

(1985) 09 KAR CK 0036

In the Karnataka High Court

Case No : Writ Petition No's. 17944 of 1983 etc.

Madhusudhan

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 12-09-1985

Acts Referred:

Mines and Mineral (Development and Regulation) Act, 1957 — Section 15, 15 (1), 9, 9 (1)

Citation : (1987) ILR (Kar) 688

Hon'ble Judges : Rama Jois, J

Bench : Single Bench

Advocate : U.L. Narayana Rao, D.L.N. Rao, Suresh S. Joshi, K. appa Rao, S. Chennarayana Reddy, S.B. Shahpur, Udaya Holla, Law Associates, K.S. Desai, V.S. Ugrappa, S.K. Kulkarni, G.K. Shevgoor, Hegde Associates, V.B. Ganachari, Prakash H. Golkhindi, Gangi Reddy, B.M. Krishna Bhat, A.C.C. Associates, K. Ramssubbaiah, G.V. Thimmappaiah, A. Jayaraman, T. Umashankar and Mir Noor Hussain, for the Appellant; B.J. Somayaji, HCGP, for the Respondent

Final Decision : Allowed

Judgement

Kama Jois, J.—In all these Writ Petitions presented by persons who have taken on lease, from the State Government in respect of lands belonging to the Government, for extraction of minor minerals have questioned the legality of the enhancement of annual dead rent payable in respect of the lease at the rate higher than the rate fixed in the lease deeds executed between each of the petitioners and the State Government.

2. The facts of the case in brief are as follows: (i) The petitioners entered into agreement with the State Government for extraction of various types of minor minerals in the area specified in the respective lease deeds The different types of minor minerals extraction of which constitutes the subject matter of these Writ Petitions are ;

(i) Ornamental stone.

(ii) Building Stone.

(iii) Lima stone and Kankar.

The relevant clauses in the agreement regarding payment of dead rent and royalty reads:

"1. To pay dead rent or royalty whichever is greater... The lessee/lessees shall pay for every year except the first year of the lease yearly dead rent as specified in Clause 2 of this part in respect of each mineral:

Provided that the lessee/lessees shall be liable to pay the dead rent or royalty in respect of each mineral whichever is higher in amount but not both.

2. Bate and mode of payment of dead rent.- Subject to the provision of Clause 1 of this Part, as from the date of -----19.... during the subsistence of this lease, the lessee/lessees shall pay to the State Government annual dead rent at the following rates per hectare of the lands described in Part I of the Schedule.

3. Rate and mode of payment of royalty.- Subject to the provisions of Clause 1 of this Part, the lessee/lessees shall, during the subsistence of this lease, pay to Government at such times and in such manner as the Government may prescribe royalty in respect of any minor minerals removed by him/them from the leased area at the rates for the time being in force under Schedule I to the Mysore Minor Mineral Rules, 1969.

4. Payment of Surface rent.- The lessee shall pay rent to the State Government for all parts of the surface area leased to him for the purpose of quarrying surface rent at the rate prescribed by Government."

< (underlining by me)

(ii) It is common ground that every lessee is, under the Act and the Rules liable to pay dead rent or Royalty, to the Government annually, whichever is higher. Dead rent is in the nature of invariable ground-rent, whereas royalty, is payable ad valorem, on the quantity of mineral extracted, at the prescribed rate. Normally when the mine is operated, royalty would be more than dead rent, and therefore a lessee has to pay that amount to the Government.

(iii) There is no dispute that all these lease deeds were executed sometime prior to 11th August 1983 on which date the impugned notification fixing higher rate of dead rent was sought to be brought into force. The rate of dead rent fixed in the lease deeds were as follows :

(i) Ornamental Stone Rs. 500 per acre per annum.

(ii) Building stone Rs. 400 per acre per annum.

(iii) Lime stone and all other minor minerals Rs. 50 per acre per annum.

These rates were fixed by means of a notification issued in accordance with Sub-

clause (1) of Rule 20 of the Karnataka Minor Mineral Concessions Rules, 1969.

(iv) A notification dated 11-8-1983 was published in the Official Gazette dated 4-5 1984 by which the rates of dead rent were enhanced. The notification reads:

NOTIFICATION

No. CI 194 MMN 83, Bangalore, dated 11th August 1983.

In exercise of the powers conferred under Sub-rule (1) of Rule 20 of the Karnataka Minor Mineral Concession Rules, 1969, and in supersession of the Government Order No. CI 151 EMO 69, dated 15th November, 1969, the Government of Karnataka hereby fixes the dead rent payable under the said rules as follows :-

1. For specified Minor Minerals Rs. 5000 per acre per annum ; 2. For other Building Stones Rs. 2500 per acre per annum, and; 3. For other Minor Minerals Rs. 500 per acre per annum

This shall come into force at once.

