
(2011) 07 AHC CK 0316

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 24077 of 2011

Jaiprakash Associates Limited

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 18-07-2011

Acts Referred:

Mines and Minerals (Development and Regulation) Act, 1957 — Section 13, 15, 18, 25, 9

Uttar Pradesh Kshetra Panchayat and Zila Panchayat Adhiniyam, 1961 — Section 103, 142(1), 143, 2(10), 2(37)

Uttar Pradesh Minor Minerals Concession Rules, 1963 — Rule 12

Citation : (2011) 7 ADJ 556 : (2011) 5 AWC 5432 : (2011) 3 UPLBEC 1994

Hon'ble Judges : Ashok Srivastava, J; Amitava Lala, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Amitava Lala, J.—Basically this writ petition has been filed by the Petitioner company, through its constituted attorney one Sri K.M. Abraham, praying inter alia quashing of all demands and collection of fee/toll on transportation of limestone from the quarries forming part of the mining lease area of the Petitioner to its factory gate, and also for a direction upon the Respondent Nos. 2 and 3 to refund all collections of fee/toll collected by the Zila Panchayat, Sonebhadra, Respondent No. 2 herein, through the contractor, Respondent No. 3 herein, on the transportation of minerals, as aforesaid.

2. Briefly stated case of the Petitioner is that it is a company, which, amongst other businesses, is also engaged in the manufacture of Portland cement. Pursuant to the proceedings of sale conducted in the Company Court, the assets of the Uttar Pradesh State Cement Corporation Limited, a Government company, were transferred in favour of the Petitioner upon payment of a sum of Rs. 459 crores. Such sale was confirmed by the Company Judge by order dated 11/12th October, 2006. Thereafter, the Petitioner undertook major renovation and refurbishment of the factory and the unit commenced commercial production of

Portland cement on or about 2008. Upon confirmation of sale, the mining lease, which stood granted in favour of the company as well as all those independently promised and forming part of the sale, were transferred to the Petitioner by the State under the provisions of the Mineral Concession Rules, 1960 (hereinafter in short called as the "Rules, 1960").

3. The present dispute pertains to the limestone lease. Mining lease area granted to the Petitioner under the transfer deeds also included existing roads leading from the quarries to the factory gate of the units of the company. These roads run over numerous revenue plots which are duly recorded in the revenue records in the name of Public Works Department, Government of Uttar Pradesh, Petitioner company and individual land holders. However, on or about 5th April, 2011 the representatives of the Respondent No. 3 have started demanding Rs. 100/- per truck carrying limestone from the quarry to the Dala Cement Factory as a pre-condition to the transit of the said vehicles. Thereafter, upon enquiry the Petitioner came to know that Zila Panchayat-Respondent No. 2 had framed certain bye-laws on 5th December, 1994 for levy of a fee on vehicles transporting minerals over roads in District Sonbhadra. Such bye-laws were published in the Gazette on 10th December, 1994. Subsequently, the rates of fee to be levied on transport of minerals were further revised by means of a notification dated 6th November, 2008, which were published in the Gazette on 20th December, 2008. On 31st March, 2011 the contract was awarded by the Zila Panchayat-Respondent No. 2 in favour of the Respondent No. 3 for collection of fee on transport of minerals.

4. Mr. Yashwant Varma, Learned Counsel appearing for the Petitioner, has contended that according to the Respondent No. 2, in exercise of power u/s 239 of the Uttar Pradesh Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961 (hereinafter in short called as the "Adhiniyam") the rates of fee to be levied on transport of minerals were revised by the notification dated 6th November, 2008, published in the Gazette on 20th December, 2008. According to him, levy of fee under the bye-laws is wholly without jurisdiction or authority of law, inasmuch as no provision of Section 239 of the Adhiniyam empowers the Zila Panchayat to levy a fee on the transportation of minerals. More fundamentally, the limestone is not transported by the Petitioner on or over any property vested in or entrusted to the management of Zila Panchayat nor does it traverse any public road or place, the use or occupation of which may have been allowed by the said "Zila Panchayat. The road, over which the limestone is transported from the quarry to the factory gate of the Petitioner, falls within the mining lease area granted to the Petitioner by the State. A perusal of revenue records of the plots, over which road traverses, also establish that it runs over no plots which may belong to or vest in the Zila Panchayat. The road has been constructed and is maintained by the Public Works Department of the State Government and it does not belong to Zila Panchayat. Since the road is neither maintained nor has been constructed by the Zila Panchayat, levy of fee is wholly unjustified. Moreover, grant of mining lease to the Petitioner confers upon it a right to use all roads and pathways

falling within the lease area either existing or those which may be constructed without any fetter.

