(2017) 01 OHC CK 0092

In the Orissa High Court

Case No : W.P.(C) No. 20918 of 2015

Banwarilal Newatia APPELLANT

Vs

State of Odisha RESPONDENT

Date of Decision : 12-01-2017

Acts Referred:
Forest (Conservation) Act, 1980 — Section 3

Citation : (2017) AIRCC 974 : (2017) 1 OJR 417

Hon'ble Judges : Mr. Vineet Saran, CJ. and Dr. B.R. Sarangi, J.

Bench : Division Bench

Advocate : M/s. Sudarshan Nanda, I.A. Acharya and A. Dash, Advocates, for the Petitioner; Mr. B.P. Pradhan, Addl. Government Advocate, for the Opp. Parties

Final Decision : Allowed

Judgement

Dr. B.R. Sarangi, J.—The petitioner, who is a lessee of mining lease, has filed this writ application seeking for following reliefs;

"It the circumstance stated above, it is humbly prayed that this Hon''ble Court may graciously be pleased to issue a rule NISI to the nature of Writ of Mandamus and/or other appropriate writ/Writ(s) calling upon the Opp.Parties to show cause as to why the directions issued by the Opp.Party no.4 to deposit Rs.3,31,04,478/- towards NPV in respect of the surrendered area of 45.3486 Ha. demanded vide Order no. 306 dated 09.07.2010 (Annexure- 3), Letter No. 781 dated 01.02.2014 (Annexure-10) and Letter dated 1380 dated 22.02.2014 (Annexure-12), shall not be quashed;

And further be pleased to direct the Opp.Parties to allow the petitioner to commence mining operation over 67.1390 Hectares in village Tikarpada, Ambadahara, Dist: Keonjhar with (sic ''within'') a period of one month;

And if the Opp.Parties fail to show cause or show insufficient or false cause, make the Rule NISI absolute;

And pass such other and further order (s) as this Hon''ble Court may deem fit and proper in the facts and circumstances of the present case.

And allow the writ petition;"

2. The factual matrix of the case is that the petitioner was granted mining lease in respect of an area of 112.4876 hectares for Pyrophyllite and Quartzite in village Tikarpada, Ambadahara, Dist- Keonjhar for a period of 20 years w.e.f. 07.11.1998 to 06.11.2018. The entire area was a non-forest land. The Collector, Keonjhar granted surface right in respect of 67.1390 hectares (over plot no. 1050 and Plot No. 1142 under Khata No. 274) out of the granted mining lease area of 112.4876 hectares. After obtaining necessary statutory clearance and approval, the petitioner carried on mining operation over the said 67.1390 hectares, in respect of which surface right had been granted.

3. Due to lack of market demand, the petitioner discontinued the mining operation w.e.f. 15.12.2004 after informing the statutory authorities regarding temporary discontinuance. He again started mining operation w.e.f. 19.09.2007 after service of notice of reopening to the concerned authorities as required under the provisions of Rule 22(1) read with Rule 25 of the Mineral Conservation and Development Rules, 1998 (hereinafter referred to as "MCD Rules, 1988"). The statutory notification for obtaining environment clearances, namely, Environment Impact Assessment Notification dated 14.09.2006 was issued by the Ministry of Environment and Forest (MOEF), Government of India for which mining operation of the petitioner was kept in abeyance w.e.f. 08.10.2007, as the petitioner sought for environment clearance from the MOEF in respect of 67.1390 hectares, over which surface right had been granted by the competent authority.

4. The Director of Mines, Odisha approved the scheme of mining plan with projected annual production of 6500 M.T. of Pyrophyllite and 4000 M.T. of Quartzite on 08.07.2009. The petitioner also sought for consent to operate from the State Pollution Control Board, Bhubaneswar, Odisha in respect of the above approval. The petitioner also submitted an application on 02.06.2010 for surrender of an area measuring 45.3486 hectares, which formed part of the original mining lease area of 112.4876 hectares. The said surrendered area was virgin/unbroken and intact area and no mining operation was carried out by the petitioner and more particularly the said 45.3486 hectares was not a part of 67.1390 hectares, in respect of which surface right had been granted.