By Order and in the name of the Governor of Karnataka,

Sd/- Y.B. Chinnappa Reddy, Under Secretary to Government, Commerce and Industries Department."

After the promulgation of the above notification the petitioners were called upon to pay the dead rent at the rate fixed in the aforesaid notification. Aggrieved by the said notification and the action taken pursuant to the said notification the petitioners have presented this petition.

3. The Learned Counsel for the petitioners urged the following contentions.

1) No power is conferred on the State Government u/s 15 of the Mines and Minerals (Regulation) and Development Act, (the Act for short) to levy dead rent in respect of minor minerals.

2) Even on the basis that the rule making power conferred under Sub-section (1) of Section 15 to frame rules regulating the grant of lease of minor minerals and for the purpose connected therewith includes the power to levy dead rent, in the rules framed under that provision, such rules cannot affect the leases already executed in which the rate of dead rent payable by the lessee concerned lessee had been specified.

3) In any event the rates of dead rent fixed in the Impugned notification even if it were to be regarded as having come into force on 4-5-1984 on which date it was published in the Official Gazette but not with effect from 11-8-1983 on which date it is stated to have been issued.

4) The Rule 20(1)(2) of the Rules is invalid for the reason that while provisions of Section 15(1) requires the fixation of dead rent under the rules itself, by that rule

the power to fix the rent is delegated to the State Government.

5) The rate of dead rent fixed in the impugned notification is not only discriminatory but also arbitrary, as the rate is exorbitant and confiscatory in character and therefore violative of Article 14 of the Constitution.

4. Before considering the merits of the contention, it is necessary to make a brief survey of the relevant provisions of the Act and the Rules. Section 9(1) of the Act inter alia provides that notwithstanding anything contained in the Instrument of lease or in any law for the time being in force at such commencement, a holder of a mining lease is liable to pay royalty in respect of any mineral removed from the leased area at the rates specified in the II Schedule in respect of that mineral. Sub-section (3) of Section 9 expressly authorises the Central Government to enhance or reduce the rate of royalty by amending the said schedule. The proviso to this section however imposes a condition in that, the rate shall not be more than once within a period of four years. Thus, this provision expressly provides for the payment of royalty at the rate specified in the II Schedule even if it is different from the rate of royalty incorporated in the lease deed.

5. Section 9(A) provides that a holder of a mining lease is liable to pay dead rent at the rates specified in the III Schedule for the time being in force notwithstanding anything to the contrary contained in Instrument of lease. Sub-section (2) of 9A empowers the Government to enhance or reduce the rate of dead rent by amending the third Schedule. The proviso under this sub-section imposes a condition to the effect that enhancement shall not be more than once within a period of four years. Both Sections 9 and 9A are not applicable to these cases for the reason that Section 14 of the Act provides that Sections 4 to 13 of the Act, would not apply to quarry lease, mining lease or other mineral concessions, in respect of minor minerals. As far as minor minerals are concerned special provision has been made u/s 15. It reads :

"15. (1) The State Government may, by notification in the Official Gazette, make rules for regulating the grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals and for purposes connected therewith.

(2) Until rules are made under Sub-section (1), any rules made by a State Government regulating the grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals which are in force immediately before the commencement of this Act shall continue in force.

(3) The holder of a mining lease or any other mineral concession granted under any rule made under Sub-section (1) shall pay royalty in respect of minor minerals removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee at the rate prescribed for the time being in the rules framed by the State Government in respect of minor minerals :

Provided that the State Government shall not enhance the rate of royalty in

respect of any minor mineral for more than once during any period of four years."

It is also necessary to state that Sections 9, 9A and Sub-section (3) of Section 15 and amendment to Section 15(1) were all incorporated by the same Amending Act namely Amendment Act 56 of 1972. Whereas the Parliament made express provision for payment of royalty and dead rent at the rates specified in the II and III Schedule respectively by Section 9 and 9-A respectively, notwithstanding anything contained to the contrary in the lease deeds, as far as minor minerals are concerned. Sub section(3) of Section 15 only provides for payment of royalty at the prescribed rates for the time being in the rules. According to the learned Counsel for the petitioner, the omission in the amendment Act to make any provision for collection of dead rent its respect of minor minerals also at the rate prescribed in the rule implies that in so far it relates to the minor minerals the intention of the Legislature was to provide collection of dead rent at the rates specified in the contract.

