

(2019) 01 BOM CK 0055

In the Bombay High Court

Case No : Writ Petition No. 4313 Of 2004, Writ Petition No. 4517 Of 2004, Writ Petition No. 5869 Of 2004

Graphic Paper Products

APPELLANT

Vs

State Of Maharashtra & Others

RESPONDENT

Date of Decision : 11-01-2019

Acts Referred:

Maharashtra Land Revenue Code, 1966 — Section 70, 336
Central Province Irrigation Act, 1931 — Section 3, 26, 37(1), 40
Maharashtra Irrigation Act, 1976 — Section 2(3), 11
Central Provinces & Berar Regulation of Waters Act, 1949 — Section 2(b), 3, 5, 5(2), 26, 40

Citation : (2019) 3 MahLJ 842 : (2019) 2 BomCR 758

Hon'ble Judges : B.P. Dharmadhikari, J;S.M. Modak, J

Bench : Division Bench

Advocate : A.A. Naik, A.M. Kadukar, V. G. Palshikar, S.N. Thakur, Anand Jaiswal, A.M. Kadukar

Final Decision : Dismissed

Judgement

S. M. Modak, J.

1. In all these petitions, the petitioners have challenged the enhancement of water rates made as per Notification dated 28th November, 2002. This Notification is issued by the Irrigation Department of the State of Maharashtra. They have prayed for setting aside this Notification on the ground that it is an example of exceeding the limits prescribed for delegated legislation. So also, the petitioners have asked for declaring Section 70 of Maharashtra Land Revenue Code as unconstitutional.

2. The facts of every petition are slightly different. There is an Agreement for supply of free water executed with Ballarpur Industries Ltd. [predecessor-in-title of BILT Graphic Ltd.]. It was executed with Government of Central Provinces & Berar on 31st July, 1947. So also, there was a new agreement executed post-

independence on 21st May, 1997. Whereas in case of Associated Cement Companies Ltd., there was a supply of water for cement plant. It was started in or about 1968 at district - Chandrapur. Company has not executed any agreement with Government. Whereas M/s. Ultratech Cement Co. Ltd., has executed an Agreement dated 23rd May, 1997 with Government. Their Cement Plant is situated at Bhayegaon, Tq. Korpana, Distt. Chandrapur.

3. BILT Company has got a plant for manufacture of papers, whereas other two petitioners are having cement plants. Though from different periods, all of them were fetching water of river Wardha, 1947 Agreement provides for free supply of water and mentions about 9000 tons production capacity, whereas for other two petitioners, there is no reference of manufacturing capacity and the water was charged.

4. We have heard learned Advocate Shri A. A. Naik [Writ Petition No. 4313 of 2004], learned Adv. Shri Manoj Pillai [Writ Petition No. 4517 of 2004] and learned Adv. Ms. S. N. Thakur [Writ Petition No. 5869 of 2004] for petitioners and learned Asstt. Govt. Pleader Shri Kadukar and learned Adv. Shri V.G. Palshikar, for VIDC.

5. Ballarpur Co. Ltd., was fetching water since prior to independence. Learned Adv. Shri Naik has taken us through the provisions of the laws in existence during pre-independence and post-independence. Pre-independence law is Central Provinces Irrigation Act, 1931. Post-independence laws are Central Provinces & Berar Regulation of Waters Act, 1949, Maharashtra Land Revenue Code, 1966 and Maharashtra Irrigation Act, 1976. Other two petitioners-Companies started functioning after 1968 [which is pleaded]. There is no occasion for them to go through the provisions of 1931 and 1949 Acts. They have restricted their challenge to the provisions of Section 70 of Maharashtra Land Revenue Code and the Notification dated 28th November, 2002.

6. It is important to note that all these petitions were filed in the year 2004 particularly when the Collector, Chandrapur, has issued Demand Notices in the year 2004. Their main contention is Govt., cannot recover the water charges retrospectively. As per notice dated 16 th July, 2004 , Chandrapur Collector has demanded Rs. 04,46,05,261- 00 from Ballarpur Industries Ltd., towards arrears of water charges, apart from the other amount. As per notice dated 30th June, 2004, Chandrapur Collector has demanded Rs.33,19,076-00 towards arrears of water charges, apart from the other amount from M/s. Ultratech Cement Co. Ltd. As per notice dated 30th September, 2004, Chandrapur Collector has demanded Rs.17,90,301-10 towards arrears of water charges, apart from the other amount from M/s. Associated Cement Companies Ltd.

