
(2012) 02 JH CK 0127

In the Jharkhand High Court

Case No : Writ Petition (PIL) No. 5259 of 2011

Krishna Nand Tripathi

APPELLANT

Vs

State of Jharkhand and Others

RESPONDENT

Date of Decision : 14-02-2012

Acts Referred:

Constitution of India, 1950 — Article 246
Mineral Conservation and Development Rules, 1988 — Rule 12(4), 18(3), 31, 33(3), 33(4)
Mines and Minerals (Development and Regulation) Act, 1957 — Section 18, 18(2), 18(3), 2, 5
Mines and Minerals (Regulation and Development) Act, 1948 — Section 5

Citation : (2012) 4 JCR 486

Hon'ble Judges : Prakash Tatia, J; Aparesh Kumar Singh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. Heard learned counsel for the parties. This petition has been filed by one of the sitting members of Legislative Assembly of the State of Jharkhand, challenging the legality and validity of Annexure-2, which is purported to be a policy decision of the State Government published in the Gazette on 27th August, 2011, whereby the State Government has taken a decision withdrawing the restriction imposed upon the sale of the iron ore fines.

2. Learned counsel for the petitioner submitted that Article 246 of the Constitution of India has demarcated the jurisdiction of the Central Government as well as the State Government and also provided the power where the Central Government and State Government may legislate. The Central Government has been given exclusive power to make laws with respect to the matters enumerated in List-I in the Seventh Schedule appended to the Constitution of India; whereas the State has been given such power under sub clause (3) of Article 246 and subjects are given in List II of the Seventh Schedule and it is called the "State List". In addition to Clause (3) of Article 246 of the Constitution

of India, the Parliament has, subject to Clause (1) of Legislature of any State, also been given power to make laws with respect to any of the matters enumerated in List-III in the Seventh Schedule, which is called "Concurrent List" and, according to the learned counsel for the petitioner, in the Union List (List-I) Entry no. 54, it is specifically provided that law relating to regulation of mines and minerals development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest, obviously shall be enacted by the Parliament only. By exercising powers, the Central Government has enacted the Mines and Minerals (Development and Regulation) Act, 1957 and specific declaration has been made in Section 2 of the Act, 1957. There are Rules known as Mineral Conservation and Development Rules, 1988, which have been specifically framed by the Central Government by exercising power conferred u/s 18 of the Act, 1957 and Chapter V has been enacted with clear object to see that the environment in the area, where the mining lease are granted, may not be disturbed and every care has been taken with respect to operations of tailings, slimes and fines as well as the overburden, which may not be at any use or may be a by product, which may adversely affect the environment of the area and, therefore, it has been provided under Rule 31 of the Rules of 1988 that every holder of a prospecting license or a mining lease shall take all possible precautions for protection of environment and control of pollution, while conducting prospecting mining, beneficiation or metallurgical operations in the area and Rule 33 (3) (4) (5) & (6) provides for the management of all those materials which can normally be a wastage and as per sub rule (4) of Rule 33, it is provided that wherever possible, the waste rock, overburden etc. shall be back-filled into the mine excavations with a view to restoring the land to its original use as far as possible. Therefore, all wastages, overburden as well as fines can be used in a particular manner and cannot be sold. Sub rule (6) of Rule 33 is also relevant which specifically deals with the fines, rejects or tailings from mine, beneficiation or metallurgical plants shall be deposited and disposed in a specially prepared tailings, disposal area such that they are not allowed to flow away and cause land degradation or damage to agricultural field, pollution of surface water bodies and ground water or cause floods. Even after making the above declaration and provisions with respect to, not only taking care of the environment issue but making provisions for the dealing with subjects referred above, certain powers have been given to the Controller General, who can issue direction, obviously to carry out the aims and objects of the Rules.

