
(1989) 04 PAT CK 0027

In the Patna High Court

Case No : C.W.J.C. No's. 1210 of 1985 (R) with 734, 877 and 1871 of 1986 (R)

Indian Alluminium Co. Ltd. and Another etc.

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 27-04-1989

Acts Referred:

Bengal Cess (Amendment) Act, 1981 — Section 6

Constitution of India, 1950 — Article 265

Mines and Minerals (Development and Regulation) Act, 1957 — Section 1

Citation : AIR 1990 Patna 120

Hon'ble Judges : Satyeshwar Roy, J; Bisheshwar Prasad Singh, J

Bench : Division Bench

Advocate : Dipankar Gupta, M.M. Banerjee, V. Shivnath, K.K. Sahay and Debi Pal, for the Appellant; Narayan Roy (Govt. Pleader), M.M. Pal (Jr. Counsel to Govt. Ltd. v. State of Bihar), S.B. Gadodia (Standing Counsel) and K.P. Mitra (Jr. Counsel to Standing Counsel), for the Respondent

Final Decision : Allowed

Judgement

Roy, J.—All these cases were heard together as common questions of law are involved and are being disposed of by this judgment.

2. The petitioners are lessees of different minerals. In C.W.J.C. No. 1210 of 1985(R) and C.W.J.C.No. 1871 of 1986 (R) the lease is of Bauxite, in C.W.J.C. No. 734 of 1986(R), the lease is of Kyanite and in C.W.J.C. No. 877 of 1986(R), it is of Copper. The petitioners have challenged the jurisdiction of the State of Bihar to impose and demand cess on Bauxite, Kyanite and Copper under the amended provisions of the Bengal Cess Act, 1880 (the Cess Act for short) and its jurisdiction to fix different rates at which cess is payable for different minerals. They have also challenged the certificate cases levied against them for recovery of cess at rates notified by the State Government.

3. There was some confusion at the Bar whether the amendment of Cess Act by the Bihar Cess (Amendment) Ordinance 1975 (Bihar Ordinance 209 of 1975) by

which some of the provisions of the Cess Act were amended and which were kept in force by repeatedly promulgating it, were permanently incorporated in the Cess Act by an Act of the Legislature. Although Bihar Ordinance 209 of 1975 was given retrospective effect from 1-4-1975, it was promulgated on 2-12-1975. In the Ordinance it was provided that in case of minerals bearing land cess was to be assessed on the basis of royalty and at a rate which shall be determined from time to time by the State Government. The State Government issued notifications under this power and those notifications were kept alive.

4. In the writ petition filed by the Hindustan Copper Limited, there is reference of the Cess Act, the Ordinance and the Bihar Finance Act, 1981, 1982 and 1984. In the other writ petition, there is also reference of the Bihar Cess (Amendment) Act, 1981. We must record that in spite of the fact that there was reference of the Bihar Cess (Amendment) Act, 1981, learned counsel appearing in the two cases made long submission on the supposition that the amendments introduced in the Cess Act by the Ordinances lapsed as it were not placed before the Legislature which has reassembled as provided under Article 213(2) of the Constitution and also because no Act was passed incorporating those amendments. The amendments introduced in the Cess Act by the Ordinances were made permanent by the Bihar Cess (Amendment) Act, 1981 (Cess Amendment Act for short) and was given effect from 1-4-1975. In that view of the matter the submission made on the footing that the notifications cannot be enforced as the Ordinances lapsed need not be gone into.

5. It was submitted by Dr. Pal, learned counsel for the petitioners in C.W.J.C. Nos. 877 and 734 of 1986(R), that the cess imposed under the Cess Act was a fee as the same is to be utilised for particular purpose as stated in the preamble of the Cess Act. The rate at which the fee is to be charged is disproportionate to the services rendered. It, therefore, could not be sustained. It was also urged that as under Entry 54 of List I to schedule VII of the Constitution appropriate legislation has been made by the Parliament by enacting Mines and Minerals (Regulation and Development) act, 1957 (M and M Act for short), the Bihar Legislature could not have made any legislation with regard to the mines and minerals under Entry 23 of List II of that Schedule.