5. At this point of time, the Divisional Forest Officer (DFO), Keonjhar, opposite party no.4 vide Office Order no. 220 dated 16.06.2010 declared the said 45.3486 hectares as District Level Committee (DLC) land and demanded payment of Rs. 2,83,88,224/- towards Net Present Value (NPV) for the said area of 45.3486 hectares, which had already been surrendered by the petitioner. Thereafter, the DFO, Keonjhar vide Office Order no. 306 dated 09.07.2010 modified the Office Order No. 220 dated 16.06.2010 and issued a revised demand notice claiming

payment of Rs.3,31,04,478/- towards NPV for the said area of 45.3486 hectares, which remained virgin/unbroken and no mining operation was carried out by the petitioner. In response to the same, the petitioner immediately on 13.07.2010 and 09.08.2010 intimated the D.F.O., Keonjhar that the petitioner vide his letter dated 02.06.2010 already submitted an application for surrender of the said virgin/unbroken area, where no mining operation was carried out by him, which is under active consideration by the State Government, and as such he is not liable to pay the NPV in respect of the said area.

6. At this juncture, the Range Officer in the office of the DFO, Keonjhar on 25.10.2010 submitted a report to the DFO, Keonjhar in respect of the surrendered area of 45.3486 hectares stating inter alia that there was no illicit felling of trees and no encroachment. In the meantime, the revised mining scheme in respect of the retained area of 67.1390 hectares out of 112.4876 hectares was approved by the statutory authority vide letter no. 2538 dated 19.08.2011 being valid up to 2015-16. In view of such position, the opposite parties did not take any steps for more than a period of two years, but all on a sudden in 2013, the DFO, Keonjhar vide Letter No.1956 dated 11.03.2013 intimated the Collector and District Magistrate, Keonjhar stating, inter alia, that surrendered area of 45.3486 hectares had not been broken up/no mining operation had been carried out and that the area was intact. The Collector and District Magistrate, Keonjhar vide letter no. 454 dated 02.04.2013 forwarded the application of the petitioner in respect of the surrendered area of 45.3486 hectares to the Director of Mines, Bhubaneswar, Odisha along with the report of Senior Surveyor in the office of the Mining Officer, Keonjhar, DFO, Keonjhar, Tahasildar, Banspal as well as the Joint Survey Report along with the Map for further action. The Director of Mines, Bhubaneswar, Odisha vide Letter No. 1106 dated 01.11.2013 forwarded the surrender proposal of the petitioner in respect of the 45.3486 hectares to opposite party no.1 for disposal on merits.

7. In the meantime, MOEF, Government of India vide letter dated 28.06.2013 granted environment clearance to the petitioner in respect of the retained area of 67.1390 hectares. Consequently, the petitioner vide his letter dated 12.08.2013 sought for reopening the mines and to commence the mining operation in Form-C under the provisions of Rule 22(1) read with Rule 25 of the MCD Rules, 1988 over 67.1390 hectares of Plot No. 1050 and Plot No. 1142 under Khata No. 274 in village Tikarpada, Ambadahara, District Keonjhar. Since no response was received, the petitioner reminded on 03.12.2013 for granting permission for commencement of mining operation, as the consent to operate was valid up to 31.03.2014 and the approved mining plan for retention of area of 67.1390 hectares was valid up to the period 2015- 16.

8. When such permission regarding reopening and commencement of mining operation was pending consideration with the Director of Mines, Odisha, the D.F.O., Keonjhar-opposite party no.4 on 01.02.2014 called upon the petitioner to deposit NPV in respect of surrendered area of 45.3486 hectares. In response to

the same, the petitioner communicated on 01.03.2014 stating that he has already surrendered the area and, as such, he was not holding any forest land within the retained area of 67.1390 hectares and, therefore, not liable to pay NPV as demanded. But, the D.F.O. without considering the contention raised by the petitioner directed vide letter dated 22.02.2014 to deposit an amount of Rs.3,31,04,478/-.

