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(2019) 05 PAT CK 0031

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 18002 Of 2014

Md. Israil APPELLANT

Vs

State Of Bihar Through Principal Secretary And Ors RESPONDENT

Date of Decision : 17-05-2019

Acts Referred:

Bihar Minor Mineral Concession Rules, 1972 — Rule 9, 22, 25, 26(4), 26(6), 33, 33(1), 33(3), 40, 40(7), 40(8), 40(9), 40(10), 43

Mines And Minerals (Development And Regulation) Act, 1957 — Section 9, 15, 21

Citation : (2019) 05 PAT CK 0031

Hon'ble Judges : Sanjay Priya, J

Bench : Single Bench

Advocate : Sanjeev Ranjan, Naresh Dikshit

Final Decision : Dismissed

Judgement

1. This writ application has been filed for issuance of direction in the nature of certiorari to quash the part of the letter as contained in Memo No.C.C.03/2013/M-Patna dated 27.11.2013 issued by the Principal Secretary by which it has been held that royalty realized by different technical wings of Irrigation, Health, Road Construction Department and other Departments for consumption/ supply of minor minerals in construction activities by work contractor and kept under different head be transmitted to the concerned Mining Office as it plays a pivotal role in augmenting departmental revenue target and accordingly direction was issued to these departmental heads to order their technical wings to transmit these amounts to the mining department, which order per se is illegal and legally unsustainable as mining department cannot realize any amount as royalty to augment its revenue to which it is not legally entitled as royalty in terms of Section 9 of Mines & Minerals (Development & Regulation) Act, 1957, is payable only by grantor or lessor on the basis of working/use of the property leased and thus the amount so collected exclusively belongs to a person, who has been granted mining lease for excavation of sand under Rule 9 or mining lease renewed under Rule 22 of the Rules.

2. Further prayer has been made for direction to the respondents, namely, concerned Mining Offices to pay the amount so collected in exercise of power vested under Rule 40(10) of Bihar Minor Mineral Concessional Rules, 1972, to the Mining lessees/ permit holder of the district in which work was undertaken for failure to deposit Form M with particulars in Form N as sand was illegally excavated from their lease hold area.

3. It is also prayed to hold and declare that Rule 40(10) of Bihar Minor Mineral Concession Rules, 1972, does not permit, retention of the amount of royalty by mining department for failure of the work contractor to submit Form M with particulars in Form N and the same is liable to be disbursed amongst lessee and permit holder from whose mining area the minor mineral was illegally extracted or under whose area the construction activities was undertaken as is manifest from bare heading of Rule 40(10) read with Affidavit in Form M, otherwise, it will amount to forfeiture by default without any authority of law.

4. It has also been prayed to hold and declare that the amount of money deducted from the running bill of work contractor for consumption/use of minor mineral, in the district of Kishanganj for failure to deposit Form M with particulars in Form N be made payable to petitioner in the financial year 2014-15, as the petitioner is the mining lessee for sand in the entire area of Kishanganj district as the said amount lawfully belongs to him as sand was illegally extracted from his mining lease area.

5. As per case of the petitioner, advertisement was published in Hindi newspaper Hindustan dated 08.05.2013 inviting bids for settlement of Balughats Unit A for the remaining period of 2013, wherein, the last date of purchase of tender document was 10.05.2013, date of submission of bid was 11.05.2013, opening of technical and financial bid was on 13.05.2013 and bidding was to held on 13.05.2013. The reserve price was fixed at Rs.17,35,000/-. The bidder has to submit income tax certificate of last three years, which must not be less than 25% of the reserve price. The tender document is to be purchased from the District Mining Office, Purnea, on deposit of Rs.1000/-. The open bidding was to be done from amongst the bidder on the basis of highest offer received.

6. Pursuant to the aforesaid advertisement, only three persons submitted their bid, namely, Vijay Kumar Singh, Sakul Rahi and Sarwar Alam and only two persons, namely, Vijay Kumar Singh and Sarwar Alam were present on the date of auction i.e. 13.05.2013. Accordingly, Tender Committee decided to scrap the tender as it was not expedient in the interest of revenue to settle Balughats in presence of two bidders and directed that fresh advertisement be issued in newspaper fixing schedule of dates for settlement of Balughats. The bid earlier submitted prior to 11.05.2013 will be valid as regard Technical and Financial bid.