Dr. Pal urged that the question whether the impost under the Cess Act was fee or tax was not required to be decided by this Court in Associated Cement Co. Ltd. v. State of Bihar 1979 Pat LJR 429 as it was conceded in that case that the nature of cess which is to be imposed under the Cess Act was tax and not fee.

6. From perusal of paragraph 8 of judgment of that case it appears that the Bench recorded that it was admitted on all hands that the nature of cess which was to be imposed under the Act was a tax and not fee. But in view of the fact that the vires of Bihar Cess (Amendment) Ordinance 1975 was challenged, the Bench was required to adjudicate under what entry the Cess Act as amended by the Ordinance was referable. By recording detail reasons it was held that the imposition of cess was tax on lands and buildings and referable to Entry 49 List

II. It is not necessary to go into that question again in these cases by recording detail reasons. I accept the findings recorded in Associated Cement Company Ltd. (supra) that the imposition under the Cess Act was referable to Entry 49 of List II of Schedule VII and what is payable under the Cess Act is tax and not fee. In support of the proposition that the levy under the Cess Act was a fee reliance was placed by Dr. Pal in The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others, . The Supreme Court in that case after considering the preamble and provisions of Orissa Mining Areas Development Fund Act, 1952, held that although the levy is on a certain percentage of value of the minerals produced, it was not excise duty and, therefore, not referable to Entry 84 in List I, Hingir Rampur case is of no assistance to Dr. Pal. I may mention that in C.W.J.C. No. 1210 of 1985(R) in paragraph 11 of the writ petition it was stated that the levy of cess is in the nature of tax. Levy under the Cess Act is tax on land and building and not fee.

7. Although it was urged that enhancement in the rate of cess was not reasonable, sufficient materials were not placed in this regard. There was also no detailed submissions. I am, therefore, not deciding this.

8. According to Dr. Pal, in view of the provisions of M & M Act, Cess Act must be held to have become inoperative and no demand can be raised under the Cess Act from the petitioners. Reliance was placed by him in the State of Orissa Vs. M.A. Tulloch and Co., .

9. In the case of Tulloch the Supreme Court considered the question whether in view of the provisions of M. & M. Act enacted under Entry 54 List I, Orissa Mining Areas Development Fund Act, 1952 enacted under Entry 23, List II ceased to be operative. The object of the Orissa Act was the constitution of mining areas and the creation of a Mining Area Development Fund with a view to making provisions of amenities like communications, water supply and electricity and the better development of areas wherein any mine was situated as well as to provide welfare to the residents or workers in every such area within which persons employed in a mine or group of mines reside or work. After noticing the object and provisions of the Orissa Act, and of the M. & M. Act, the Supreme Court held that as the purpose for which Orissa Act was enacted was covered by M. & M. Act, the former must give way to the latter.

10. So far Cess Act is concerned, as held in Associated Cement Co. Ltd. (1979 Pat LJR 429) (supra) it was referable to Entry 49 of List II. Under this Act all immovable properties except as otherwise in Section 2 provided shall be liable to the payment of a local cess. Cess Act relates to rating for the construction, charges and maintenance of district roads other means of communication and of provincial public. The purpose and provisions of Cess Act and Orissa Act are different. Cess Act is not referable to Entry 23 of List II. The reasons for which Supreme Court held that Orissa Act was referable to Entry 23 of List II and must give way to M. & M. Act are not available with regard to Cess Act. The contention of Dr. Pal must be rejected.

11. It was contended on behalf of all the petitioners that neither the Ordinance nor the Cess Amendment Act nor Finance Act empowered the State Government to levy different rates for different minerals, and notifications issued by which different rates have been fixed are ultra vires the power of the State Government. Let us see the legislative history of the Cess Act.

A. Section 5 of the Cess Act provides that all immovable properties situate in any district or part of the district except as otherwise prescribed in Section 2 proviso shall be liable to payment of local cess. Section 6 of the Cess Act provides how cess is to be assessed. The basis before 1-4-1975 for assessment of cess each year so far mines and quarries are concerned was annual net profits. By the Bihar Cess (Amendment) Ordinance, 1975 (Bihar Ordinance 209 of 1975) the basis of assessing cess on mines and quarries was changed. By the Ordinance besides other sections Section 6 of the Cess Act was amended and in Section 4 of the Cess Act definition of royalty was introduced.

