

**(2014) 08 GAU CK 0018**

**In the Gauhati High Court**

**Case No : Writ Petition (Civil) No. 1832 of 2009**

G.H. Vijapura and Co.

APPELLANT

Vs

The State of Assam

RESPONDENT

**Date of Decision : 19-08-2014**

**Acts Referred:**

Constitution of India, 1950 — Article 265

Mines and Minerals (Development and Regulation) Act, 1957 — Section 15, 3

**Citation : AIR 2014 Guw 165 : (2014) 3 GLD 38**

**Hon'ble Judges : Hrishikesh Roy, J**

**Bench : Single Bench**

**Advocate : N. Dutta, Sr. Adv., J. Roy, N. Choudhury, R.J. Phookan, S. Sarma and R. Hazarika, Advocate for the Appellant; J. Handique, G.A., R. Dubey and R. Devi, Advocate for the Respondent**

## **Judgement**

Hrishikesh Roy, J.—Heard Mr. N. Dutta, the learned Senior Counsel appearing in the W.P.(C) No. 1832/2009 and W.P.(C) No. 4482/2008. The other petitioners are represented by Mr. J. Roy, the learned Counsel. The learned Government Advocate Mr. J. Handique appears for the State respondents. The Airport Authority of India (AAI) is represented by advocate Mr. R. Dubey. The respondent Railways are represented by Ms. B. Devi, the learned Standing Counsel. The issue that requires Court's consideration is whether royalty can be demanded from the contractors for ordinary earth utilized in levelling the low lying areas, in execution of the contracts under the AAI, N.F. Railways and the National Highway authorities. The earth was extracted by the contractors from private patta lands and demand for royalty is made from the contractors and not from the land owners. In 5 cases, [barring the W.P.(C) No. 2177/2066] the work was completed but because of royalty demand, the earnest money is retained by the principal employer except in the W.P.(C) No. 2022/2006 where even the earnest money has been refunded to the contractor on satisfactory conclusion of work. Since common arguments are advanced from both sides, the following judgment will cover all five cases.

2. As relevant aspects in these cases are substantially similar, the facts from the W.P.(C) No. 1832/2009 are delineated for the purpose of this judgment. In this case, the AAI entrusted the work for levelling the low lying areas and development of internal drainage system for the runway extension in the LGBI Airport, Guwahati. To execute the contract, the petitioner made agreements with owners of private patta lands for extracting earth therefrom, to execute the work. The Addl. D.M., Guwahati accorded permission for earth extraction after concurrence of the Forest Department and accordingly the contract was being executed with ordinary earth collected from private patta lands.

3. While the work was on, the notice dated 6.4.2009 (Annexure-9) was issued by the AAI, whereby the contractor was asked to submit documents to confirm that royalty was paid for the extracted earth and failing this, withholding of Rs. 75,10,000.00 from their running bills was threatened. Aggrieved by this threat, the contractor filed the W.P.(C) No. 1832/2009 and relied upon this Court's decision in the Brihattar Dispur Mati Truck Malik Santha Vs. State of Meghalaya and Others, to contend that removal of earth from non-forest areas can't be subjected to forest royalty. Accepting this projection an interim order was passed on 8.5.2009, whereby royalty deduction was stayed from the contractors bills by this Court.

4.1. Assailing the legality of the royalty demand, the petitioners contend that compulsory extraction of royalty can only be made through statutory authorization and when the statute permits collection through a particular manner and from a particular person, it can be collected only in that manner and from the specified person and that too at the stipulated rate and not in any other manner. Moreover, such compulsory levy by the Government can only be in accordance with law and taking statutes will have to be construed strictly by the Court.

4.2. According to the petitioners the demand of royalty must be authorized by law and in the absence of any legislative sanction, the levy can't be imposed through executive authorization or through interpretive exercise.

4.3. The petitioner refers to the Clause 5.1 of the Special Conditions of Contract to project that royalty is to be paid directly to the Government as was pointedly clarified by the AAI in their clarificatory response to query No. 3 and therefore the demand for royalty addressed to the contractor by the AAI is inconsistent with the contract terms.