7. One Sarwar Alam was declared highest bidder for Unit A & Ghulam Rabbani for Unit B and, as such, they were allotted Balughats, in question, for the remaining period after re- auction was held on 24.05.2013. The State again issued

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advertisement for settlement of Balughts Unit A and B for the year 2014-15 through bid cum auction for all rivers in Kishanganj and Kochadham Anchal. Pursuant to the said agreement, the petitioner and other bidders submitted their bid. In the auction held on 03.03.2014, the petitioner was declared highest bidder and his bid was accepted by the competent authority for Rs.73,50,000/- for Unit A and Rs.1,23,30,000/- for unit B. Accordingly, the competent authority issued order sanctioning the lease by order dated 25.02.2014 for Unit A and by order dated 04.03.2014 for Unit B respectively and settlement was commenced with effect from 31.12.2014. Xerox copy of the order sanctioning the lease dated 25.02.2014 and 04.03.2014 are enclosed as Annexure-3 to the writ application.

8. The petitioner presented two lease deeds before the Collector, Kishanganj, for execution within the stipulated period and formal lease deeds were executed by the Collector and registered in terms of Rule 25 of Bihar Minor Mineral Concession Rules.

9. Rule 26(6) of Bihar Minor Mineral Concession Rules speaks about royalty and assessment and amount of royalty will be assessed on the basis of enquiry and verification conducted by the Competent Officer of the monthly returns furnished by the lessee in From H and in terms of Rules 26(4) of the said Rules, the lessee shall pay royalty in respect of minor mineral extracted and removed at the rate specified from time to time in Schedule I and II. In terms of Rule 33, every lessee or permit holder, who intends to dispatch mineral by rail, road or river shall issue Challan in Form F to the carriers, who shall produce the same on demand by any competent Officer and every lessee will submit every month to the competent authority a true and correct return for mineral in Form H and if the returns are incorrect, the competent Officer will proceed to assess to the best of his judgment, the amount of royalty due from the assesses. Further, the purchaser of minor mineral, who intends to obtain royalty/ Cess clearance certificate from the competent authority shall retain the Challan in Form F issued to the carrier. The competent authority on production of Challan in Form F shall issue royalty /Cess clearance certificate of the quantity as dispatched in Challan.

10. Road Construction Department, Education, Health and Irrigation Departments in Kishanganj District carries large number of construction activities, which are carried by work contractor. The bill of quantity issued by the respective department gives the estimated cost of a project and clearly shows item wise quantity of minor mineral to be used in the said project. The petitioner has enclosed tender document and the bill of quantity for construction of PCC road from Galgaliya Check Post to Menuguri via Railway crossing issued vide NIT 05/2013 14/E- Tender/LAEO, Kishanganj, issued by the Executive Engineer, Kishanganj, wherein, quantity of minor mineral to be used. Xerox copy of the NIT issued by Executive Engineer is annexed as Annexure-4 to the writ application.

11. The work contractors while submitting their financial bids also has to indicate the item wise quantity of minor mineral to be used in the construction of the project and the source from which the supply is to be made.

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12. The petitioner under Right to Information Act, sought information from the Mines Supervisor cum Authorized Officer of the Mining Office, Kishanganj, regarding the amount that has been deducted by different department, namely, Road Construction Department, Health Department, Nagar Parishad and Irrigation Department from the running bill of work contractor against consumption of sand in construction activity and defrayed to the mining department in the financial year 2012-13. The Authorized Officer vide his letter No.359/M dated 11.07.2014 gave details of amount of royalty that has been deducted from running bill of work contracts against consumption of sand in construction activities undertaken by the concerned technical wing of the different department and defrayed to the Mining Department, which clearly shows that Rs.90,27,024/- was illegally retained by the State. Xerox copy of the letter dated 11.07.2014 is enclosed as Annexure-6 to the writ application.