"Royalty" as introduced in Section 4 of the Cess Act by that Ordinance reads as follows:--

"Royalty in respect of mines and minerals means a payment made or likely to be made to the owner of mines and minerals for the right of working the same on every ton or value of such produce, and includes payment which Government may demand for the appropriation of the mines and minerals belonging to the Government."

B. This definition was again amended by the Bihar Cess (Amendment) Act, 1981 to read as follows:

""Royalty" for the purpose of this Act in respect of mines and quarries means payment (which includes dead rent) made or likely to be made to the owner of mines and minerals for the right of working the same on the quantity or value of such produce by a lessee if the land had been held under a lease granted under the Mines and Minerals (Regulation and Development) Act, 1957 (Act 67 of 1957) and rules made thereunder and includes any amount which Government may demand for the appropriation of mines and minerals belonging to the Government and any amount that may be paid as or in lieu of royalty for the right of working mines and quarries in areas held or acquired under any Act or Agreement."

C. By the Bihar Finance Act, 1981., definition of royalty in the Cess Act was amended which reads as follows:

" "Royalty" in respect of mines and quarries means a payment made or likely to be made to the owner of any area, believed to contain mines and quarries, for the right to working the same on the quantity or value of such produce and includes dead rent, which the owner may demand for the right of working the area as also the payment which the Government may demand for the appropriation of the mines and minerals belonging to the Government."

D. The other section with which we are concerned is Section 6 of the Cess Act. This section was also amended with effect from 1-4-1975 by the Bihar Cess (Amendment) Ordinance, 1975 (Bihar Ordinance 209 of 1975), which reads as follows:

"6. Cess how to be assessed-- The local cess shall be assessed on the annual value of lands and until provision to the contrary is made by the Parliament, on the royalty of mines and quarries, sale value of the other immovable properties including forest produce and annual net profits from tramways and railways ascertained respectively as prescribed in this Act and the rate at which the local cess shall be levied for each year shall be :

(a) in the case of royalty, the rate will be determined by Government from time to time but it will not exceed the amount of royalty;

(b) in the case of such annual net profits, fifteen paise on each rupee of such profits;

(c) in the case of annual value of lands, twenty paise per rupee of the annual value; and

(d) in the case of sale value of immovable properties including forest produce, the rate will not exceed 10 per cent and the State Government may, by notification prescribed from time to time the commodities on the sale of which cess would be levied along with the rates at which it would be levied."

This was kept alive by promulgating successive Ordinances.

E. By the Bihar Cess (Amendment) Act, 1981, Section 6 of the Cess Act was again amended which reads as follows:

"6. Cess how to be determined-- Local cess shall be assessed on the annual value of lands and royalty of mines and minerals or on value of mineral bearing land as the case may be, sale value of other immovable properties including forest produce and annual net profits of railways and tramways ascertained respectively as prescribed in this Act and the rate at which the local cess shall be levied, shall be as under:

(a) in the case of royalty, the rate will be determined by the Government from time to time but it will not exceed twice the amount of royalty; But the local cess payable in any one year shall not be less than amount obtained from dead rent fixed by Clause (a) multiplied by the rate of cess; in the case of value of mineral bearing land, when the local cess payable in any year in respect of any mineral bearing land as assessed in Clause (a) is less than 10 per cent of the value of mineral bearing land in that year then notwithstanding anything hereinbefore contained, the State Government may assess the local cess at such percentage of the value of minerals bearing land, not exceeding 10 per cent, as may be notified in the official gazette from time to time, although the cess so assessed may exceed thrice the amount of royalty."

- (b) in case of such annual net profits, fifteen paise on each rupees of such profits;
- (c) in the case of annual value of lands, twentyfive paise per rupee of the annual value; and
- (d) in the case of sale value of immovable properties including forest products, the rate will not exceed 10 per cent and the State Government may, by notification prescribe from time to time the commodities on the sale value of which cess would be levied along with the rates at which it would be levied."