3. In view of the above, it is submitted that the State Government has no jurisdiction to issue any direction or frame a Rule or to take a decision with respect to the subjects covered under List-I of Seventh Schedule of the Constitution of India, for which a declaration has been made by the Central Government. In addition to the above, sub clauses (f) (k) & (l) of Clause (2) of Section 18 also deal with the arrangements for the storage of minerals and stocks thereof, that may be kept by any person and also the regulation of

prospecting operation and also certain things in the interest of conservation of systematic development of minerals or for the protection of environment by preventing or controlling pollution which may be caused by prospecting or mining operations and all those powers are conferred in the Central Government. Therefore, in view of the above provisions also, the State Government cannot and could not have issued such direction, so as to allow the sale of the fines.

4. Learned counsel for the petitioner also relied upon the judgment of the Hon'ble Supreme Court, delivered in the case of -- 1998(6) Supreme Today, 281, wherein it has been held that the regulation is possibly not of sale of the minerals but also of removal of the mineral and, therefore, even if minerals are not removed from the mines after excavation or abstraction, even then the leaseholder is liable to pay royalty. Therefore, it is submitted that this is not a case where if the impugned order is set aside then there will be loss to the State Government in terms of the royalty.

5. Learned Advocate General vehemently submitted firstly; that as per the Public Interest Litigation Rules, 2002, the procedure has not been followed, either by the petitioner or by the High Court in listing the matter. It is submitted that as per the Rules, the writ petitioner is required to categorically state that he has no personal interest in the matter and the lis is in public interest litigation and he should also clearly indicate that what is the public interest. According to the learned Advocate General, in fact, it is a litigation instituted by a Member of Legislative Assembly, who himself could have raised the point in the Assembly if there was any public interest. However, according to the learned Advocate General, this petition is, in fact, against all interest of the State, so as to deprive the hundreds and thousands crores of royalty to the State. It is also submitted that, in fact, it is the petitioner who could have acted in public interest than to challenge the order staying the sale of the fines, which has been stayed by the order Annexure-B, annexed with the supplementary counter affidavit by the State whereby, by the executive order, even sale of the iron ore itself has been stayed in the matter of three companies i.e. Steel Authority of India, Tata Steel Ltd. and Usha Martin Ltd. The State only corrected the mistake which was committed by Annexure-B dated 11th December, 2009 and it was sent to the concerned authority on 17th December, 2009. It is also submitted that the writ petition lacs the material particulars with respect to the research made by the writ petitioner and about his credential also. Learned Advocate General submitted that the State Government has taken a conscious decision in view of the fact that one of the authority in the State of Jharkhand passed the stay order on sale of the fines and, that too, in relation to there Companies out of 43 Companies and thereby, in fact, discrimination has been done to these three Companies, which have been prevented from selling the fines; whereas others were allows to continue to sell the fines. It is submitted that the Companies submitted representation to the competent authority, upon which t(sic) competent authority i.e., the office of Regional Controller of Mir(sic) issued a letter on 3rd February, 2010 (Annexure-A) indicating (sic) problem caused

because of the accumulation of the huge quantity fines. The authority was of the view that because, of the huge port of the iron ore fines dumped on the hill slope in the western side of the Quarry no. 1 of the Company-Usha Martin Ltd., a huge quantity of fines is being washed away to the virgin forest area in the hill slope below the quarry working and it has been opined that the above wash off fines from the fines stack is not only a potential danger to the forest growth in the hill slope below the said Quarry no. 1 but also to the loss of valuable mineral. The learned Advocate General again drew our attention to the opinion of the Office of the Regional Controller of Mines indicating the loss of valuable minerals. It is also submitted that even a large number of quantity have been shown in the said communication, which clearly indicates that a large quantity of fines have been accumulated and it has caused loss to the State Government. It is submitted that it is not only the loss to such lease holders but the same is also against the condition of the lease as given in form "K", prescribed by the Rules. It is clearly indicated that the lease holders have right to sell the minerals, including the fines and, therefore, the State Government could not have imposed any restriction with regard to the sale of the fines and when, once restriction imposed by one executive order passed by an authority has been withdrawn and that has been withdrawn by the State Government, then, in fact, this is in consonance with the Act and the Rules framed thereunder and, therefore, unless the petitioner is able to show that there is any restriction under that Rule, no writ of mandamus could have been sought from this Court by the writ petitioner. Learned Advocate General further submitted that even if the impugned notification-Annexure-2 is quashed, even then there will be no restriction against the sale of the fines or if there is a purported order-Annexure-B of staying the sale of the fines then that would be, in fact, perpetuating the illegality committed by that authority, putting an embargo upon the sale of fines contrary to the statutory provisions made by the Central Government. The learned Advocate General also drew our attention to some relevant provisions of the said Act and Rules, referred above, and again reiterated that, in fact, the State Government has no right to impose any condition or restriction by any order of staying the sale of the fines or any other materials and, therefore, the writ petition is wholly misconceived as well as a motivated litigation, to have the political mileage only.