13. The State by letter as contained in Memo No.C.C.03/2013/M-Patna dated 27.11.2013 as contained in Memo No.03/13 dated 27.11.2013 issued by the Principal Secretary, Department of Mines and Geology, Patna, addressed to all departmental heads clearly states that in terms of power conferred under Rule 40(10) the amount of royalty deducted against the running bill of the Contractor for consumption/use of minor mineral in construction activities is to be deposited with the Mining Department, but on appraisal, it was found that many technical wings of these departments had retained the amount so deducted and has not transmitted it to revenue department, which as per rules is to be transmitted to Mining Department since royalty plays a pivotal role in meeting revenue target of the department and, therefore, request was made to transfer the amount. Xerox copy of the letter dated 27.11.2013 is enclosed as Annexure-7 to the writ application.

14. Different technical wings of the above mentioned departments, in compliance of the aforesaid letter, has transferred the amount of royalty so deducted for each financial year to the Mining Department.

15. Counsel for the petitioner submits that Rules 40(10) does not empower the Mining Department to retain the amount of royalty, which was deducted from the running bills of the work contractor against supply of sand, a minor mineral in construction activities for the failure of work contractor to deposit Affidavit in Form M along with Form N i.e. certificate from lessee but it gives discretion to the Mining Officer not to take punitive action against the work contractor, who failed to submit bill along with Affidavit in From M with particulars in From N as very opening line of Rule 40(10) clearly states that work contractor shall purchase the mineral from lessee/ permit holder and authorized dealers only and work department will not receive bill of work contractor under any agreement if the bill is not supported by an Affidavit in Form M with particulars in Form N.

16. The Rules prohibit use/consumption of minor mineral by different departments without Challan in From F evidencing payment of Royalty and any person removing minor mineral, otherwise, in accordance with these Rules, shall

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be a party to illegal removal of minor mineral and they may be arrested, complaint lodged, suffer imprisonment, tools confiscated, driver arrested and suffer imprisonment for transporting minor mineral without Challan in Form 'F'. Such Rules leaves no manner of doubt that sand or any minor mineral cannot be removed without payment of amount of royalty to the lessee.

17. It is further submitted that Rules 40(9) of Bihar Minor Minerals Concession Rules, 1972, speaks that if royalty is included in the cost of mineral, such royalty shall be deposited in terms of Rules 43 under the head; rent and royalty from mining leases, which would thus be accredited to the petitioner's head.

18. It is further submitted that action of the respondent authorities in deducting the amount of royalty in respect of mineral consumed against the running bill of the work contractors for their failure to submit the Affidavit & Challan confers power on the competent authority to condone the act of illegal mining as failure to submit Affidavit raises a conclusive presumption that minor mineral was obtained illegally and, as such, even if the act done is per se illegal, no action will be taken by the department if the amount of royalty payable is deposited but the rules does not give power and authority to appropriate the said amount by the Mining Department. Rule 40 has been en-grafted to check evasion of royalty by making provisions of penalty for unauthorized extraction & removal of minor mineral, but does not envisage under Rule 40(10) that the amount so deposited by the work contractors shall belong to the Mining Department.

19. Counsel for the petitioner has submitted that respondent authorities has exceeded the jurisdiction in directing that the amount so collected by different department shall be transferred to the Mining Department as it is a source to augment their revenue. Counsel for the petitioner further submits that royalty is always payable by the lessee by which the grantor reserve something to himself out of which he grants in proportion to sand excavated and the action of the respondent in condoning the act of obtaining sand by illegal mining from lease hold area of petitioner will authorize it to charge royalty on use of sand to appropriate the amount, which is arbitrary and illegal.

20. Counsel for the petitioner further submits that in the interest of justice the department be directed to either refund the amount so collected to the respective lessees from whose mining lease area, the sand was excavated or direct the Mining Department to return the amount to the petitioner or adjust the same against the amount due against payment of royalty.

21. Counsel for the petitioner further submits that it is expedient in the interest of justice to quash a part of the letter dated 27.11.2013 by which direction was issued by the Principal Secretary for depositing the amount payable as royalty for consumption of minor mineral to the Mining Department to bolster its revenue.

