
(1992) 01 OHC CK 0004
In the Orissa High Court
Case No : O.J.C. No. 260 of 1991

Debasis Singh Samant

APPELLANT

Vs

The State of Orissa and Another

RESPONDENT

Date of Decision : 20-01-1992

Acts Referred:

Mines and Minerals (Development and Regulation) Act, 1957 — Section 15
Orissa Cess Act, 1962 — Section 5, 6, 7
Orissa Minor Minerals Concession Rules, 1990 — Rule 13, 33

Citation : AIR 1993 Ori 11

Hon'ble Judges : G.B. Patnaik, J; D.M. Patnaik, J

Bench : Division Bench

Advocate : P.K. Misra, for the Appellant; Additional Government Advocate, for the Respondent

Final Decision : Partly Allowed

Judgement

G.B. Patnaik, J.—Petitioner is a lessee in respect of 96 hectares of land for period 1989-90 to 1993-94 in river Brahmani in village Gengutia under the provisions of the Orissa Minor Minerals Concession Rules, 1983. Under the terms of the agreement, the royalty had been fixed at Rs. 75,255/- per annum which was to be paid in advance by the lessee every year. The petitioner was further liable to pay the surface rent of Rs. 887/- and cess of Rs. 887/- every year. While the petitioner was continuing as a lessee under the aforesaid terms and agreement, opposite party No. 2 by letter dated 2-2-1990 demanded payment of cess at the rate of Rs. 13,858/ in place of the contractual rate of Rs. 887/- per year and the notice demanding the same has been annexed as Annexure-2. The petitioner had to pay the said amount under pressure. The Government of Orissa framed the Orissa Minor Mineral Concession Rules, 1990, which came into force with effect from 29-8-1990 and under Schedule I of the said Rules, royalty for sand has been fixed at the rate of Rs. 15/- per cubic metre in place of Rs. 1.50 per tonne which has been fixed under the Rules of 1983. Opposite party No. 2 vide letter dated 1-1-1991 intimated the petitioner that royalty for petitioner had been fixed

at the rate of Rs. 3,13,989/- per year and, therefore, the petitioner was called upon to pay the balance amount of Rs. 1,31,659/- for the year 1990-91 towards the arrear royalty and it was further stated that if the royalty was not paid, then the lease would be cancelled. The said order of opposite party No. 2 has been annexed as Annexure-3. The petitioner, therefore, has approached this Court to quash Annexures 2 and 3 and has further prayed for refund of the enhanced amount of cess which the petitioner has paid already.

2. Opposite party No. 2 has filed a counter-affidavit and the stand taken in the counter-affidavit is that the Cess Act having been amended in 1989 and the said amended provisions having come into force with effect from 6-10-1989, the petitioner is liable to pay the enhanced amount of cess as provided under the Orissa Cess Act and, therefore, there has been no infirmity in making the demand under Annexure 2. So far as the enhancement of royalty is concerned, the stand of opposite party No. 2 is that in accordance with the conditions of lease deed contained in Part VI of the agreement, the lessee is liable to pay royalty at the rates specified by the Government from time to time and since the Minor Mineral Concession Rules of 1983 were repealed and replaced by the Rules of 1990, with effect from the date the new Rules came into force, the petitioner-lessee is liable to pay in accordance with the Schedule contained in the new Rules and Annexure 3 has been issued in accordance with the same. The Rules have not been applied retrospectively, but prospectively from the date the Rules came into force and, therefore, there is no illegality under Annexure 3.

3. So far as the demand of enhanced cess under Annexure 2 is concerned, the matter is concluded by the decision of the Supreme Court in the case of M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others, wherein the Supreme Court has struck down the amended provisions of Sections 5, 6 and 7 of the Orissa Cess Act as ultra vires and has affirmed the decision of this Court. In view of the aforesaid decision of the Supreme Court, the demand made under Annexure 2 is without jurisdiction and opposite party No. 2 is not entitled to make any demand under the amended provisions of the Orissa Cess Act. Consequently, the demand under Annexure 2 is quashed.