6. Learned counsel for the respondent no. 5 vehemently submitted that the various provisions made under the above Act and Rules, which we have already referred, clearly indicate that u/s 5 of the Act, the scheme of mining is required to be approved by the Indian Bureau of Mines and this exercise is done periodically and for the period 2010-11 to 2014-15 such Scheme was approved by the Indian Bureau of Mines, wherein also in addition to prescribing of the rate of royalty under Schedule II of Entry 23 framed u/s 9 of the Act of 1957, it has been clearly provided that there will be a royalty on sale of the fines and in the mining plan also it is clearly stipulated that the respondent -Company itself shall have the right to sale and disposal of surplus ore on the rate prescribed at Table No. 16, according to grade and size specification of the materials of the Company

M/s Usha Martin Ltd. Therefore, in view of Rule 33(6), Section 18(2) as well as statutory lease deed under Form K and in view of the binding character of the above Rules and Section 18(3), which binds all State Governments, and as per Rule 54, mining plan required under Rule 12(4), even if the present order passed by the State Government is not in consonance with the statutory provisions of law, empowering the State Government to pass such order, even then there is other order putting restriction of the sale of fines and contrary to it there are all other provisions referred above, including Form K containing specific condition empowering the lease holder to sale not only the minerals but authorizes specifically to dispose of the mineral and minerals. It is submitted that, in fact, fines is a particular type of commodity comes out in the process of the mining operation and that part of the fines which cannot be utilized for any purpose and if put in a particular type of process then that process may block the entire machinery therefore, fines are required to be sold and, therefore, the Companies had right to sell such fines. Learned counsel for the respondent no. 5 vehemently submitted that the respondent no. 5-Company has obtained a lease in the year 2005 and continued to sell the fine till 2009 upto the period when such restriction was imposed by the State authority, without any authority of law and not only this because of stacking of fines in huge quantity, in view of the order passed by the subordinate authority, the mining authorities even threatened to cancel the mining lease of the respondent no. 5 and, therefore, a representation was submitted to the Central Government, upon which the respondent -Company was communicated vide letter dated 3rd February, 2010 that they should not violate Rule 13(1) of the MCDR, 1988, lest their mining lease can be cancelled. The learned counsel for the respondent no. 5 further drew our attention to the application for mining lease-Annexure-R-5/1, wherein also under Clause-xix, it is clearly provided that in a case of use of mineral raised in a mining area by the respondent-Company and if it is for captive use then it is to be used according to Clause-xix (a)(ii) and it has been provided thereafter "For sale for indigenous consumption" - only surplus ore, if any to be sold. It is clearly indicated that if the Company itself applied for permission to sale the surplus ore and has already pointed out that those cannot be utilized by the Company as its end product and it contain some condition of the mining which can be processed and can be converted into small portion for other use and when there is buyer then the lease holder under his statutory right created by virtue of the various provisions of the Act followed in form "K" has right to sale the fines. The learned counsel for respondent no. 5 also relied upon the judgment of Supreme Court, delivered in the case of Ramlal and Sons Vs. The State of Rajasthan, , wherein the Hon''ble Supreme Court held that where grant of mining lease was envisaged under definite statutory rules made in exercise of power conferred u/s 5 of the Mines and Minerals (Regulation and Development) Act, 1948, the state Government was under legal obligation to act in accordance with those rules. The Hon''ble Supreme Court further held that it could not exercise a power in the matter of grant of mining lease unknown to the Rules.