5. Mr. Varma has further submitted that in connection with the authority of the Panchayat to levy the fee on minerals, a challenge was thrown before the writ Court and this Court by its judgment dated 15th January, 2001 in Okhla Sand Supply Co. and another Vs. State of U.P. and others, was pleased to hold that the levy was without legislative competence, therefore, it is unjustified in the light of the provisions of the Mines and Minerals (Regulation and Development) Act, 1957 (hereinafter in short called as the "Act, 1957"). The Court further held that the provisions of the Act clearly eclipsed the power of the State to levy any fee and, therefore, the Panchayat was not entitled to impose the fee. Doubting the correctness of such Division Bench judgment, the issue was referred to the Full Bench and the Full Bench by its judgment dated 20th July, 2007 in S. Agarwal Stone Product Ltd. v. State of U.P. and Ors. 2007 (7) ADJ 228 (FB), was pleased to hold that the aforesaid Division Bench judgment did not lay down the correct law and the levy of fee would be fully justified in the case of transport of minerals over the roads constructed by the Zila Panchayat. The Full Bench was also pleased to notice the contention of the Petitioners (therein) that the minerals were not being transported over roads, which were either built or maintained by the Zila Panchayat. The Full Bench further observed that since it was deciding only legal issues, the other factual issues were left open to be decided by the concerned Division Bench. According to the information of the Petitioner, consequent to the above observations, the writ petitions are still pending disposal before this Hon'ble Court.

6. By filing counter-affidavit, Mr. P.N. Saxena, learned Senior Counsel appearing for the Zila Panchayat-Respondent No. 2, has brought to our notice legal provisions involved herein. According to him, Section 142 of the Adhiniyam gives power to the Zila Panchayat to charge fee fixed by the bye-laws for use and occupation of the immovable properties, as follows:

142. Fees for use, otherwise than under a lease of property of a Zila Panchayat or a Kshettra Panchayat.--(1) A Zila Panchayat or a Kshettra Panchayat may charge fees to be fixed by bye-law or by public auction or by agreement for the use or occupation (otherwise than under a lease) of any immovable property vested in, or entrusted to the management of, the Zila Panchayat or the Kshettra Panchayat, as the case may be, including any public road or place of which it allows the use or occupation whether by allowing a projection thereon or otherwise.

(2) Such fees may either be levied alongwith the fees charged u/s 143 for the sanction, licence or permission or may be recovered in the manner prescribed by Chapter VIII.

We find Section 143 of the Adhiniyam provides as follows:

143. Licence fee, etc.--A Zila Panchayat or Kshettra Panchayat may charge a fee

to be fixed by bye-law for any licence, sanction or permission which it is entitled or required to grant by or under this Act.

7. Chapter VIII of the Adhiniyam deals with recovery of taxes and certain other claims. Section 2(37) of the Adhiniyam defines "public road" or "public street", when definition of "public place" has been given u/s 2 (38). Sections 2(37) and 2(38) of the Adhiniyam are as under:

2(37) "Public Road" or "Public Street" means any road street, bridge, culvert, thoroughfare, passage or place over which the public in general have legally enforceable right of way and which is vested in, or maintained by, the Government or a local authority;

(38) "Public place" means a place, not being private property, which is open to the use or enjoyment of the public whether such place is vested in the local authority or not;

8. We find from Section 2(39) that "local authority" includes a "Gram Panchayat", whereas Section 2(40) gives the definition of "Panchayat Area". Section 239 of the Adhiniyam gives power to Zila Panchayat to make bye-laws and provides that a Zila Panchayat may, and where required by the State Government shall, make bye-laws for its own purposes and for the purposes of Kshettra Panchayats, applicable to the whole or any part of the rural area of the district, etc. We also find the notified Bye-laws dated 05th September, 1994 at page 244 of the writ petition, annexed as Annexure-7, which says that from the mines situated in the rural areas of District Sonbhadra if any person takes out gitti, stones, boulder, surkhi, lime, coal, bhassi, and accumulates it or transports it from rural area by tractor or truck etc., he has to pay fee to the Zila Panchayat, Sonbhadra.