5.1 The stand of the respondents can be culled out from the 3 applications i.e. Misc. Case 3318/2008 (filed by the AAI), the Misc. Case 3173/2009 and Misc. Case 3145/2009 (both filed by the Principal Chief Conservator of Forest, Assam). According to the PCCF, earth extracted from patta land doesn't come within the ambit of O.M. dated 17.6.2000 issued by the Finance Department since earth is not specified in the Government O.M. and therefore the claim is not covered by the Forest Regulation, 1891. But elsewhere, the respondents seek support for

the levy from the Assam Minor Mineral Concession Rules, 1994 (hereinafter referred to as the 1994 Rules) where the Rule 28(3) permits collection of royalty on minor minerals. Mr. R. Dubey relies on the Minor Mineral Deptt's O.M. issued on 7.3.2005 (which amends the 2nd Schedule to Rule 1994) to contend that the demand on the contractor has the requisite statutory support. Moreover since earth was extracted for commercial exploitation, the extraction is not exempted under Rule 48 and therefore the Government Advocate argues that State is competent to ensure recovery of royalty.

5.2. The respondents refer to the Clause 15 of the General Conditions of Contract (GCC) to project that the contractor is responsible for depositing the royalty for the materials utilized by him in execution of contract and therefore the demand for royalty from them by the AAI as the principal employer, is supported by the contract terms.

6. The Supreme Court in *Som Datt Builders Ltd. Vs. Union of India (UOI) and Others*, considered the provisions of the Mines and Minerals (Regulation and Development) Act, 1957 (hereinafter referred to as the 1957 Act) and noted that the Central Government through the notification dated 3.2.2000 had declared ordinary earth used for filling or levelling purpose in construction works, to be a minor mineral in the category of any other mineral. Thus ordinary earth was bracketed with ordinary clay, ordinary sand etc. which were already categorized as minor minerals, under sub-clause (e) of Section 3 of the 1957 Act.

7. The Section 15 of the 1957 Act empowers the State Government to frame Rules in respect of minor minerals and under sub-section (1)(g), the Rules may provide for fixing and collection of..... royalty .... and the manner in which the levy is payable. All mining lease holders are required to pay royalty for minor minerals removed or consumed by them at the rate prescribed by the State Government. The 1994 Rules was notified on 21.1.1995 and in exercise of powers conferred by Rule 28, the Assam Government's Mines & Mineral Department through their notification dated 7.3.2005 amended the 2nd Schedule of the Rules and replaced the original entry 12 i.e. Brick by Earth and also stipulated the rate of royalty at Rs. 15.00 Cu.M. for the new entry. As earlier noted, the respondents claim support for the levy from the 1994 Rules and the rate specification made by this amendment Notification of 7.3.2005, issued under Rule 28(3) of the Rules.

8. In *Brihattar Dispur Mati Truck Malik Santha* (supra) this Court was examining the issue of earth collected from private lands in Meghalaya. But the Court while accepting that earth is a minor mineral within the meaning of Rule 6(ii) of the Transit Rules framed under the Assam Forest Regulation, 1891 (hereinafter referred to as the Forest Act) further declared that unless such earth is removed from forest, it would not attract the levy, under the Meghalaya Government's Notification dated 21.10.1999. Consequently the Court placed a caveat for earth extracted from private land by declaring that such extraction will not come within the embrace of the Government notification. In other words the Court held that

earth is minor mineral for the purpose of the levy under the Forest Act only if, it is extracted from a forest area.

9. In the present case, it is not disputed that ordinary earth used by the contractor was extracted from private patta land and not from forest area. Now the question is whether the contractor can be fastened with royalty demand for such extracted material from private patta land, when it is the statutory responsibility of the land owner to deposit the royalty.

10. Since the Government notification of 7.3.2005 (whereby the rate of levy was specified) was issued under the 1994 Rules, it will be necessary to examine whether this executive authorization can be made the basis for demand of royalty from the contractor. Under Rule 16(i)(a) of the 1994 Rules, the mining lessees are required to pay royalty for the minor minerals removed or consumed by him or by his contractors, at the rate specified in 2nd Schedule. Under the Clause (n) of Rule 16, the lessee is required to submit annual returns in Form-"J" on paid royalty, to the Director/PCCF. When the lessee defaults, sub-rule (7) of Rule 16 enables the authorities to take consequential action against him. Here Rule 28 makes it abundantly clear that only the holder of the mining lease is required to pay royalty for the minor minerals removed or consumed by him or by his contractor. On examination of these relevant provisions of the 1994 Rules, it is apparent that the burden is cast on the mining lessee to pay royalty even for those extraction made by his agent or contractor and the Rules nowhere provide for collection of royalty, directly from the contractor. Therefore it logically follows that when the 1994 Rules makes the mining lessees responsible even for extraction made by the contractors, the Government notification made under this Rules, can't authorize the levy from the contractors.