7. However, learned counsel for the respondent no. 5 as well as learned Advocate General submitted that if State wants to put certain restriction or condition in the mining lease then that can be done after obtaining the approval from the Central Government and that has not been done in this case.

8. Learned counsel appearing for the respondent no. 6 tried to support the impugned notification-Annexure-2 dated 27th August, 2011, however to the extent only by which the restriction against sale of the fines has been removed. Learned counsel for the respondent no. 6 drew our attention to the pleadings submitted by the respondent no. 6, indicating that for use of fines they are trying their best to transport the dumps ore and fines to its various plants, which clearly is not done by other Companies in India and even after doing so and even after their proposal to establish some more process, there will be huge quantity of the fines which will be of no use except of any other purpose for which the buyers are there, who are paying the price for such commodity and Company is paying royalty.

9. Learned counsel for the Union of India submitted that the notification issued by the State Government is without approval of the Central Government as well as beyond the powers conferred upon the State Government. Learned counsel for the Union of India also relied upon the said provisions, which we have already referred, including Rule 54 of the Rules of 1988 and it has been submitted that some of the conditions imposed in the impugned notification are contrary to the statutory provisions as it has put certain restriction and selected certain parties for the purpose of obtaining the fines from the Companies.

10. Be that as it may, according to the State Government, Central Government and the private Companies, the impugned notification issued by the State Government, which has been impugned by the writ petitioner, in fact, is though without any power conferred upon the State Government but at the same time by this notification nothing has been done so as to create cause of action for filing a Public Interest Litigation and only a mistake has been corrected. However, so far as powers of the State Government are concerned, they are governed by other provisions other than the referred above which empowers Central Government only to frame the Rules in relation to same subject matter for which the Rules have been framed.

11. We have considered submission of the learned counsel for the parties and gone through all relevant provisions of the law referred above. It is undoubtedly a declaration made by the Central Government u/s 2 of the Mines & Minerals (Development and Regulation) Act, 1957, whereby the Central Government has undertaken task to enact the law to control and regulate the mines and development of minerals, however to the extent provided under the Act of 1957. Whether the extent of the Act of 1957 covers the entire area for which dispute has been raised, is the core issue, because of the reason that we are not going into the preliminary objection raised by the Advocate General with respect to the maintainability of the present writ petition, in view of the basic reason that,

prima facie, it is admitted by all the parties, by the State Government and Union of India as well as by the private parties that the power to frame Rules for such subject of protection of the environment in mining area and framing of the Rule vests in the Central Government and, therefore, when State Government came up with an order which has been issued by the Department of Mines & Geology of the State Government and, that too, under the heading of policy decision but without showing any of the provisions of law in which such Resolution was issued by the State Government and admittedly this order dated 27th August, 2011 is not an order of withdrawal of any earlier stay order granted against the sale of the fines but it is absolutely an independent Resolution in the form of policy decision and it contains permission for disposal of iron ore fines overburden and other waste materials of the captive iron ore mines. It also prescribed the size of the iron ore which shall be below 10 mm. We are conscious that even if the size of the iron ore fines has been prescribed by the Central Government then the State Government by this Notification could not have declared what shall be the size of the fines and the order of the Central Government would prevail. Not only this, under Clause (2), following provisions have been made which appears to be beyond the authority and power of the State Government and for the purpose of clarity, we would like to quote this brief policy decision under the heading of amended Resolution dated 27th August, 2011, which is as follows :

2. The cabinet of Government of Jharkhand has taken a policy decision to lift the ban imposed upon the captive mine owners for disposal/sale of iron ore fines, overburden and other wastes materials in order to control pollution and protect the environment with the following conditions:-