9. It is further stated by Mr. Saxena that same question regarding power of the Zila Panchayat to frame bye-laws and levy of fee u/s 239 read with Sections 142 and 143 of the Adhiniyam was considered by the Full Bench in S. Agarwal Stone Product Ltd. (supra) holding affirmatively in respect of the power of the Zila Panchayat.

10. By filing rejoinder to the counter-affidavit of Respondent No. 2, Mr. Yashwant Varma has contended before us that "limestone" is a major mineral and not a minor mineral as per the Act, 1957. The bye-laws have provided for levy of a fee on "lime", which is a distinct and different commodity from "limestone". Therefore, there was no authority of the Zila Panchayat to levy fee on it. Such submission, as he made, is without prejudice to the Petitioner's contention that levy of fee by the Zila Panchayat is quid pro quo. If the Zila Panchayat wants to take fee, it should render service regarding construction, administration and maintenance of the road, which has not been done by it and accordingly, it is not entitled to levy fee upon the Petitioner company. Since the road runs over the plots standing in the name of various individuals, the District Magistrate in terms of Rule 72 of the Rules, 1960 has also promulgated a notification dated 31st July, 2009 for determining the amount of compensation to be paid to each of the land

holders to enable the Petitioner to purchase surface rights in respect thereof. The process of determination of compensation is under process. To differentiate the "lime" from the "limestone", Mr. Varma has placed before us a notification dated 1st June, 1958 issued by the Department of Mines, Government of India, which provides that following minerals are to be minor minerals, namely,

Boulder, shingle, Calcedony pebbles used for ball mill purposes only, lime shell, kankar and limestone used for lime burning, morrum, brick earth, fuller's earth bentonite road metal, reh-matti, slate and shale when used for buildings materials.

11. Mr. Varma has further submitted that First Schedule of the Act, 1957 in its Part-C included the "limestone" at Item No. 8, which speaks limestone, except when it is used in kilns for the manufacture of lime as building material. Said item has been omitted by the Act No. 38 of 1999 by the Government of India from the First Schedule and added as Item No. 26 in the Second Schedule of the Act, 1957. We have gone through it and found that "limestone" is described as- (a) L.D. Grade (less than one and half percent silica content), (b) others, when Item No. 27 speaks about "lime Kankar" and Item No. 28 about "limeshell". For the purpose of administering minor minerals, the State of Uttar Pradesh framed the Uttar Pradesh Minor Minerals (Concession) Rules, 1963 (hereinafter in short called as the "Rules, 1963") and a reference to the said Schedule establishes "limestone" as "Chuna Patthar". But treating the "limestone" as a major mineral, the Central Government in exercise of power u/s 9 of the Act, 1957 has fixed a royalty in terms of notification dated 13th August, 2009. So far as "limestone" and "Chuna Patthar" are concerned, the State Government has prescribed a separate royalty by issuing notification dated 02nd June, 2009 in exercise of power conferred by Section 15 of the Act, 1957 treating it as minor mineral. According to the Petitioner, "limestone", which is used in cement industry, is a major mineral and is different from "lime", which stands covered under the minor mineral. In the light of the aforesaid position, the Petitioner has been granted a lease for 20 years although in terms of Rule 12 of the Rules, 1963 a lease for minor minerals cannot exceed for 15 years. Keeping in mind the aforesaid distinction between "lime" and "limestone", the Government of India has also issued notification dated 14th September, 1989, wherein they have permitted the State Government to grant mining lease for "limestone" treating it as a minor mineral only if it is found that limestone is fit to be used for manufacture of lime as a building material only.