6. It is contended for the State that the source of its power to fix dead rent as also royalty is Sub-section(1) of Section 15 which confers power on the Government to frame rules regulating the grant of lease and for purposes connected therewith. Counsel for the petitioner, however contended that Section 15(1) read in the light of Sections 9 and 9-A and its inapplicability to minor minerals, the State Government derives no such power from Section 15(1). I find no difficulty in acceding to the construction of Section 15(1) suggested for the State, for, fixation of rate of dead rent or royalty is certainly a power without which the rule making power would be purposeless as obviously it cannot be the intention of the Legislature that the leases should be granted freely without liability to pay dead rent or Royalty. The petitioners' contention is that the power to levy royalty is conferred under Sub-section (3) of Section 15, but there was no power to levy dead rent. According to the Learned Counsel for the State, Sub-section (3) is not the source of power to fix the royalty but was intended to fix the liability to pay royalty at a rate higher than the rate fixed in the lease deed with a restriction that such revision of rates cannot be made more than once within a period of four years as indicated in the proviso to Sub-section (3) of Section 15.

7. Elaborating the point, Learned Counsel for the State submitted, that Sub-section (3) of Section 15 was inserted with the object of getting over the Judgment of the Supreme Court in *Bajinath v. State of Bihar*, AIR 1970 SC 89 in which the Supreme Court held that, in the absence of an express provision in an Act of Legislature, a rate higher than the one specified in the contract, cannot be collected, under the authority of a subordinate legislation and was not intended to confer the power to levy royalty. Having regard to the language of Sub-section (3) of Section 15, its construction, by the Learned Counsel for the State is plausible. Though the Proviso to sub-section which restricts the power of revision of the rates of Royalty not more than once in a period of four years gives an indication, the main part of the sub-section confers the power to levy royalty, it is

really a proviso to Sub-section (1) of Section 15 which includes the power to levy royalty. Therefore, I find no difficulty in accepting the construction suggested for the State and reject the first contention. For these reasons I hold

(i) The power to levy dead rent and royalty is implicit in Section 15(1);

(ii) The proviso to Sub-section (3) is really a proviso to Sub-section (1);

(iii) Sub-section (3) of Section 15 provides for collection of royalty at the rates prescribed in the rules even if it is at variance with the rates prescribed in the contract.

8. The 2nd contention urged for the petitioners is even on the basis that Section 15(1) confers power on the Government to fix the dead rent by rules, they were liable to pay the dead rent only at the rates fixed in the respective lease deeds and that the revised rates apply only to new leases. In support of this contention Learned Counsel for the petitioners relied on a Division Bench Judgment of Andhra Pradesh High Court in M.V. Krishna Rao Vs. The District Collector Krishna and Others, in which following the Judgment of the Supreme Court in Baijnath, held that once the amount of dead rent payable by a lessee was fixed in the lease deed, it creates a vested right and the collection at higher rate could be authorised only by Legislation and not by subordinate Legislation. Relevant paragraph reads:

"In the instant cases, the leases in most of the cases, if not all, have been executed by the State Government earlier to March 23, 1977 when Rule 10 and Schedules I and II were substituted. Whether dead rent is payable by such lessees, requires to be considered next. In considering that question, whether Rule 10 has any retrospective operation has to be determined. When like contentions were raised before the Supreme Court in Baijnath Kedia AIR 1970 SC 1436 as respects minor mineral of Bihar State, that Court observed "all mining leases granted before the commencement of the Mines and Minerals (Regulation and Development,) "even when the leases were brought in conformity" with the provisions of the Act, the Supreme Court held, "vested rights could only be taken away by law made by a competent legislature" as distinguished from subordinate legislation. In that case it was added "Mere rule making power of the State Government was not liable to reach them " Following the dicta of the Supreme Court, we hold the leases granted, concessions accorded,, earlier to March, 25, 1977 are not liable to pay dead rent under the impugned rule. The State Government can collect dead rent prospectively from the date of the impugned rule. Rule 10, in that sense, has no retroactivity. Therefore, we direct the State Government to issue demand notice? afresh as to dead rent wherever "leases" or "concessions" were accorded after March 25, 1977 and in the cases of "contracts" executed earlier, demands be made afresh excluding the dead rent. The Writ Appeals and the Writ Petitions of M.V. Krishna Rao, the lessee of black rough stone is allowed, with directions as indicated above. No costs. Advocates fee Rs. 150/- in each "

9. The crucial question which arises for consideration in the light of the rival contentions is, if the rate of dead rent is increased in exercise of the power under Sub-section (1) of Section 15 by making rules which is the provision in the Act, which requires the lessees to pay dead rent at such higher rates; as it is beyond doubt in view of Baij Nath's case that collection of dead rent at a rate higher than the rate fixed in the contract can be provided only by legislation and not by subordinate legislation.