22. Respondents have filed Counter Affidavit stating therein that for construction works huge quantity of minor minerals are used. To check the evasion of royalty, State of Bihar has framed Mines & Minerals Concession Rules, 1972. Section

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40(10) of the Rule defines "To prevent evasion of royalty it is provided that works contractor shall purchase the minerals from lessee/permit holder and authorized dealers only and no Works Department shall receive the bill which the works contractors submit to recover cost etc. of mineral used by them in completion of the works of the Works Department under any agreement from the works contractor if the said bill is not accompanied by an affidavit in Form 'M' with particulars in Form 'N' of these rules". It is also provided in the aforesaid Rules that if the works contractor deposits or pays the royalty in respect of minerals so consumed/ supplied by him as soon in the aforesaid affidavit and particulars received the said District Mining Officer in his discretion may not take action as prescribed in the Rule. The work contractors for construction works use more than one minor minerals for completion of construction work for which amount of royalty is paid under Rule 40(10) of Bihar Minor Minerals Concession Rules, 1972.

23. The State has submitted in para 9 of the Counter Affidavit that this petitioner was settlee for the year 2013 for Unit "A" Balughat and for the year 2014 the writ petitioner is settlee for Unit "A" and Unit "B" also of Kishanganj district. The writ petitioner is not settlee of whole district Balughat units. West Bengal is adjacent to Kishanganj district and from Silliguri minor minerals are transported by work contractors for construction work specially sand is transported from Bhagalpur district due to quality as mentioned in DPR of said works. The respondents have submitted in the Counter Affidavit that within Kishanganj in form of minor mineral ordinary clay and sand is available, which came into light after the writ petitioner filed petition before the DM, Kishanganj, in which it is specifically written that the sand of Kishanganj is not recommended for construction work. As such, question of refund of royalty to the petitioner does not arise.

24. This Court finds that Rule 40(10) of Bihar Minor Minerals Concession Rules, 1972, provides:

"To prevent evasion of royalty it is provided that works contractor shall purchase the minerals from lessee/permit holder and authorized dealers only and no Works Department shall receive the bill which the works contractors submit to recover cost etc. of mineral used by them in completion of the works of the Works Department under any agreement from the works contractor if the said bill is not accompanied by an affidavit in Form 'M' with particulars in Form 'N' of these Rules along with a photo copy of the said affidavit and particulars. It shall be the duty of the officer who receives or on whose behalf the said bill is received to send the photo copy of the Affidavit and particulars to the District Mining Officer/Assistant Mining Officer within whose jurisdiction the mineral was allegedly purchased, for verification.

If contents of the said affidavit on verification by the concerned District Mining Officer/Assistant Mining Officer is found to be false either wholly or partly it shall be presumed that the concerned mineral was obtained by illegal mining and in that event the said District Mining Officer/Assistant Mining Officer shall take

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action as prescribed in these Rules against the maker of the said affidavit:

Provided that if the Works Contractor deposits or pays the royalty in respect of the mineral so consumed/supplied by him as shown in the aforesaid affidavit and particulars the said District Mining Officer/Assistant Mining Officer in his discretion may not take action as prescribed in this Rule".

Explanation. - For the purposes of this rule-

(i) "Works Department" means departments of the Central or State Government including Company, Corporation, Undertakings, Autonomous body of the Government engaging Works Contractors for any kind of construction on its behalf.

(ii) "Works Contractor" means an individual, a firm, a company, an association or body of individuals who under an agreement, with the Works Department work for the said Department."

25. Similarly, Rule 40(7) of Bihar Minor Minerals Concession Rules, 1972, prescribes that "If any driver of any carrier while carrying minor minerals fails to furnish the transporting Challan in the prescribed format or refuses inspection of such Challan by the Competent Officer or Director of Mines or Additional Director of Mines or Deputy Director of Mines or Director (Mines) or Collector or Commissioner or any Officer authorized by the Collector, he shall be punishable with simple imprisonment which may extend to six months or with fine which may extend to one thousand rupees or with both.