F. Section 6 of the Cess Act was amended by the Bihar Finance Act, 1982 which reads as follows:

"6. Cess how to be determined-- Local cess shall be assessed on the annual value of lands and royalty on mines and minerals or on value of mineral bearing land, as the case may be, sale value of other immovable properties including forest produce and annual net profits of railway and tramways ascertained respectively as prescribed in this Act and the rate at which the local cess shall be levied-

shall be as under:

(a) in the case of royalty, the rate will be determined by the Government from time to time but it will not exceed twice the amount of royalty; in the case of value of minerals bearing land, where the local cess payable in one year, in respect of any mineral bearing land as assessed in Clause (a) is less than 10 per cent of the value of mineral bearing land in that year, then notwithstanding anything here-in-before contained the State Government may assess the local cess at such percentage of the value of mineral bearing land, not exceeding 10 per cent, as may be notified in the official gazette from time to time although the cess so assessed may exceed twice the amount of royalty;

But the local cess payable in any one year shall not be less than the amount obtained from dead rent fixed by Clause (a) multiplied by the rate of cess.

- (b) in case of such annual net profits, fifteen paise on each rupee of such profits;
- (c) in the case of annual value of lands, twenty five paise per rupee of the annual value; and
- (d) in the case of sale value of immovable properties including forest products, the rate will not exceed 10 per cent and the State Government, may, by notification prescribe from time to time the commodities on the sale value of which cess would be levied along with the rates at which it would be levied."

G. Bihar Finance Act, 1984 again amended Section 6 which reads as follows :

"6. Cess how to be determined-- Local cess shall be assessed on the annual value of lands and royalty on mines and minerals by or on the value of minerals bearing land, as the case may be, sale value of other immovable properties including forest product and annual net profits of railways and tramways

ascertained respectively as prescribed in this Act and the rate at which the local cess will be levied shall be as under :

(a) in the case of royalty, the rate will be determined by the Government from time to time but it will not exceed twice the amount of royalty;

But the local cess payable in any one year shall not be less than amount obtained from dead rent fixed by Clause (a) multiplied by the rate of cess;

in the case of value of mineral bearing land, where the local cess payable in one year, in respect of any mineral bearing land as assessed in Clause (a) is less than 20 per cent of the value of mineral bearing land in that year, then notwithstanding anything hereinbefore contained the State Government may assess the local cess at such percentage of the value of mineral bearing land, not exceeding 20 per cent, as may be notified in the official gazette, from time to time, although the cess so assessed may exceed twice the amount of royalty.

(b) in case of such annual net profits, fifteen paise on each rupee of such profits;

(c) in the case of annual value of lands, twenty five paise per rupee of the annual value; and

(d) in the case of sale value of immovable properties including forest produce, the rate will not exceed 20 per cent and the State Government may, by notification prescribe from time to time the commodities on the sale value of which cess would be levied along with the rates at which it would be levied."

H. Sections was again amended by the Bihar Cess (Amendment) Ordinance, 1985 which reads as follows :

"Cess how to be determined-- Local cess shall be assessed on the annual value of mineral bearing land, as the case may be, sale value of other immovable properties including forest produce and annual net profits of railways and tramways ascertained respectively as prescribed in this Act and the rate at which the local cess shall be levied, shall be as under:

(a) in the case of royalty, the rate will be determined by the Government from time to time but it will not exceed five times the amount of royalty;

In the case of value of minerals bearings land, where the local cess payable in any one year, in respect of any mineral bearing land as assessed in clause

(a) is less than 30 per cent of the value of minerals bearing land in that year then notwithstanding anything herein before contained the State Government may assess the local cess at such percentage of value of mineral bearing land, not exceeding 30 per cent as may be notified in the official gazette from time to time although the cess so asses-seed may exceed five times the amount of royalty, but the local cess payable in any one year shall not be less than the amount obtained from dead rent fixed by Clause (a) multiplied by the rate of cess;

(b) in case of such annual profits, 15 paise on each rupee of such profits.

(c) in the case of annual value of land, 25 paise per rupee of the annual value;
and

(d) in the case of sale value of immovable properties including forest products the rate will not exceed 30 per cent and the State Government may, by notification prescribe from time to time the commodities on the sale value of which cess would be levied along with the rates at which it would be levied."