- a) Fines shall not be exported outside the country.
- b) Fines should be supplied on priority basis to industries operating within the State of Jharkhand, after the own consumption of the captive mine lease holder.
- c) Payment of royalty for iron ore fines will be made in accordance with the royalty as decided by Government of India from time to time for iron ore.
- d) One time and time bound disposal/sale of fines lying in Mining Lease Area/ Stock Yard will be done.
- e) Fines being generated on a regular basis will have to be used (within the State) by increasing capacity for which approval on a time bound programme will have to be obtained from the department, after which only the permission for disposal/sale of the same under para-2 mentioned above will be granted.
- f) Disposal of iron ore fines, overburden and other wastes materials obtained during mining of iron ore should be ensured in a manner so as to avoid pollution to local environment.

12. A bare perusal of sub clause (2) of the said Policy decision, it is clear that the State Government has prescribed a condition which includes that fines shall not be exported outside the Country and fines should be supplied on priority basis to

industries operating within the State of Jharkhand, after the own consumption of the captive mines lease holder. Priority has been fixed in this area in the matter of sale and disposal of fines. Clause (d) & (e) also provide that there will be one time and time bound disposal/sale of fines lying in the Mining Lease Area / Stockyard and fines being generated on regular basis will have to be used within the State by increasing capacity for which approval on a time bound programme will have to be obtained from the department. So, these restrictions imposed by this Resolution is contrary to even the argument advanced by the learned counsel for the respondents and, therefore, on technical ground of non- following the complete procedure in true spirit, we are not inclined to dismiss the writ petition.

13. If we go into the merit of the case, then it is not in dispute that the Resolution of the State Government dated 27th August, 2011 being issued without authority of law and in contravention to the provisions of the Act of 1957 and Rules, wherein the powers have been separately given to only the Central Government in prescribing of the relevant Rules, including the provisions to be made which have been already made by the Central Government. However, it is a different issue, whether the petitioner can succeed in the writ petition. In view of the fact that if the argument of the learned counsel for the petitioner is accepted in toto then it was the duty of the writ petitioner to show that under which law the petitioner is seeking direction against the State Government so as to have a restriction against the sale of the fines. Annexure-2 dated 27th August, 2011, the alleged policy decision, if found to be illegal even then, as we have already noticed, there are all provisions under the Act and Rules, which clearly provided for complete procedure for sale of minerals and fines. The lease is granted to the lessee by the lessor to be executed by the State Government with the limited right of the State Government only to enter into lease agreement but without putting any condition by the State Government and the lease is required to be in prescribed form, as prescribed under Form "K", which is, in fact, a statutory lease deed which prescribes statutory condition in the lease and in the form "K". Part-2 of Clause

(1) specifically provided:

(1) Liberty and power at all times during the term hereby demised to enter upon the said lands and to search for mine bore, dig, drill for win work, dress, process, convert, carry away and dispose of the said mineral/minerals.

Therefore, so far sale is concerned, right has been given to the mining holders to dispose of the minerals.

14. At this juncture, it will be relevant to mention sub rule (6) of Rule 33 of the Mines Conservation and Development Rules, 1988, which may be interpreted in the manner that the fines falls in the category of rejects and, therefore, they are required to be disposed of according to sub rule (6) of Rule 33.

Sub rule (6) of Rule-33 is as under :

The fines, rejects or tailings from mine, beneficiation or metallurgical plants shall be deposited and disposed in a specially prepared tailings disposal area such that they are not allowed to flow away and cause land degradation or damage to agricultural field, pollution of surface water bodies and ground water or cause floods.