The petitioner has prayed for refund of the amount which he has paid pursuant to the demand under Annexure 2. Annexure 2 is dated 2-2-1990. Though the petitioner has averred that the amount demanded under Annexure 2 has been paid, but the date of payment; has not been indicated. The Supreme Court in the Orissa Cements case (referred to supra) considering the question of refund held that even though the levy of cess was unconstitutional, but there shall be no direction to refund to the assessee of any amount of cess collected until the date on which the levy in question has been declared unconstitutional and in respect of Orissa, the relevant date would be 22-12-1989, the date when the Orissa High Court declared the provisions to be ultra vires. Since the petitioner has paid the amount under Annexure 2 subsequent to the said date, he is entitled to refund of the amount paid under Annexure 2. We would accordingly call upon opposite

party No. 2 to refund the cess collected from the petitioner pursuant to the demand made under Annexure 2.

4. So far as the question of enhanced royalty under Annexure 3 is concerned, according to Mr. Misra, the learned counsel for the petitioner, royalty having been fixed under the agreement in question in accordance with the rules as were prevalent, even if the said rules stood repealed and were replaced by a new set of rules, that would not affect the subsisting leases, whereas according to the learned Additional Government Advocate, the rules having been repealed and a new set of rules having been substituted and the original agreement having contained a term that the lessee will be bound to pay royalty at the rate specified in the Schedule to be fixed by the State Government from time to time, by operation of law, the petitioner is liable to pay the royalty at the rate fixed under the 1990 Rules and, therefore, there is no infirmity in Annexure 3. The rival submissions require a careful examination of the provisions contained in the Rules together with the relevant clauses of the agreement itself.

5. Clause 1 of Part VI of the agreement provides that the lessee shall during the subsistence of lease pay to Government royalty in respect of any minor minerals removed by him from the leased area at the rates prescribed in Schedule I and surface rent at the rates prescribed in Schedule II in accordance with the provisions under Rules 18 and 32(1). Rule 18 of the Orissa Minor Mineral Concession Rules of 1983 provided that royalty shall be leviable on minerals extracted from the leased area at the rates specified in Schedule I, provided that the rate of royalty in respect of any minor mineral may be enhanced not more than once in a period of four years. Thus, under the 1983 Rules under which the agreement between the parties had been entered into, there was no provision that the lessee will be bound to pay the royalty at the rate to be fixed by the Government from time to time. The said 1983 Rules stood repealed by the Orissa Minor Mineral Concession Rules, 1990. Under the 1990 Rules by virtue of Rule 33, anything done, any action taken or orders passed under the repealed Rules shall be deemed to have been done under the new Rules. Therefore, the lease in question by virtue of the deeming provision would be lease under the 1990 Rules. Under the new Rules, the provision for royalty has been provided in Rule 13 and Rule 13(ii) states that royalty shall be leviable on minor minerals extracted from the leased area at the rates specified in Schedule I. The proviso to Rule 13(ii) stipulates that the rates specified in Schedule I may be revised by Government from time to time by amendment made to the Schedule, but no such enhancement shall be made before expiry of three years from the date when the rates were last fixed. In the absence of any clause in the agreement between the parties enabling the State Government to enhance the royalty from time to time, the question that requires adjudication is whether by virtue of the provisions of the 1990 Rules, the State Government can enhance the rate of royalty in accordance with Schedule I of the 1990 Rules in respect of existing leases. As has been discussed earlier, by virtue of Rule 33 of the 1990 Rules, the lease in question will be deemed to be a lease under the 1990 Rules. Once the

lease shall be deemed to be a lease under the 1990 Rules, Rule 13 will operate with regard to the liability for payment of royalty and under Rule 13(ii) royalty is leviable on minor minerals extracted from the leased area at the rates specified in Schedule I. Schedule I prescribed the enhanced rate. On a combined reading of Rule 33 and Rule 13(ii) read with Schedule I of the 1990 Rules, we are of the considered opinion that the royalty could be levied on minor minerals extracted from the leased area even in respect of an existing lease at the rates stipulated in Schedule I of 1990 Rules from the date the Rules have come into force and consequently, there is no infirmity in the demand of royalty made under Annexure 3. In this view of our conclusion, the prayer to quash Annexure 3 cannot be granted.

6. In the net result, therefore, the demand under Annexure 2 is quashed and opposite party No. 2 is directed to refund the amount paid by the petitioner pursuant to demand under Annexure 2 within a period of two months from the date of receipt of our order. The writ application is allowed in part. There will be no order as to costs.

D.M. Patnaik, J.

7. I agree.