10. Learned Counsel for the State pointed out to sub-section(3) of Section 15 as the provision authorising collection of dead rent at a rate higher than the one prescribed in the contract. In this behalf he submitted that the word "Royalty" in Section 15(3) should be construed as including both dead rent and royalty, as the expression royalty was a generic one and included dead rent. In support of this submission he relied on the Judgment of the Rajasthan High Court in Atma Ram Bilochi and Others Vs. State of Rajasthan,

11. It is common ground that royalty is amount payable to the State, by a lessee of Mines calculated on the basis of the quantity of ore extracted at the prescribed rates and the dead rent is a fixed payment to be made depending upon the extent of the area of the land leased, calculated at the rates prescribed. Both are payable to the State in recognition of its paramount title, in the land and in the minerals. Therefore, if under various provisions of the Act the word royalty alone was used, it would be capable of being construed as including both the type of payments. But Section 9(1) and 9(1A) of the Act as pointed out earlier expressly provided for the obligation to pay royalty and dead rent respectively at the rates prescribed by or under the Act. These two words are therefore used to give separate and distinct meaning. These Sections apply to major minerals. But in Sub-section (3) of Section 15, such a provision is made only in respect of royalty. The word "royalty" is not defined in the Act. If it was used in the Act to include the dead rent also, then Section 9 itself would have covered dead rent also and Section 9A would be redundant. Therefore the expression royalty used in Section 9 cannot be construed as including rent. It is difficult to agree that the word "Royalty" in Section 9 does not include dead rent but the same word in Section 15(3) includes dead rent. For these reasons, I reject the construction suggested for the State that the word "royalty" used in Section 15(3) includes dead rent also.

11. In the light of the above discussion, my conclusions are -

(1) Section 15(1) which confers power on the concerned State Governments, to make rules for regulating the grant of annual leases in respect of minor minerals and for purposes connected therewith, included the power to fix rate of royalty and also the rate of dead rent payable by leases for extracting minerals.

(ii) The said power read with Section 21 of the General Clauses Act, empowers the State Government to revise the rates either by way of enhancement or by way of reduction. However, in view of the proviso to Section 15(3) which is really

a proviso to Section 15(1), the revision of rate of royalty by way of enhancement cannot be made more than once during any period of four years.

(iii) Sub-section (3) which provides that a lessee shall pay the royalty at the rate prescribed for the time being in the rules framed by the State Government, applies only to royalty and that the word "royalty" used in that sub-section does not, include dead rent.

(iv) As the power to fix the rate of dead rent is a subordinate Legislative power flowing from Sub-section (1) of Section 15, the revised rate cannot be made applicable to lease deeds in which the rate of dead rent payable by the concerned lessor, has been incorporated, as that is a vested right and therefore cannot be affected by subordinate Legislation in view of the Law declared by the Supreme Court in *Baij Nath's case* AIR 1970 S.C. 89.

(v) The impugned notification by which the rates of dead rent are revised cannot be enforced against the petitioners as they are governed by the rates which existed then and which formed one of the conditions of lease.

12. The third contention of the petitioners is that though the notification was dated 11-8-1983, it was actually published in the Official Gazette dated 4-5-1984 and therefore even if the notification is held to be valid it can be effective only from 4-5-1984 and not from 11-8-1983. The answer to the above contention depends upon the fact as to whether prior to the date of the notification in the official gazette on 4-5-1984, the notification dated 11-8-1983 had been widely published in any manner so as to make it known to all the persons concerned. As far as the principle applicable to a situation like this, there is no doubt. It is well settled that any subordinate legislation in the form of statutory rule's or orders, in order to be enforceable against a citizen, it must come into force and it could come into force only on due publication. Though it is not necessary that, it must be published only in the official gazette, and other types of publications are not ruled out, unless it is published it cannot affect the right of the parties (See *State of Maharashtra v. Mayer Hans George* AIR 1963 SC 722 and *R. Narayana Reddy v. State of Andhra Pradesh*. 1969 SLR 736 (AP))

13 It is unnecessary to pursue this contention for the reason. I have accepted the second contention and held that the notification cannot be enforced against the petitioners. Likewise it is also not necessary to consider all the other contentions as set out earlier.

14. In the result, I make the following Order:

(i) The Writ Petitions are allowed.

(ii) A Writ of mandamus shall issue to the respondents not to enforce the impugned notification dated 11-8-1983 (published in the official Gazette dated 4-5-1984) against the petitioners.

(iii) Parties to bear their own costs.