7. On going through the record and on hearing the respective parties, we think that the controversies are centered around following points -

[a] whether the Government has got right to increase water rates? and if yes, under which law?,

[b] constitutional validity of the provisions of section 70 of Maharashtra Land Revenue Code,

[c] validity of the notification dated 28/11/2002, and

[d] whether enhancement can be made applicable retrospectively.

8. We will deal with these points individually. Cement plants by M/s Ultratech Cement Ltd. and by M/s Associated Cement Ltd. were started during post independence period and that too after Code of 1966 was introduced. As such while dealing with their objections 1931 and 1949 Acts are not relevant. However certain facts are similar and we will deal with them together. Where ever it is necessary we will express our separate opinion for individual writ petition.

9. There are agreements executed only by Ballarpur Company and M/s Ultratech Cement Ltd. M/s Associated Company Ltd. has not executed any agreement with Government. Agreement with M/s Ultratech Ltd. was executed in the year 1997. The company has surrendered to the jurisdiction of section 70 of 1966 Code. Company has agreed to pay as per revised rates. It is referred in clause 8 of that agreement. There is also reference of notification dated 10/6/1976 issued by revenue and forest department. Whereas Ballarpur company has executed two agreements one in the year 1947 and another in the year 1997. As per 1947 agreement water was supplied free and company has agreed to manufacture 9000 tons of paper. Whereas 1997 agreement provides for payment as per water rates notified by the Government if the manufacturing capacity exceeds 9000 tons. When both the agreements provide for liability to pay as per revised/notified rates, we do not find any difficulty. Because it is contractual obligation. In that eventuality the issue remains about validity of the notification dated 28/11/2002. We will deal with them lateron. First we will deal with right of Government to enhance water rates and validity of the provisions of section 70 of 1966 code.

RIGHT OF GOVERNMENT TO ENHANCE WATER RATES

10. There is a serious dispute between M/s Ballarpur Ltd on one hand and Government on the other hand about which Law is applicable and whether rates can be increased when there is 1947 agreement. This issue does not arise in other two petitions because they started business after 1966. Learned Advocate claims that the provisions of Maharashtra Irrigation Act 1976 are applicable whereas learned Assistant Government Pleader and learned Advocate Shri Palshikar claims that the provisions of Maharashtra land revenue code are applicable.

APPLICABILITY OF MAHARASHTRA IRRIGATION ACT 1976

11. There are certain pre-conditions for applicability of 1976 Act. We agree with the submission made on behalf of Govt., and VIDC that 1976 Act is not applicable because it is not the canal water, but it is the Wardha river water. There is a broader meaning of canal given in 1976 Act than that was given in

1931 Act. River water is not included in the meaning clause of canal given in Section 3 of 1931 Act, whereas river water finds place in Clause (d) of Sub-section 3 of Section 2 of 1976 Act. It is as follows :-

"Section 2 (3) - "Canal" includes :

(a)

(b)

(c)

(d) any part of a river (including its tributaries), stream, lake, natural collection of water or natural drainage- channel, to which the State Government may apply the provisions of section 11, or of which the water has been applied or used before the commencement of this Act for the purpose of any existing canal;"

12. However, there are two conditions prior to including river under canal. Either Govt. must notify river under the provisions of Section 11 of 1976 Act or such river water must have been used for the purpose of canal. Company does not claim fulfillment of either of the conditions at least till filing of this petition. For these reasons, we have no hesitation but to hold that 1976 Act is not applicable.

APPLICABILITY OF MAHARASHTRA LAND REVENUE CODE 1966

13. We are satisfied that the provisions of 1966 Maharashtra Land Revenue Code are very much applicable. There is much stress on the provisions of Section 70 of the Code. Learned Adv. Shri Naik contends that second condition of Section 70 of the Code is not satisfied. It is disputed on behalf of the Govt. Section 70 of the Code empowers the Collector [when authorized by the Govt.] to fix water rates. It can be done only when two conditions are fulfilled. One is right over the water must vest in the Govt. There is no dispute that this condition is fulfilled in case before us. Second condition reads as:-

"in respect of which no rate is leviable under any law relating to irrigation in force in any part of the State." The essentials are :

[a] there is a law which is in force,

[b] but water rates are not leviable.