9. In the meantime, the State Pollution Control Board, Bhubaneswar vide Office Order No. 606 dated 22.04.2015 granted consent to operate for a production capacity of 6500 M.T. of Pyrophyllite and 4000 of Quartzite till 31.03.2016. The mining operation of the petitioner was kept in abeyance w.e.f. 17.09.2007 for want of statutory clearance under the Environment Impact Assessment Notification dated 14.09.2006. Instead of allowing the petitioner to reopen and commence the mining operation over 67.1390 hectares, opposite party no.1 initiated a proceeding for lapsing, as envisaged under Rule 28(2) of the Mineral Concession Rules, 1960 (for short "MC Rules, 1960") and vide notice under Rule 28(1) of the said MC Rules, 1960 called upon the petitioner to show-cause as to why the lease shall not be declared lapsed. In response to the same, the petitioner submitted his reply on 24.11.2014 and on consideration of his reply, opposite party no.1 vide letter dated 02.06.2015 was pleased to hold that mining lease was not liable to be lapsed and ordered that the surrender proposal over the area of 45.3486 hectares was accepted, but the petitioner was restrained from resuming mining operation pending deposit of the NPV dues in respect of 45.3486 hectares. In compliance of the same, the Tahasildar, Banspal vide Letter dated 07.07.2015 intimated the Collector, Keonjhar regarding taking over the possession in respect of 45.3486 hectares of surrendered area, which has been accepted by the State Government. As the petitioner did not deposit the NPV dues over the said surrendered area of 45.3486 hectares in compliance of letter dated 02.06.2015, he was not allowed to have the mining operation over the area of 67.1390 hectares. Hence this application.

10. Mr. S. Nanda, learned counsel appearing for the petitioner contended that the petitioner is not liable to pay any NPV amount, as he has not diverted any forest land for non-forest purpose under the Forest (Conservation) Act, 1980 (for short "FC Act, 1980"). He further contended that as per the guidelines for diversion of forest land for nonforestry purpose, the NPV can be levied and such demand can be made only after 30.10.2002 and the same can be realized before Stage-II (final) approval. As the petitioner has surrendered an area of 45.3486 hectares and on the basis of the report of the competent authority the same was intact and was not utilized for any other purpose nor the said forest land was diverted for non-forestry purpose under FC Act, 1980, the demand so made pursuant to letter dated 22.02.2014 for an amount of Rs.3,31,04,478/- towards NPV cannot sustain in the eye of law. Consequentially, the direction contained in letter dated 02.06.2015 that mining operation would be allowed to resume after the lessee deposited the pending NPV dues, being illegal, arbitrary and contrary to the guidelines, is liable to be quashed.

11. Mr. B.P. Pradhan, learned Addl. Government Advocate for the State justifies the demand raised by the authority and states that unless the petitioner deposits the NPV dues he will not be allowed to resume mining operation over the area of 67.1390 hectares where surface right has been granted by the competent authority. It is stated that NPV amount has been demanded on the basis of the order dated 12.02.1996 passed by the apex Court in W.P.(C) No.202 of 1995 (T.N. Godavarman Thirumulpad v. Union of India), and that the surrendered area of 45.3486 hectares being the integral part of the mining lease till it was accepted on 02.06.2015, the petitioner is liable to pay the NPV amount demanded by the authority. It is further contended that the petitioner did not challenge the demand to pay Rs.2,83,88,224/- towards the NPV over 45.3486 hectares DLC forest land vide office order no.220 dated 16.06.2010 of the opposite party no.4 as well as the revised demand of Rs.3,31,04,478/- over the said area which was raised on 09.07.2010, at the relevant time. Only when the resumption of mining operation in respect of the area over which surface right had been granted, i.e., 67.1390 hectares was allowed subject to condition of payment of NPV dues pursuant to letter dated 02.07.2016, the petitioner has approached this Court by filing the present writ application which cannot sustain in the eye of law.

12. We have heard learned counsel for the parties and perused the records. Since pleadings have been exchanged between the parties, with the consent of learned counsel for the parties, the writ petition is disposed of at this stage.