This amendment has now been incorporated by an Act.

12. It will thus be noticed that under the Cess Act as it was originally enacted the basis for assessment of case on mines and quarries was the annual net profits. For the first time, this basis was changed and instead of annual net profits, the basis was made "Royalty". The definition of "Royalty" was introduced in the Cess Act. Both the definitions of "Royalty" and Section 6 were amended repeatedly. Although in Section 6 for mines, quarries and mineral bearing land the basis for assessment of cess was stated, instead of determining the rate, power was given to the State Government to determine it from time to time. With reference to "Royalty" in the Ordinance, inter alia, it was provided that rate at which the cess was to be determined would not exceed the amount of Royalty. The outer limit which was provided under the Ordinance i.e. the amount of "Royalty" was increased by the Bihar Cess (Amendment) Act, 1981 which provided that the rate at which the cess would be assessed should not exceed twice the amount of "Royalty". This was adopted by the Bihar Finance Act, 1981. By the Bihar Cess (Amendment) Ordinance, 1985, the outer limit has been fixed as five times of the amount of "Royalty". Alternative basis, i.e. value of mineral bearing land has also been provided, with power to State Government to fix the rate.

13. In pursuance of the power given to the State Government to fix the rate at which the cess was to be determined, notifications were issued by the State Government from time to time and in these notifications different rates were fixed for different minerals and even for one mineral, viz. iron ore, one rate was fixed where the mine is operated manually and another rate where the mine is not operated manually.

14. The contention made on behalf of the petitioners that the Cess Act as amended, no doubt give power to the State Government to fix the rate with reference to the "Royalty" or value of mineral bearing land, but it did not empower the State Government to fix different rates for different minerals and different rates for the same mineral was met by the learned counsel appearing on behalf of the State by submitting that in M & M Act different rates of royalty have been fixed for different minerals. It was urged on behalf of the State that reading Section 6 along with this provision in the M & M Act, it should be held that the State Government was entitled to fix different rates for different minerals.

15. I have quoted above in full Section 6 as amended from time to time. It will appear that outer limit of the rate at which cess could be determined either with reference to royalty or annual value of mineral bearing land has been provided. Section 9 of the M M Act provides for payment of royalty in respect of any mineral removed by the lessee or his agent, manager, employee, contractor or sub-lessee from the leased area at the rate for the time being specified in the Second Schedule of the Act. Power has been given to the Central Government to amend the Second Schedule so as to enhance or reduce the rate of royalty. It will thus be noticed that in M & M Act itself provision has been made for payment of royalty at different rates for different minerals. There is no such provision in the Cess Act. Section 6 empowers the State Government to fix the rate. But it does not empower the State Government to fix different rates for different minerals. I am, therefore, of the opinion that notifications issued from time to time by the State Government fixing different rates at which cess will be determined with regard to different minerals are ultra vires the power of the State Government and the levy of cess on the basis of those notifications cannot be sustained.

16. Although the petitioners have succeeded, what relief is to be given in these cases? Copper Corporation have filed two cases, one for Copper and the other for Kyanite. In both the cases the challenge mainly is with regard to increase of rate by notifications dated 18-6-1985 under the 1985 Ordinance, which are annexure 3 to both the cases. In the other two cases the challenge is to notification dated 21-6-1985 on Bauxite issued under the 1985 Ordinance, annexure 1 to both the cases. By these notifications cess on Copper has been fixed at 300% of royalty, on Kyanite at 200% and on Bauxite at 500% all with effect from 21-6-1985. None of the earlier notifications issued under the Ordinances and the Acts have been annexed, in any of the writ petitions and not prayer has been made to specifically quash it. For all intent and purpose the petitioners in all cases were aggrieved by notifications of June, 1985. Therefore, although, I have held that all the notifications fixing different rates for different minerals were ultra vires the power of the State Government, it is ordered that the respondents shall not be entitled to give effect to the notifications of 18-6-1985 and 21-6-1985 issued under 1985 Ordinance and shall not be entitled to recover cess under those. The certificate cases levied for recovering cess under those notifications are quashed.

B.P. Singh, J.

17. I agree.