14. We have to consider the position as existing earlier to 1966 when Code came into force. The Acts of Central Province Irrigation Act 1931 and Central Province and Berar Regulation of Waters Act 1949 were in force at that time. Section 336 of the Code deals with repeal and saving clause. But the 1931 and 1949 Acts were not repealed.

PROVISIONS OF 1931 AND 1949 ACTS

15. Right in water vests in the Government. Whether it was earlier to or after independence. Such right in river water was recognized in Section 26 of 1931

Act. This Act predominantly deals with water used for irrigation. Canal water can be supplied for different purposes [Section 37 (1) of 1931 Act]. There is a difference in procedure to fix the charges, depending upon the purpose. There was a choice left with the Local Govt., and the user and they will fix conditions for supply of water and the charges [Section 40 when the water is used for industrial, urban or other purposes not connected with agriculture], Whereas for other purposes, exclusive right is given to Local Govt., to fix the charges.

16. It seems that thereafter, there was a need felt to enact a special law relating to water used by industrial concerns. The 1931 Act deals specifically with irrigation, whereas Central Provinces & Berar Regulation of Waters Act, 1949 specifically deals with use for industrial purpose. So also 1931 Act laid more emphasis on water supplied through canal, whereas 1949 Act laid emphasis on 'natural source of supply.' It means, rivers, streams, springs, lake [Section 2 (b)] We do not find reference of canal in 1949 Act. Right of Crown in such water is also recognized in Section 3 of 1949 Act. There is protection of rights acquired in such water earlier to appointed date. There is a rule-making power of Provincial Govt. recognized in Section 5 of 1949 Act. Rules to provide for manner of demanding such water, its rate etc.

17. So as per 1931 Act, it is the negotiations between the parties which will decide the water rates [Section 40], whereas it was left to Govt. to decide water rates by making Rules [Section 5 (2) as per 1949 Act]. The Government and the user were given choice to fix water rates [Section 40 of 1931 Act].

18. So, on an in-depth reading, we feel that Act of 1931 contains provisions for charging water but only when it is taken from a canal [industrial or otherwise]. It does not contain a provision when water is directly taken from a river. There is a reference of Section 26 in recital of 1945 agreement. We feel that it is, only for the purpose of referring vesting of Govt.'s right in river water and no other purpose. So we feel that 1949 Act is more appropriate Act. It lays down the meaning of the phrase 'natural source of water' and it specifically deals with industrial use only.

19. On one hand, 1949 Act protects the rights acquired earlier in such water and on the other hand empowers the Govt., to make rules [including fixing of water rates]. No such rules were placed before us. Immediately before 1966, 1949 Act was made applicable to State of Maharashtra with effect from 1st June, 1962 [notification dated 3rd May, 1962].

20. We feel that direction given as per letter dated 28th September, 1965 by Irrigation Department to the Company is a proper exercise of the power under 1949 Act. Water rate @ Rs.4.50 per 10,000 cubic feet was fixed. This direction is more appropriate than the directions dated 27th September, 1963 and 8th January, 1964. Because first does not pertain to water of Wardha river and second is superseded by 28th September, 1965 directions. So also, second was issued by Industries Department and not by Irrigation Department.

21. So, admittedly, there was a law prescribing framing of rules [including fixing of rates]. But rules were not placed before us. Natural corollary will be there was no codified law in existence under which water rates are leviable prior to 1966. Hence, we conclude that second condition of Section 70 of the Maharashtra Land Revenue Code is also satisfied. So, Govt. was justified in fixing rates by issuing circular. Section 70 empowers the Govt., to do the same. Even otherwise, as per 1947 Agreement, there was a permission to manufacture nine thousand tons of paper. It must have increased due to passage of time. So, on one hand, Company cannot justify in claiming water charges at concessional rates, whereas, on the the hand, the manufacturing capacity must have been increased.

22. For above discussion, we conclude that there is no substance in the challenge to revise water rates. It needs to be rejected.

CONSTITUTIONAL VALIDITY OF SECTION 70 OF 1966 CODE

23. Section 70 of 1966 code empowers the government to authorize the Collector to fix the water rates. Once authorized the collector of particular district may fix water rates for particular district. This contention is taken in Writ Petition No.5869/2004. However during oral arguments this contention was never advanced. Hence we do not find it necessary to dwell upon it. So issue is whether rates can be fixed retrospectively and whether it has happened in this case.