13. Before addressing on the merits of the issue involved in this case, it is apposite to bring on record the object and reasons behind imposition of NPV. The natural resources are the assets of the entire nation. Therefore, it is the obligation of the Union Government as well as the State Governments to conserve and not to waste these resources. As per the provisions contained in Article 48A of the Constitution of India, States shall make all endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country. Similarly, under Article 51A the duty has been cast on every citizen to protect and improve the natural environment including forest, lakes, rivers and wildlife and to have compassion for living creatures. Therefore, for the question with regard to conservation, preservation and protection of forest and the ecology, it is to be considered that if the forest land is used for non-forest purposes what steps/measures are required to be taken to compensate for loss of forest land and effect on the ecology.

14. No doubt the forests are a vital component to sustain the life support system on the earth. The national development, if any, has to be in consistent with the protection of environment not at the degradation of the same. Therefore, policy or vision for over all development has to evolve a systematic approach so as to balance the economic development and environmental protection. The economic development at the cost of degradation of environment would be ultimately counterproductive. Therefore, it is necessary to take a precautionary measure

when forest lands are diverted for non-forest use. Thus, before diversion of forest land for non-forest purposes and consequential loss of benefit occurring from the forest should not be the user-agency and such land be required to compensate for the diversion. In this back-drop, the NPV has to be determined.

15. Being conscious of this position, the legislature to provide for conservation of forest and for matters connected therewith or ancillary or incidental thereto enacted FC Act, 1980, which postulates that no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing that any forest land or any portion thereof may be used for any non-forest purpose. Therefore, the Central Government under the FC Act has been empowered to constitute a committee to advice it with regard to grant of approval. Therefore, contravention of any of the provisions contained in Section 2 of the FC Act, 1980 has been made an offence.

16. Similarly, to protect the environment, the Environment (Protection) Act, 1986 (for short "EP Act, 1986") has been enacted. It has been done with an object and reason that although there are existing laws dealing directly or indirectly with several environmental matters, but it is necessary to have a general legislation for environment protection to prevent decline in environment quality due to increasing population, loss of vegetal cover and biological diversity, excessive concentrations of harmful chemicals in the ambient atmosphere and in food chains, growing risks of environmental accidents and threats to life support system. The Central Government has been given wide powers to take measures to protect and improve the environment as provided under Section 3 including the power to constitute an authority or authorities for the purpose of exercising and performing such of the powers and functions, including the power to issue directions under Section 5 of the Act, and for taking measures, with respect to such of the matters referred to in sub-section (2) of Section 3 as may be mentioned in the order and subject to the prejudice and control of the Central Government. The Parliament has also enacted enactments to prevent and control water pollution and air pollution {The Water (Prevention and Control of Pollution) Act, 1974, and the Air (Prevention and Control of Pollution) Act, 1981}.

17. To achieve the above objective, the Ministry of Environment and Forests (MOEF) was also directed to formulate a scheme providing that whenever any permission is granted for change of use of forest land for non-forest purposes and one of the conditions of the permission is that there should be compensatory afforestation, then the responsibility of the same should be that of user-agency and it should be required to set apart a sum of money for doing the needful. In such a case, the State Government will have to provide or make available land on which reforestation can take place and this land may have to be made available either at the expenses of user-agency or of the State Government, as the State Government may decide. It was decided that the scheme shall ensure that afforestation takes place as per the permission which are granted and there should be no shortfall. Consequentially, MOEF had to issue guidelines from time

to time under the FC Act, 1980 and the procedure for receipt and utilization of funds for compensatory afforestation, activities permissible under compensatory afforestation, adequate compensation for loss of forest land, recovery of NPV, funds for catchment area, treatment plant and involvement of user-agency for compensatory afforestation. Thus, under the aforesaid premises, the letter dated 17/18.09.2003 in Annexure-17 series was issued by the MOEF, Government of India framing guidelines for diversion of forest land for non-forest purposes under the FC Act, 1980 and also guidelines for collection of NPV. The relevant extract is reproduced hereunder for better appreciation:

"In this regard this Ministry has received correspondences from some States/UTs and Regional Officers requesting to issue the guidelines. Considering the request of the State/UT Government and the Regional Offices, the Ministry of Environment and Forests issues following guidelines for the recovery/collection of Net Present value of the forest land being diverted for non forest purposes under Forest (Conservation) Act, 1980.

