
(2015) 11 AHC CK 0109

In the Allahabad High Court

Case No : Civil Misc. Writ Petition (Tax) Nos. 923 and 1386 of 2008

Hindalco Industries Ltd. and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 17-11-2015

Acts Referred:

Forest Act, 1927 — Section 41, 41(2)(a), 76

Citation : (2015) 11 ADJ 88

Hon'ble Judges : Tarun Agarwala and Vinod Kumar Misra, JJ.

Bench : Division Bench

Judgement

Tarun Agarwala, J.—The petitioner No. 1 is a Public Limited Company incorporated under the Companies Act, 1956 and is engaged in the manufacture and sale of aluminum and its semis. Petitioner No. 2 is the Senior Vice President in Petitioner No. 1 Company and is also a shareholder. Petitioner No. 3 is the contractor to whom a contract has been given by petitioner No. 1.

2. The petitioner No. 1 contends that the manufacture of aluminum is a continuous process which requires continuous supply of power and, for this purpose, the petitioners have set up a coal base thermal plant at Renusagar for captive generation of electricity so that continuous supply of power is given to its manufacturing unit at Renukoot.

3. During the course of generation of electricity, dry fly ash is produced by the Renusagar Power Plant. For the disposal of dry fly ash, the petitioner No. 1 is required to construct an ash dyke which consists of ash dams for the disposal of ash generated by the power plant as per the requirement and specification given by the Central and State Government Pollution Control Board. One such ash dyke has been constructed by petitioner No. 1 at Bichhari Tola Sonebhadra. The height of this ash dyke was required to be raised by 8.5 meters and, accordingly, the petitioner No. 1 awarded a contract to petitioner No. 3, namely, M/s. K.N. International Limited. Petitioner No. 3, namely, the contractor applied to the Executive Engineer, Rihand Dam, Civil Division, Pipri, Sonebhadra, seeking

permission to excavate one lac cubic meter of soil from 50 acres in village Rehata and Jamshila, Tehsil Duddhi in District Sonbhadra. Permission was granted on payment of Rs. 53,225/-. Mining permit was also granted to petitioner No. 3. Permission was also sought from the Divisional Forest Officer, Renukoot Forest Division, seeking permission to excavate the soil. Such permission was granted on 14.7.2007. The land from where the soil was to be excavated was 500 meters outside the boundary of forest land. Thereafter, mining permit in Form MM-10 was issued by the competent authority in favour of petitioner No. 3 for mining the soil from the excavation site.

4. The petitioner No. 1 thereafter received a notice dated 8.10.2007 issued by the Divisional Forest Officer, directing petitioner No. 1 to pay transit fee @ Rs. 38 per tonne on the transportation of soil. Based on the said notice, the Forest Range Officer also issued a similar notice dated 9.10.2007. The Divisional Forest Officer directed petitioner No. 1 that since there was no check post or barrier on the route, on which the soil was being transported, petitioner No. 1 was directed to deduct transit fee @ Rs. 38/- per tonne from the payments made to the contractor. The petitioners replied that they are not liable to pay transit fee as the soil was neither being brought from the forest nor the same was being transported on forest road and that the soil was not a forest produce. The Divisional Forest Officer again informed petitioner No. 1 vide letter dated 29.3.2008 that the soil excavated and being brought for the purpose of raising the height of the ash dyke is a forest produce on the transportation of which the transit fee under the U.P. Transit of Timber and Other Forest Produce Rules, 1978 was payable and, therefore, required the petitioners to deposit the transit fee. The petitioners, being aggrieved by the said demand, filed writ petition No. 923 of 2008 praying that the demand raised by notice dated 29.3.2008 and 8.10.2007 be quashed and the respondents be restrained from demanding or charging of transit fee on the transportation of soil. This Court by an order dated 11.4.2008, directed that any transit fee paid by the petitioners shall be kept by the respondents in a separate account.