12. Dictionarically, "royalty" has several meanings, i.e., (i) percentages or dues payable to land owners for mining rights; (ii) sums paid for the use of a patent; (iii) percentages paid to an author by a publisher on the sales of a book. Royalty means a payment reserved by the grantor of a patent, lease of a mine or similar right, and payable proportionately to the use made of the right by the grantee. It is usually payment of money but may be payment in kind, i.e., a part of the produce of the exercise of the right. Mineral royalty is a right to a share of

income from the mineral production. Therefore, all such rights are related to mine and not in connection with transportation of the product using land. Therefore, fees in this respect and royalty, as discussed above, are different.

13. However, upon going through First Schedule of the Rules, 1963 inserted by notification dated 15th December, 2004, we find that "limestone" is specifically categorised as Item No. 1 of the minerals but without giving any particulars, for which purpose it is to be used. From the Second Schedule of the Rules, 1963, again inserted by notification dated 15th December, 2004 as Item No. 2, we find that "limestone" of Sonebhadra and other districts, if any, has been considered as minor minerals. Moreover, we do not find that any challenge has been thrown in the writ petition with regard to such notifications of the year 2004 issued by the State Government.

14. Moreover, when we asked Mr. Varma that since "limestone" is a major mineral according to him but the Petitioner is doing its business of minor minerals on the basis of the licence granted by the State, whether the Petitioner company will be delicensed by the State or not, which was unanswered by him.

15. So far as Respondent No. 3, the contractor engaged by the Zila Panchayat-Respondent No. 2 for the purpose of collection of fee, is concerned, Mr. W.H. Khan, learned Senior Counsel appearing for him, has disputed certain factual aspects by saying that it is wrong to say that the road leading from mining quarry to the factory gate of the Petitioner has been constructed by the Public Works Department and is maintained by it. The Government Order dated 20th November, 2009, annexed as Annexure-5 to the writ petition, does not prove that the road from Dala to Billi Marg has been constructed or maintained by Public Works Department. By the said Government Order the State Government has provided financial aid for widening and Srudhikaran of the road, but that does not necessarily mean that the said road either vests in or has been constructed or maintained by the Public Works Department. Moreover, the Petitioner's truck loaded with minor mineral passes through the land and link roads, which are vested in, constructed and maintained by Zila Panchayat. The Respondent No. 3 had made an application to the revenue authorities of the district to give details in this regard. The revenue authorities have submitted a report with map and Khatauni 1416-1421 Fasali showing that Obra (Billi) Data Road is situated over Plot No. 4223 Gha measuring 0.120 hectare, which is entered in revenue records in Class-5 (2) meant for "Purani Parti", and Plot No. 2786 Ga measuring 0.102 hectare, Plot No. 2787 Ga area 0.166 hectare, Plot No. 7966 Gha area 0.024 hectare, Plot No. 7967 Ga area 0.215 hectare, and Plot No. 7996 area 0.076 hectare are entered in the revenue records in Class-6(2) as "Sadak Pacci". All these roads come within the land belonging to Gaon Sabha and are meant for use of public. Apart from Petitioner, about 20 other mining lease holders, who are doing mining business near the areas in Billi Markundi and use Billi- Dala Road and other link road for carrying minor minerals from quarry, are paying fee imposed under the bye-laws. Moreover, Petitioner's lease itself is

illegal and against the mandatory provisions of the Act, 1957 and the Rules, 1963. In reply to such averments made by the Respondent No. 3, the Petitioner has contended in its rejoinder that limestone is transported from the quarry face to the factory gate of the Petitioner only. The transportation of the aforesaid limestone does not entail the usage of any link road or metal road as alleged. The entire movement of limestone is over a road, which stands constructed over the plots belonging to various individuals, details of which have been annexed to the writ petition. The Petitioner further submitted that it is incorrect to say that Petitioner is carrying minerals over the road, which is vested in or belonging to the Zila Panchayat. Mr. P.N, Saxena, learned Senior Counsel appearing for the Zila Panchayat, and learned Standing Counsel both have supported the submissions of Mr. W.H. Khan, Learned Counsel appearing for the Respondent No. 3.

