India v. State of Rajasthan and Ors.* reported in 2002 2 RLR 323 : 2003 2 Raj. 824 wherein it was held that alternative remedy of appeal is available to the petitioner, without availing alternative remedy, the petitioner cannot file the present writ petition.

28. Heard rival submissions of the respective parties.

29. It is not disputed that in the present writ petition, several disputed questions of facts are raised by the parties. It is also not disputed that the writ petition is admitted and come up for final hearing after lapse of more than 20 years. Looking to this fact and the ratio decided by Hon'ble Supreme Court in case of *Whirlpool Corporation. v. Registrar of Trade Marks, Harbanslal Sahnia v. Indian Oil, Kanak v. U.P. Avas Vikas Parishad, Dr. Bal Krishna Agarwal v. State of U.P. and Glaxo v. A.V. Venkateswaran*, the writ petition after lapse of more than 20 years cannot be dismissed on the point of alternative remedy. Thus, I am not convinced with the submissions made on behalf of the respondents with regard to maintainability of the writ petition.

30. Now the question arise for consideration is whether the State Government is competent to recover the water charges or not.

31. I have carefully considered Clause 3 of Part II of the lease deed which is categorically referred by the petitioner wherein liberty and power to appropriate and use for any purpose connected with the said mines and quarries the water upon or within any of the said lands and to collect and impound the same in ponds reservoirs or otherwise for the purpose of working the said mines and quarries but so that in the exercise of this privilege the Lessees shall not deprive

any lands villages houses or watering places for cattle of a reasonable quantity of water as before accustomed and do not in any way foul impregnate or otherwise deteriorate any springs or streams of water so as to render them useless or unprofitable.

32. A perusal of this clause reveals that power of utilising the water is given through the lease deed, but this clause does not indicate that such use shall be free of charge. This clause also does not disclose this fact that power of the State to recover water charges has been taken away, only privilege of using water has been given through the lease deed that too with certain restrictions as stipulated under Clause 3 of Part-II of the lease deed.

33. The controversy arise when audit report was given by the office of the Accountant General whereby the petitioner company was made liable to make the charges of raw water from 1.1.1956, the date of enforcement of the Rajasthan Land Revenue Act, 1956 and demand was raised by the Collector, Bundi vide notice dated 27.1.1984 u/s 88 of the Rajasthan Land Revenue Act stating that the petitioner company is regularly using every year 38,82,38,4000 gallons of raw water. Thus, the demand of Rs. 64,15,93,360/- as water charges.

34. The petitioner has raised the legal issue that the State is not competent to recover water charges u/s 88 of the Rajasthan Land Revenue Act, which is reproduced hereunder:

Section 88. All roads and all lands which are not the property of others belong to the State.--1 All public roads, lanes, paths, bridges and ditches; all fences on or beside the same, all rivers, streams, nallas, lakes and tanks, all canals and watercourses, all standing and flowing water, and all lands wherever situated, which are not the property of individuals or of bodies of persons legally capable of holding property, are, except in so far as any rights of such persons or bodies may be established in or over the same and except as may be otherwise provided in any law for the time being in force, and are hereby declared to be, with all rights in or over the same or appertaining thereto, the property of the State; and it shall be lawful for the Collector subject to the order of the Commissioner to dispose of them in such manner as may be prescribed subject always to the rights of way and all other rights of the public or of individuals legally subsisting.

(2) Where any property or any right in or over any property is claimed by or on behalf of the State or by any person as against the State, it shall be lawful for the Collector, after formal enquiry of which due notice has been given, to pass an order deciding the claim.

(3) Any suit instituted in any Civil Court after the expiration of one year from the date of any order passed under Sub-section 1 or Sub-section 2 or, if one or more appeals have been made against such orders within a period of limitation, then from the date of any order passed by the final appellate authority, shall be dismissed although limitation has not been set up as a defence if the suit is

brought to set aside such order or if the relief claimed is inconsistent with such order; provided that in the case of an order under Sub-section 2, the plaintiff has had due notice of such order.

(4) Every person shall be deemed to have had due notice of an inquiry or order under this section, if notice thereof has been given in accordance with the provisions of this Act or the rules made thereunder.

(5) Any order passed under Sub-section 1 or Sub-section 2 shall be unenforceable by the Collector in the prescribed manner.

35. I have also considered the submissions made on behalf of the petitioner that since Section 88 of the Land Revenue Act, is not charging section as has been incorporated in the Maharashtra Land Revenue Act, therefore, in absence of any charging section, notice u/s 88 is per se illegal and without jurisdiction.

36. It is not disputed that there is no charging section with regard to levy of water charges, but Section 88 clearly indicates that all rivers, streams, nallas, lakes and tanks, canals and watercourses belong to the State and Collector is authorised to decide all disputes arising u/s 88 of the Act. The Collector is also competent to issue show cause notice to the party concerned after making enquiry.

37. I have also carefully gone through the provisions of Article 265 whereby it is made clear that no tax shall be levied or collected except by authority of law. Here in the instant case, it is not disputed that u/s 88, there is no such specific stipulation regarding levying of tax. In my considered view, it is only water charges not a tax and power has been Given to the Collector to recover the same u/s 88 as the State is owner of the natural water resources and dams/lakes. The Collector can dispose of such dispute in such manner as stated hereinabove. Thus, the Collector is competent to recover the water charges also.

38. I have also gone through the provisions of Article 366 28 referred by the petitioner which speaks that taxation includes the imposition of any tax or impost, whether general or local or special and tax shall be construed accordingly. In support of his submissions, the petitioner has referred the judgment rendered in case of D.G. Ghouse supra.

39. Further the submission of the petitioner is that provisions of Section 88 are declaratory provisions and nowhere is charging section for charging water charges as incorporated by the Bombay High Court in case of Nawab Sardar supra while dealing with the Section 37 of the Maharashtra Land Revenue Act which is para materia with Section 88 of the Rajasthan Land Revenue Act.

40. After considering the submissions and the ratio decided by the judgments referred, I am of the view that imposition of tax and charge on water use is altogether different aspect.

41. Section 88 clearly indicates that all rivers, streams, nallas, lakes and tanks,

canals and watercourses are property of the State and for use of water, the State being owner of the property can levy the charge.

42. Thus, the notice issued by the Collector, Bundi u/s 88 of the Rajasthan Land Revenue Act, 1956 cannot be said to be without Jurisdiction and in violation of Article 265 of the Constitution of India as the Collector is duly authorised to decide such claims u/s 88. In view of this, the writ petition has no force and deserves to be dismissed. However, the petitioner is always at liberty to represent his case in response to the show cause notice issued by the Collector regarding use of water, quantity of water and other disputed questions regarding rate of water charges.

43. This Court is not inclined to interfere in the disputed questions of facts while exercising power under Article 226 of the Constitution of India.

44. The writ petition fails and herewith dismissed.