5. After filing of the aforesaid writ petition, the Forest Range Officer issued a letter dated 22.4.2008 requiring the petitioner No. 1 to submit details of the soil transported to Bichhari Ash Dam between the period 9.10.2007 to 18.4.2008 in a specified tabular form. The petitioner No. 1 upon information supplied by its contractor submitted the relevant details to the Forest Range Officer not only for the period upto 18.4.2008 but also upto the period 30.4.2008. Subsequently, respondent No. 3 issued a demand notice dated 12.6.2008 directing the petitioners to pay the balance transit fee. The Divisional Forest Officer accepted the figures of trips made on six wheeler trucks and 10 wheeler trucks as disclosed by the petitioners, but, disputed the correctness of the figures of the total quantity of soil transported through these trucks and consequently, made an assessment of the total quantity of soil transported and directing petitioner No. 1 to pay the balance transit fee.

6. The petitioners filed an objection contending that no transit fee is payable and that the demand is totally arbitrary. The petitioners thereafter filed writ petition No. 1386 of 2008 praying for the quashing of the demand notice/letter dated 12.6.2008 and notice dated 7.7.2008 and further prayed for a writ of mandamus commanding the respondents not to realize transit fee on the transportation of soil.

7. In this back drop we have heard Sri V.K. Upadhyay, the learned senior counsel assisted by Sri Ritvik Upadhyay for the petitioner and the learned standing counsel for the State.

8. The short counter affidavit filed in Writ Petition No. 923 of 2008 reveals that the soil which is being excavated is more than 500 meters away from the forest land/forest boundary. The respondents admit that the plot on which the mining permit has been granted is not a forest land. The respondents, however, contend that the road from which the petitioners are transporting the soil to its ash dyke is a National Highway, which has been made on a forest land.

9. Under Section 41 of the Indian Forest Act, 1977 the State Government has been empowered to make Rules to regulate transit of forest produce. Under Section 41(2)(a) of the Forest Act, the State Government is empowered to make Rules to prescribe the routes by which alone a timber or other produce could be imported, exported or moved into, from or within the State. Under Clause (c) the State Government has been empowered to provide for the issue, production and return of such passes and for payment of fee therefore. The State Government has further been empowered to make Rules under Section 76 of the Act, based on which, the U.P. Transit of Timber and Other Forest Produce Rules, 1978 have been framed.

10. Rule 3 of the Rules of 1978 provides for regulation of transit of forest produce by means of passes. Rule 4 specifies the officer and persons who shall have the power to issue the passes under the Rules. Rule 5 provides for fee payable for different class of passes. In 1978, a fee of Rs. 5 per tonne of capacity was payable on a lorry load or timber or other forest produce which has now been amended and increased to Rs. 38/- per tonne by the U.P. Transit of Timber and other Forest Produce (First) Amendment Rules, 2004. These Amendment Rules were challenged in a spate of writ petitions and which has been dismissed.

11. In Kumar Stone Works Partner Inder Singh and Others Vs. State of U.P. and Others, , the Court upheld the validity of charging of transit fee @ Rs. 38/- per tonne. The Court interpreted the words "brought from forest" under Rule 2(4) of the Rules to mean such produce which passes through the forest.

12. In the light of the aforesaid decision and in view of the admitted position that the soil excavated and transported by petitioner No. 3 passes through forest land on which a highway has now been constructed, we are of the opinion, that the petitioners are liable to pay transit fee.

13. The validity of charging transit fee is pending consideration before the Supreme Court. The Supreme Court by an order dated 29 October 2013 passed in Special Leave to Appeal (Civil) Nos. 11367/2007 (Kanhaiya Singh and another Vs. State of U.P. and others) modified the earlier interim orders which were passed in a batch of cases in the following terms:-

"We are, therefore, inclined to modify the orders suitably to the following effect:

1) The State shall be free to recover transit fee for forest produce removed from within the State of U.P. at the Department of Revenue Ministry of Finance the rate stipulated in the 3rd amendment to the Rules mentioned in the earlier part of this order.

2) Any such recovery shall remain subject to the ultimate outcome of present petitions pending in this Court.

3) In the event of writ petitioners/private parties succeeding in their cases, the amount deposited/recovered from them shall be refunded to them with interest at the rate of 9% p.a. from the date the deposit was made till actual refund.