1. NPV shall be charged in all those cases which have been granted in-principle approval after 30.10.2002.

2. NPV shall be realized before State-II(Final) approval."

18. Similarly, on 19/22.09.2003, the guidelines for collection of NPV have also been clarified, which are reproduced herein below:

"In continuation of this Ministry''s letter of even number dated 17.09.2003 regarding guarding guidelines for collection of Net Present Value in compliance to the orders of the Hon''ble Supreme Court of India dated 30.10.2002 and 01.08.2003 in I.A. No. 566 in Writ Petition (Civil) No. 202 of 1995, I am directed to clarify that NPV will be charged in all those cases which have been granted in-principle approval after 30.10.2002. NPV will be realized before State-II (Final) approval.

NPV will also charged in all those cases, where State-I approval has been granted after 30.10.2002 and final approval has also been granted.

All the States/UTs shall comply with the orders of the Hon''ble Court and complete the collection process of NPV for the cases approved under Forest (Conservation) Act, 1980 after 30.10.2002, within a period of two months and submit a compliance report through their respective Regional Offices of this Ministry. Regional Office shall submit the compliance report to the Ministry after due verification."

19. On 23.04.2004, the MOEF issued an order published in the Gazette of India Extraordinary under Part- II of Section 3, Sub-section (ii). The relevant portion is reproduced below:

"In exercise of the powers conferred by Sub-section (3) of Section 3 of the Environment (Protection) Act, 1986 (29 to 1986) (hereinafter referred to as the said Act), and in pursuance of the Hon''ble Supreme Court''s order dated the 30th October 2002 in IA No. 566 in Writ Petition (Civil) No. 202 of 1995, the Central Government hereby constitutes an authority to be known as Compensatory Afforestation Fund Management and Planning Authority (hereinafter referred to as CAMPA) with effect from the date of publication of this order for the purpose of management of money towards compensatory afforestation, Net Present Value and any other money recoverable in pursuance of the Hon''ble Supreme Court''s order in this regard and in compliance of the conditions stipulated by the Central Government while according approval under Forest (Conservation) Act, 1980 (69 of 1980) for non-forestry uses of the forest land."

20. A conjoint reading of the above guidelines and Gazette notification mentioned above clearly indicates recovery/collection of NPV of the various land being diverted for non-forest purposes under the FC Act, 1980 is to be made. The meaning of NPV has been considered by the apex Court in T.N. Godavarman Thirumulpad v. Union of India, AIR 2005 SC 4256. The relevant paragraphs 26, 27 and 28 are reproduced herein below:

"26. First, we may consider the meaning of NPV and determine what is NPV.

27. The NPV is the present value (PV) of net cash flow from a project, discounted by the cost of capital.

28. Forestry is a public project. It is important to bear in mind that a benefit received today is worth more than that received later. The benefit received today is in fact ''cost incurred'' today. Time value of the cash inflow/outflow is important in investment appraisal. NPV is a method by which future expenditures (costs) and benefit are levelised in order to account for the time value of money. The object behind NPV is to levelise costs. What is the value of Rupee today would not be the value of Rupee say 50 years later. For example, let us have the starting point of value of Rupee in India in the year 2005 and analyse it with the value of Rupee that may be in the year 2050. Cost incurred or to be incurred in 2050 have to be discounted by using appropriate parameters like rate of discount, gestation period, ratio of deflators to GDP. Therefore, expenses incurred in each year between say 2005 and 2050 have to be brought down to their present values by using appropriate discount rate in the NPV."