16. We have gone through the Full Bench judgment of B. Agarwal Stone Product Ltd. (supra) and found it was categorically held therein that Section 142(1) read with Section 239(1) of the Adhiniyam entitles the Zila Panchayat to frame the bye-laws and levy the fee. It appears to us that such Full Bench judgment stands almost on the similar footing. The Petitioner wanted to take advantage of paragraph 50 of the judgment, whereunder a factual aspect was discussed by the Full Bench without giving any answer. The fact therein was that the Petitioner did not use the service roads linking the mines to the metal roads but plied only on the metal roads which have not been built or maintained by the Zila Panchayat. However, the Full Bench held that Section 142(1) is an independent section, which empowers the Zila Panchayat to charge fee to be fixed by the bye-laws for use and occupation of the public road.

17. According to us, admittedly the mine falls within the territory area of Zila Panchayat as per Section 2(40) of the Adhiniyam. Meaning of "public road" or "public street" as u/s 2(37) of the Adhiniyam is that such road over which the public in general have legally enforceable right of way and which is vested in, or maintained by, the Government or a local authority. Likewise, u/s 2(38) it is a question of vesting of property in a local authority. Section 2(10) speaks about "rural area", which means the area of a district excluding every municipality, notified area, town area, cantonment and are of Municipal Corporation situated in the district. Under no circumstances, the area of the Petitioner falls within such category. Therefore, the area belongs to Zila Panchayat, in which either public road or public street or public place is vested for the purpose of use by the public in general. Now the question is about the authority of the Zila Panchayat in respect of imposition of "fee". According to the Petitioner, the road, which proceeds from the mine to the factory, is not constructed or administered or maintained by the Zila Panchayat, therefore, the Zila Panchayat is not entitled to collect the fee. Mr. Varma wanted to make a distinction between the words "tax" and "fee". According to us, there is no generic difference between a tax and fee. In the cases of tax, Government simply grants a permit or privilege to a person to do something which that person would otherwise not be competent to do and

extracts fees from that person in return for the privilege that is conferred. On the other hand, case of levy of fees is related with the expenses incurred by the Government in rendering of services. We have no doubt and dispute with such proposition of law but when by virtue of Section 142 of the Adhiniyam the Zila Panchayat allows one person to use or occupy the public road or place whether by allowing a projection thereon or otherwise, and the Full Bench in *B. Agarwal Stone Product Ltd. (supra)* separates such right, the definition of fee as in Adhiniyam applicable for the purpose is more akin to tax than fee. Although Section 142(2) of the Adhiniyam is not relevant for the factual purpose but when we find that it speaks about the fee to be levied alongwith the licence fee etc. u/s 143 or may be recovered in the manner prescribed in Chapter VIII, which relates to recovery of tax and certain other claims, it separates the idea of using the place of the Panchayat irrespective of the necessary administration and maintenance thereof.

18. Factually, the stand of the Petitioner is contradictory in nature. Once the Petitioner has stated that it is using its own area from the mine to the factory or the area occupied by private individuals but at the same breath, it has stated that the road belongs to the Public Works Department of the State. If the specific case of the Petitioner is that the road is constructed, administered or maintained by the Public Works Department, then the statement with regard to occupation of the private individuals or of the mining lease is incorrect. So far as the area of Public Works Department is concerned, the Respondent No. 3 on behalf of the Respondent No. 2 has categorically submitted that by virtue of the Government Order dated 20th November, 2009 widening of the road was directed to be made by the Public Works Department with the financial aid of the State, but that does not take away the right of the Zila Panchayat in respect of administration and maintenance of the road in question. Learned Standing Counsel did not oppose such contention either by filing affidavit or by making any submission in connection thereto. Moreover, in dealing with such paragraph of the counter-affidavit of Respondent No. 3, the Petitioner in paragraph-7 of the rejoinder has reiterated the same fact by saying that for the road in question the State has sanctioned fund to the Public Works Department. In further, we find that Section 99 of the Adhiniyam says that there is a fund of the Zila Panchayat, which is called "Zila Nidhi", to the credit whereof all sums received are required to be placed including grants-in-aid from the consolidated fund of the State inclusive of loans etc. The Zila Panchayat shall earmark parts of the fund received by it for a particular purpose towards its utilization. Sub-Section 2 of Section 99 says that nothing in this section shall effect any obligations of a Zila Panchayat arising from a trust legally imposed upon or accepted by it. The sums which are received will be utilized for any work of public utility together with its contribution, wherever necessary, in executing such work. By showing this part Mr. W.H. Khan has rightly pointed out that utilization of any fund from the State or from some authority of the State cannot create any right in respect of territory of the Zila Panchayat. According to us, Section 103 of the Adhiniyam is categorical in this

respect, therefore, it is proper for us to set out such section hereunder:

103. Property vested in Zila Panchayat--Subject to any reservation made by the State Government, all property of the nature specified in this section and situated within the district, shall vest in and belong to the Zila Panchayat and shall with all other property which may become vested in the Zila Panchayat, be under its direction, management and control and shall be held and applied for the purpose of this Act, that is to say--

(a) all public buildings of every description which have been constructed or are maintained out of the Zila Nidhi.

(b) all public roads, which have been constructed or are maintained out of the Zila Nidhi and the stones and other materials thereof and also all trees, erections, materials, implements and things provided for such roads; and

(c) all land and other property transferred to the Zila Panchayat by Government, or by gift, sale or otherwise; for local public purposes.

19. The aforesaid discussion clearly indicates that construction or widening of road by the Public Works Department funded by the State cannot take away the right of the Zila Panchayat in respect of such road which is under the control or supervision of the Zila Panchayat. Similarly, these discussions totally brush aside the dispute raised by the Petitioner with regard to private occupancy of the land or the area of the mining lease, in which the transport of the Petitioner company moves from mine to factory.

20. The next questions are related to royalty of the Union of India and additional royalty of the State. According to us, royalty and fee cannot be equated with each other. Imposition of fee by the Zila Panchayat for the purpose of utilization of road within its territory cannot have any connection with regard to such imposition of royalty by the Union of India or by the State. Expression of the Petitioner is very clear to the extent that "limestone" cannot be held to be minor minerals, therefore, it has got no application as minor minerals under the Rules, 1963. According to us, no challenge has been thrown about the validity of the rules and/or any notification thereunder. Mr. Yashwant Varma tried to come out from the definition of "limestone" as "minor minerals" without challenging the same. Since the Full Bench of this Court in B. Agarwal Stone Product Ltd. (supra) has already held that collection of fee can be made by the Zila Panchayat as per Section 142(1) read with Section 239(1) of the Adhiniyam by framing bye-laws, the question about the power of the Zila Panchayat in collecting fee, irrespective of payment of royalty to the Union of India or the State, cannot be reopened. The Full Bench has already held that the levy of fee can be sustained under Entry 49 of List II read with Entry 66 of the Constitution of India. The Full Bench has categorically followed the ratio of the Constitution Bench judgment of the Supreme Court in The State of West Bengal Vs. Kesoram Industries Ltd. and Others, where it was held that tax and fee was not a subject dealt with the Act, 1957 as would be clear from Sections 13, 18 and 25 of the Act and that a State

legislation which makes provisions of levying such a fee for rendering services without any intention of regulating and controlling the subject of the levy, cannot be said to have encroached upon the field of "Regulation and control" belonging to the Central Government. On account of non-payment of fee as imposed on the truck and tractor carrying minerals on land if the mineral is confiscated, it will not encroach within the field of Regulation and control of the minerals.

21. It appears to us that the case is totally covered by the Full Bench judgment, in which it has been held that levy of fee as per the bye-laws was not on the minerals but on the trucks and tractors that carry the minerals by land.

22. Having so, we do not find any merit in this writ petition. Hence, the writ petition is dismissed, however, without imposing any cost

23. If the Petitioner has already deposited any amount in a separate bank account as per the interim direction of this Court the same will be released in favour of the Respondent No. 3, who, in turn, will deposit the amount in favour of the Respondent No. 2 after completion of formalities, if any. If it is not deposited, the entire arrears will be deposited with the Respondent No. 3 within a period of one month from the date of communication of this order for the similar purpose. Apart from that the Petitioner will also deposit the current fees regularly.