4) The State shall maintain accurate amount of recovery made and the nature and the quantum/quantity of the produce removed by the private parties concerned.

5) Even in the 2nd batch of cases arising out of Writ Petition No. 975 of 2004 whereby the High Court has struck down the 4th and 5th amendment to the Rules, the State shall be free to make recoveries in terms of the 3rd amendment in regard to the forest produce removed from within the State of U.P. The operation of the orders passed by the High Court shall to that extent remain stayed."

14. In view of the subsequent order of the Supreme Court, various petitions have been disposed of by this Court in terms of the directions issued by the Supreme Court with the observation that the realization of transit fee in the manner as directed by the Supreme Court would be subject to the final decision by the Supreme Court in the Special Leave Petition against the judgment of this Court.

15. In view of the aforesaid, we dispose of the writ petition No. 923 of 2008 in terms of the directions issued by the Supreme Court dated 29.10.2013 as quoted above and directing that the realization of transit fee in the manner as directed by the Supreme Court would be subject to the final decision of the Supreme Court in the pending Special Leave Petition against the judgment of this Court.

16. In so far as Writ Petition No. 1386 of 2008 is concerned the contention of the petitioner is that the demand is illegal and that the demand, if any, should be based as per the Government Order dated 16.2.2004 and that the demand could not be made on the basis of an order of the District Magistrate, Bijnor, dated 14.9.2006. It was also contended that the demand from petitioner No. 1 is illegal and the transit fee, if any, can only be demanded and realized from petitioner

No. 3, namely, the contractor in whose favour the mining permits and MM Form-10 were issued and that petitioner No. 3 is the person responsible for transportation of the soil. Transit fee, if any, can be realized from him.

17. In this regard, we find from the impugned order that the petitioners had contended that 6 wheeler truck carries a load of 7 tonnes and 10 wheeler trucks carries a load of 15 metric tonnes. By the impugned order, the Divisional Forest Officer has assessed the carrying capacity of 6 wheeler truck at 10 tonnes and 10 wheeler truck at 20 tonnes, which is based on a letter issued by the District Magistrate, Bijnor dated 13.9.2006 in which he has specified that a 6 wheeler truck would carry 10 tonnes and a 10 wheeler trucks would carry 20 tonnes of produce. From a perusal of this letter dated 14.9.2006 one finds that the load indicated was only an estimation subject to finalisation.

18. Having perused the letter of the District Magistrate, Bijnor dated 14.9.2006, we are of the opinion, that this letter cannot be made the basis to assess as to how much load of forest produce could be carried in a 6 wheeler truck or in a 10 wheeler truck. On the other hand, we find, that the State Government has issued a Government Order dated 16.2.2004 to all the District Magistrates in the State of U.P. indicating the quantity of forest produce which a 6 wheeler, 10 wheeler and other kind of vehicles could carry the produce. In this G.O., it has been indicated that a 6 wheeler truck could carry soil upto 9 tonnes and a 10 wheeler truck could carry 15 tonnes of soil. As per the impugned order, the petitioners have indicated that a 6 wheeler truck carries 10 tonnes of soil and a 10 wheeler truck carries 15 tonnes of soil.

19. In the light of the aforesaid G.O. dated 16.2.2004, we are of the opinion, that the said Government Order is required to be taken into consideration instead of an unauthenticated letter of the District Magistrate dated 16.9.2006. Since the Government Order dated 16.2.2004 has not been taken into consideration, the impugned order cannot be sustained and is quashed. The matter is remitted to the competent authority to reassess the transit fee after considering the Government Order dated 16.2.2004 or such other Government Order, that is relevant to the issue. While reconsidering the matter, the authority will further consider as to whether the transit fee is payable by petitioner No. 1 or by its contractor, petitioner No. 3, after giving them an opportunity of hearing.

20. In the light of the aforesaid, the impugned order dated 12.6.2008 cannot be sustained and is quashed.

21. The writ petition No. 1386 of 2008 is allowed.