11. But since the parties here are covered by contract terms, it may be necessary to examine the Conditions of Contract to test the legality of the demand made by the principal employer from the contractors. In these cases the contractor was not made bound to procure royalty paid ordinary earth. Moreover as already noted, under the 1994 Rules, only the mining lessees are obliged by law to pay the royalty. Under Clause 5.1 of the Special Conditions of Contract with the AAI, the Contractor is required to pay the royalty directly to the Revenue Authority or to the Government coffers. In W.P.(C) 1832/2009 when the contract was being finalized, in response to the Query No. 3 raised by the bidder M/s. G.H. Vijapura & Co., the AAI had clarified that the Principal doesn't owe responsibility to deposit the royalty to the Government and it is the duty of the contractor. If such be the contract terms, the demand for royalty by the principal employer who is neither the State Government nor the Central Government, can't be legal. Therefore in the absence of any provisions in the contract agreement, the deduction from the contractual dues by the AAI on account of royalty, can't legally be justified. This Court in *State of Assam and Others Vs. Muslim Ali (Md.)*, had declared that appropriation of money from the contractual dues is impermissible unless supported by statutory provisions or by express

provisions incorporated in the contract. Therefore this decision of the Division Bench lends support to the conclusion reached in favour of the contractors.

12. In the 2nd Schedule of the 1994 Rules as it originally stood, under Rule 29, the rate of royalty was stipulated for 22 minor minerals and ordinary earth was not listed amongst those 22 entries. But the Rules were amended through notification of the Assam Minor Mineral Concession Rules, 2013 (hereinafter referred to as the 2013 Rules) and under this Rule, ordinary earth was inserted at entry No. 24 of the 1st Schedule. But unfortunately while the rates of royalty was prescribed for the other articles, the rate wasn't specified for ordinary earth under Entry 24. It is well settled that a taxing statute (in addition to the subject of the compulsory levy) must also prescribe the rate at which the levy is to be charged and unless all 3 components are specified, the levy will be hit by Article 265 of the Constitution which provides that no tax can be levied or collected except by authority of law [refer to Consumer Online Foundation, etc. Vs. Union of India (UOI) and Others, etc., ]. Therefore even on this count, when the rate is unspecified in the 2013 Rules, the demand for royalty can't be considered legal.

13. Moreover since royalty is a compulsory levy, the enabling provisions will have to be strictly construed. On this aspect what is glaring here is that the 1994 Rules permits realization only from the lessee and not from the contractor. That apart the rate of royalty for ordinary earth is yet to be specified in the 1st Schedule to the 2013 Rules. The statutory support for the levy can't also be secured from the Forest Act as the extracted material is admittedly from non-forest areas. Therefore when the Government itself doesn't prescribe the rate it must logically follow that the State has not authorized collection of royalty from the ordinary earth despite incorporation of entry 24 in the 1st schedule to the 2013 Rules. Thus in my considered view, statutory support for royalty demand for ordinary earth is not available in these cases. As the rate of royalty even under the 2013 Rules are not stipulated by Assam Government these cases are clearly distinguishable from Som Datt Builders Ltd. Vs. Union of India (UOI) and Others, , where the State of U.P. had provided for the full mechanism to collect royalty from the contractors.

14. Moreover judicial opinion is still inconclusive on whether royalty is tax. The 7 Judges Bench in India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others, initially opined that royalty is tax. But in The State of West Bengal Vs. Kesoram Industries Ltd. and Others, , the 5 Judges (in both the majority and minority views), after referring to India Cement (supra) described the 7 Judges decision to be a typographical error and declared that royalty is not tax. Because of the resultant ambiguity on the issue, the Apex Court in Mineral Area Development Authority etc. Vs. Steel Authority of India and Others, felt the necessity for reference of the vexed question to a Larger Bench and consequently the conflict of views between India Cement and Kesoram Industries Ltd. still persist and is now to be re-considered by a larger Bench. Thus the final word on whether the royalty is a tax is still to be uttered by the Apex Court.

15. In the context of the issue to be answered here, when the demand can't be traced to a statutory enactment and the contract conditions too doesn't enable the principal employer to demand royalty from the contractor, it has to be declared that payment of royalty for ordinary earth is not an obligation to be discharged by the contractor. Therefore the decision of the principal employer to deduct royalty from the contractors' bills is found to be without any legal basis. Accordingly the respondents are directed to free the contractor from royalty deduction from their contractual dues. Consequently for the concluded contracts, the earnest money/Bank Guarantee be discharged but for the unfinished contract, the contractual payment be disbursed without deduction of royalty. It is ordered accordingly. With the above order, these cases are allowed to the extent indicated above, without any order on cost.