21. Applying the above meaning of NPV to the present context and considering the guidelines, as discussed above, there is no dispute that mining lease of an area measuring 112.4876 hectares was granted in favour of the petitioner in the year 1998 in respect of plot nos.1050 and 1142 under Khata No.274 in village Tikarpada, Ambadahara in the district of Keonjhar for a period of 20 years from 07.11.1998 to 06.11.2018, but surface right was granted in respect of 67.1390 hectares on 18.05.1999, over which the petitioner has started the mining operation awaiting environment clearance. On 02.06.2010, the petitioner surrendered an area measuring 45.3486 hectares, which forms part of the

original mining lease area of 112.4876 hectares. When the surrender application was pending for consideration, the demand of NPV was made over the said surrendered area of 45.3486 hectares by the D.F.O., Keonjhar on 16.06.2010 and subsequently a revised demand was made on 09.07.2010 for Rs.3,31,04,478/-. But, the petitioner communicated vide letter dated 09.08.2010 that his application dated 02.06.2010 for surrendering of 45.3486 hectares of land is under active consideration of the State Government.

22. At this point of time, Range Officer submitted report to the D.F.O. on 25.10.2010 that there was no illicit felling of trees or any encroachment over the surrendered area of 45.3486 hectares. This fact was communicated to the Collector and District Magistrate after two years, i.e., on 11.03.2013 that the said surrendered area was intact/unbroken. Consequentially, the Collector and District Magistrate on 02.04.2013 forwarded the surrender application to the Director of Mines, Odisha on 02.04.2013. When the matter stood thus, on 28.06.2013 the MOEF granted environment clearance in respect of the retained area of 67.1390 hectares with the finding that DLC forest land of 45.3486 hectares has been surrendered. On 01.11.2013, in compliance of Rule 29 of the MC Rules, the Director of Mines forwarded the surrender application to opposite party no.1 for final order, which was ultimately accepted on 02.06.2015 vide Annexure-14.

23. In the meantime, even though steps for lapsing were taken, but it was held that mining lease was not liable to be lapsed and the petitioner was directed to deposit NPV dues in respect of 45.3480 hectares of virgin/unbroken area, which had been surrendered to the Government. As the surrendered area was not diverted for non-forest purpose under the FC Act, 1980 and it remained intact and virgin as it was, the question of recovery/collection of NPV for using forest land for being diverted for non-forest purpose under the FC Act, 1980 does not arise. Laudable consideration for recovery/collection of NPV has been well discussed above. Therefore, the area of 45.3486 hectares, which has been surrendered by the petitioner, as per the report of the Range Officer and other competent authority, having been remained intact and virgin and having not diverted to non-forest purpose under the FC Act, 1980, the petitioner is not liable to pay NPV, as demanded pursuant to letter in Annexure-10 dated 01.02.2014 and consequent revised demand made on 22.02.2014 in Annexure-12.

24. By the impugned order dated 02.06.2015 Annexure-14, though the petitioner has been communicated that the mining lease is not liable to be lapsed since the lessee has operated the mines from January, 2013 to April, 2014, as intimated by the Mining Officer, Keonjhar vide memo no.749 dated 12.05.2015 in respect of 67.1390 hectares in respect of which surface right was granted, and accepted the surrender proposal over an area of 45.3480 hectares, resumption of mining operation has been allowed only after deposit of the pending NPV dues by the lessee. The petitioner is aggrieved to the extent of direction given therein with regard to payment of NPV dues demanded against the surrendered area of 45.3480 hectares, as the said forest land has not been diverted for any non-

forest purpose under the FC Act, 1980. In view of such position, since the petitioner has not utilized the surrendered 45.3480 hectares of forest land by diverting the same to any non-forest purpose under the FC Act, 1980, he is not liable to pay the NPV dues, as demanded vide letter dated 01.02.2014 in Annexure-10 and revised amount vide letter dated 22.02.2014 in Annexure-12, thereby the direction no. (iii) contained in impugned letter under Annexure-14 dated 02.06.2015 to the extent, that the mining operation may be allowed to resume after the lessee deposited the pending NPV amount, is hereby quashed.

25. The writ petition is allowed to the extent that the NPV would not be charged for the area which has been surrendered not being used for non-forest activities. No order as to cost.