RETROSPECTIVE OPERATION OF

NOTIFICATION DATED 28/11/2002

24. The impugned notification was issued by irrigation Department. There is strong objection in all the three petitions that the Collector is taking disadvantage of revision of water rates and making it retrospectively applicable. Before going to the facts it will be material to go through the citations relied upon by both the parties.

DISCUSSION ON JUDGMENTS RELIED UPON BY GOVERNMENT

25. The judgment delivered in case of Waluj Industries Association & others Vs. State of Maharashtra & two others [Writ Petition No. 4263 of 2005 along with other petitions; decided on 10th October, 2008 (Coram : Swatanter Kumar, C.J. & R. M. Borde, J.)] is the judgment earlier in time. It was also referred in remaining judgments. There was an agreement in between the holders of industrial units with Maharashtra Industrial Development Corporation [for short, "MIDC"] for supply of water. The Irrigation Department, vide various Notifications, have enhanced the water rates and, in turn, the MIDC has also enhanced the water rates for its users. This Court has considered the provisions of Maharashtra Industrial Development Corporation Water Supply Regulations and clauses of the Agreements executed with industrial users. The contention about retrospective operation was turned down. What we think is that on factual aspects, it was turned down. There is a discussion on this issue, more particular in para nos.

14, 15 and We reproduce certain important observations therein as below:-

"14.The Corporation issued notices to different industrial establishments in respect of revision of water rates and made demand in respect of payment of water charges at revised rates. Although petitioners have made a grievance that levy of water charges is with retrospective effect and respective industrial establishments were not informed about the revision of water charges on previous occasions, however, Respondent-Corporation has contended in its affidavit-in-reply that in fact different industrial establishments, operating within the area of Industrial Development Corporation, have been specifically informed in respect of revision of water rates and their liability to pay water charges at revised rates."

"15.A further application appears to have been tendered by the Chamber of Marathwada Industries and Agriculture on 16th August 2003 in respect of revision of water rates and communications made by the Corporation in that behalf to respective industrial units. Similar communications find place in the record dated 14th July 2003 by Industries Association of Young Entrepreneurs, Aurangabad and dated 24th July 2003 by the Chamber of Marathwada Industries and Agriculture. Many industrial units operating within the industrial area have tendered undertakings in the prescribed form in compliance with the directives issued by MIDC."

The important factual observations in paragraph 15 are as follows:-

"15.On perusal of an application tendered by Waluj Industries Association on 23.11.2001, it appears that said communication is in response to a Circular dated 05-11-2001 issued by MIDC."

Para 15 further says :-

"15.A further application appears to have been tendered by the Chamber of Marathwada Industries and Agriculture on 16th August 2003 in respect of revision of water rates and communications made by the Corporation in that behalf to respective industrial units. Similar communications find place in the record dated 14th July 2003 by Industries Association of Young Entrepreneurs, Aurangabad and dated 24th July 2003 by the Chamber of Marathwada Industries and Agriculture. Many industrial units operating within the industrial area have tendered undertakings in the prescribed form in compliance with the directives issued by MIDC."

26. For all these factual aspects, the objection about retrospective operation was held unacceptable. The industrial establishments have been communicated in the year 2001 and thereafter every time in respect of revision of water rates by the Corporation.

27. This was also an issue in case of Pepsico India Holding Pvt. Ltd. [Supra]. There also, MIDC was getting water from Irrigation Department and, in turn,

MIDC was supplying it to Pepsico Industries. There were also other contentions. There was an argument that there was a continuing liability to pay increased rate from the year 2001 itself, and it was not paid in spite of representations. There was also an argument that the enhancement as per the Circular dated 25th October, 2001 [by ten times] cannot be said to be a retrospective demand because it was not altered in spite of representations [para 31]. Finally, there are observations in paras 43 and 44. The relevant part of para 44 reads thus :-

"44.The stand of the appellant that the increased rate of water charges is being demanded from them on a retrospective basis is erroneous and fallacious and not proper because it is established from the record that the appellant had the knowledge about the aforesaid increase in 2001 itself when the Government issued the notification intimating such increase which fact is an admitted position."

28. Issue about retrospective operation was also one of the issues in case of Zawar Sales Ltd. [Supra]. Water rates were increased from Rs.16.50 per cubic meters to Rs.51.10 per cubic meter. Water was used as a raw material and also for allied activities. Above two judgments were also referred in para 17 of this judgment. In case State Bank of India [Supra], SBI was getting water from BMC and there was increase in water rates.