15. A bare perusal of sub rule (6) of the Rules of 1988 will reveal that it has been provided that the rejects or tailing from mine, beneficiation, or metallurgical plants shall be deposited and disposed in a specially prepared tailings disposal area. Rejects, tailings and fines also have been included in sub rule (6) and, therefore, it appears from sub rule (6) of Rule-33 that though fines might have been referred to here, but that does not mean that fines, which can be utilized and used for any other purpose, is also a rejects in any manner so as to permit its use only for the purpose, as provided under sub rule (4) of Rule-33, which provides that wherever possible, the waste rock, overburden, etc. shall be backfilled into the mine excavations with a view to restoring the land to its original use as far as possible. As per said sub rule (6), for keeping these fines, rejects and tailings, a caution has been given so that they are not allowed to flow away and cause land degradation or damage to agriculture field, pollution of surface water bodies and ground water or cause floods. Here, in this case, there are materials which indicate that because of the accumulation of the fines in huge quantity, the authorities found that it is creating pollution in the surface water bodies and also creating huge pollution for the environment and causing deforestation also. Therefore, the fines if are required to be deposited then it does not mean that sub rule (6) of Rule 33 prohibits sale of the fines in any way. In view of the above, Rule 33(6), as interpreted by the petitioner, cannot be accepted to mean that fines are required to be kept deposited and can only be disposed of in specially prepared tailing disposal area.

16. At this juncture, we would like to refer two orders placed on record by the State Government along with the supplementary counter affidavit because of which it has been stated by the State that the State had to take a policy decision in the form of Annexure-2. The said order is Annexure-B dated 11th December, 2009 and this is not a general order passed by the State Government, so as to prohibit the sale of the fines, obviously the iron ore fines. This order is a blanket stay against the sale of the iron ore itself in open market by the Companies which supposed to utilize the iron ore for their own use. It nowhere says that by this order the sale of the fines have been stayed. However, this order is also not an order passed by the State authority so as to stay the sale of the fines by all the Companies in the State of Jharkhand, which are 46 in numbers and even if it is so, then also this order dated 11th December, 2009 itself, which is also issued by the State Government and, therefore, the State Government had no authority to issue even such type of order. In fact, said order dated 11th December, 2009 is running contrary to the above referred provisions of law, which cannot be an order that can bind anybody. When an order is contrary to the statutory provisions of law then its legality can be examined even when as such its legality

has not been challenged by any of the parties because of the plain and simple reason that the orders cannot be given precedence over the statutory provisions of law and orders are required to be only in consonance with the order to give effect to the statutory provisions of law. When order is found to be contrary to law, according to the submission made, not only by the respondents but also the writ petitioner, then it is of no use to keep such order.

17. However, we cannot appreciate the manner in which the State Government proceeded to issue Annexure-2 because of the plain and simple reason that the order dated 11th December, 2009-Annexure-B was in relation to the three Companies and not a policy decision of the State Government, so as to require a policy decision of the State Government for taking the decision back. However, the State Government after passing of the order dated 11th December, 2009 proceeded to prescribe more conditions than required in any manner if the State Government was of the opinion that Annexure-B may not come in the way of the free sale of the fines in the State then in that situation the State Government could have passed the order of the withdrawal of Annexure-B.

18. Be that as it may, in totality the order dated 11th December, 2009 and the impugned notification dated 27th August, 2011 have been issued without any authority of law by the State Government and from the provisions of law referred above that a right given to the lessee in form "k" and other relevant rules authorize them to dispose of all minerals including the fines. Therefore, the present writ petition has no merit and hence is liable to be dismissed.

19. Learned counsel for the respondents vehemently submitted that in such matters some cost should have been imposed. For that purpose, though Annexure-2 was found to be illegal and without jurisdiction, issued by the State Government, this Court has not passed any interim order in favour of the writ petitioner and as such we do not propose to impose any cost upon the writ petitioner. However, we may observe here that in any Public Interest Litigation, it is always desirable that a thorough research be done by the writ petitioner so as to assist the Court and particularly when it is a matter of State revenue. At this juncture, we further like to point out that the State of Jharkhand is a mineral rich State and the State itself without stay order passed by this Court prohibited itself from realising a huge amount of royalty and, therefore, more caution should have been taken by the writ petitioner before filing the writ petition and he should have tried to find out what was the interest of the public. This writ petition is, accordingly, dismissed.