JUDGMENTS RELIED UPON BY PETITIONER IN WRIT PETITION NO. 4313 OF 2004

29. In all, there are seven citations. They are as follows :-

[a] Commissioner of Income Tax 5 Mumbai Vs. Essar Teleholdings Ltd [(2018) 3 SCC 253],

[b] Commissioner of Income Tax (Central)-I, New Delhi Vs. Vatika Township Pvt. Ltd. [(2015) 1 SCC 1],

[c] Vice-Chancellor, M.D. University, Rohtak Vs. Jahan Singh [(2007) 5 SCC 77],

[d] Regional Transport Officer, Chittoor & others Vs. Associated Transport Madras (P) Ltd., & others [(1980) 4 SCC 597],

[e] Bakul Cashew Co. & others Vs. Sales Tax Officer, Quilon & another [AIR 1987 SC 2239],

[f] Govind Das & others Vs. The Income Tax Officer & another [(1976) 1 SCC 906], and

[g] The Income-tax Officer, Alleppey (in both the Appeals) Vs. 1. M. C. Ponnose & others (in C.A. No. 942 of 1966) 2. Excel Productions, Alleppey & others (In C.A. No. 943 of 1966) [AIR 1970 SC 385].

On perusing them we find more or less similar principles have been laid down. In order not to burden the judgment, we are only reproducing the ratios laid down in the judgment. In case of Income Tax Officer, Aleppi [supra], Issue was about investing Tahsildar with powers of Tax Recovery Officer. The question was

whether such powers can be invested from the date of notification or earlier thereto. It has been turned down. There cannot be any dispute about proposition that there cannot be retrospective operation of delegated legislation. On this basis we will look into the factual aspects.

NOTIFICATION

30. The notification does not specifically mentions of any section of any law. On reading it, one can very well infer that water rates were changed and it also mentions the reason and it is due to world wide industrial slackness and on the basis of representations made by various industrialists.

31. There is reference of notifications dated 12/9/2001 and dated 24/10/2001 in it. It also mentions the considerations for increasing the charges 3 times. The factors were recommendations of Finance Commission, Irrigation Commission National Water Supply Authority. It also mentions the difference between the expenses incurred and income derived from present water charges.

32. Now, it will be material to see the water rates mentioned in these two earlier notifications. The petitioners have not filed them on record. Respondents through referred them in their pleadings, have not filed them in time. When they attempted to file them at the time of arguments, it was strongly opposed on behalf of the petitioners. Hence even we have not granted permission.

33. So we have no alternative to decide the factual aspects on the basis of pleadings and available record. The respondents no. 1 and 2 have in their Return have given the calculation thereby suggesting how rates were not made applicable retrospectively. In fact they want to suggest that even though they have been made retrospectively applicable, they are not to the detriment of the petitioners but to their advantage. We have also read the rejoinder to the reply (filed by BILT PAPER PRODUCTS). They have simply denied the allegations. They have simply laid emphasis on the concessional rates granted as per the agreement and non application of the provisions of section 70 of M.L.R. Code.

34. It is very well true that there are four periods mentioned in the schedule II attached to the impugned notification. It relates to industrial use other than cold drink. The periods start from 1/7/2000, 1/7/2001, 1/7/2002 and 1/7/2003. so the arguments on behalf of the petitioners are certainly attractive. But what we feel is that the petitioners ought to have filed earlier two notifications. They could not be taken on record due to attempt made belatedly by the respondents to file it on record. So we have no alternative to hold that the changes made as per the impugned notifications even though made applicable retrospectively, they are to the benefit of the petitioners. We draw support from the wordings of impugned notification. Industrial slackness was considered by the government and that too on the representations of the industrialists.

35. So we find that revised rates were made applicable retrospectively. We do think that all the petitioners will be having any objection if the revised rates will

be given effect retrospectively. There is also no merit in the argument about enormous increase in water rates and changing the measure of computing water consumption. Earlier, it was per cubic feet. It is also changed to cubic liters. Ultimately, it is the policy decision. It has been done on the recommendations of various Authorities. It can not be interfered by the Court.

36. For all these reasons, we do not find any merit in the contentions raised in all these petitions. They deserve to be dismissed. Interim arrangement, if any, is discontinued. Both the parties are at liberty to take steps for payment of arrears, if any, and, for recovery. Parties to bear their own costs.