26. Rule 33 of Bihar Minor Minerals Concession Rules, 1972, speaks as follows:

"33. Challans, Registers, Returns and Signboard. - Every lease or permit holder who intends to despatch minerals, by rail, road or river shall issue challan in Form 'F' to the Carriers who shall produce the same on demand by any Competent Officer or Collector or Deputy Director (Mines) or Additional Director (Mines) or Director of Mines or any other officer authorised by them.

(2) Every lease or permit holder shall maintain Register in Form 'G' in which day to day transaction shall be entered. He shall also have to display a signboard exhibiting following information (i) Name of kiln-owner,

(ii) mauza and plot no. of the land on which kiln, is situated (iii) volume of Brick earth excavated so far (iv) date of starting brick- laying (v) date of firing the kiln (vi) no. of rounds already completed by kiln (vii) stock of bricks on site on the day.

(3) Every lessee or permit holder shall submit every month to the Competent Officer a true and correct return for minerals in Form 'H' by the fifteenth of the following month to which it relates.

(4) Every lessee or permit holder shall give all reasonable facilities to the Competent Officer or Director of Mines or Additional Director of Mines or Deputy

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Director of Mines or any other Officer authorised by the Collector in this behalf to inspect, verify and check the accounts of the minerals.

(5) If the accounts, returns and other evidence produced by the lessee; permit-holder or any other person who has removed minerals, are in the opinion of any of the officers authorized under Rule 33 (1) incorrect, incomplete or unreliable either wholly, or partly, the officer concerned, shall report to the Competent Officer who shall proceed to assess to the best of his judgment, the amount of royalty due from the assessee:

Provided that if the Competent Officer himself has formed the opinion he shall proceed forthwith to assess to the best of his judgment, the amount of royalty due from the assessee:

Provided further that the purchaser of minor mineral who intends to obtain royalty/cess clearance certificate from the Competent Officer shall retain the challan in Form 'F' issued to the carrier. The Competent Officer on production of Challan in Form 'F' shall issue royalty/cess clearance certificate of the quantity shown as despatched in Challan."

27. In the instant case, from the case of the petitioner itself, it appears that he is not settlee of entire Balughats of Kishanganj district. He has stated in the writ petition that he is settlee of Unit "A" and "B" Balughats within Kishanganj district. Xerox copy of the order sanctioning the lease dated 25.02.2014 and 04.03.2014 has been annexed as Annexure-3 to the writ petition.

28. Counsel for the State has submitted that the bills submitted by the contractor may be related with various minor minerals. It has been mentioned in para 10 of the Counter Affidavit that West Bengal is adjacent to Kishanganj district and from Silliguri minor minerals are transported by works contractors for construction work specially sand is transported from Bhagalpur district due to quality matters as mentioned in the DPR of the said works. It is also mentioned that the petitioner himself has filed petition before the Collector, Kishanganj, stating that in the form of minor mineral ordinary clay and sand is available. Sand of Kishanganj is not recommended for construction work.

29. Moreover, as per Rule 33 of Bihar Minor Minerals Concession Rules, 1972, every lease or permit holder who intends to dispatch minerals by rail, road or river shall issue Challan in Form 'F' to the Carriers, who shall produce the same on demand by any competent Officer, (2) Every lease or permit holder shall maintain Register in Form 'G' in which day to day transaction shall be entered. He shall also have to display a signboard exhibiting following information (i) Name of kiln-owner, (ii) mauza and plot no. of the land on which kiln is situated (iii) volume of Brick earth excavated so far (iv) date of starting brick-laying (v) date of firing the kiln (vi) no. of rounds already completed by kiln (vii) stock of bricks on site on the day, (3) Every lessee or permit holder shall submit every month to the Competent Officer a true and correct return for minerals in Form 'H' by the fifteenth of the following month to which it relates.

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30. In the instant case, petitioner has not been able to substantiate that he has issued Challan in Form 'F' to the carriers of the works contractors and details of such carriers has been maintained in Register in form G in which day to day transaction is entered.

31. Every lessee or permit holder is required as per Rule 33(3) of Bihar Minor Mineral Concession Rules, 1972, to submit every month to the competent Officer a true and correct return for minerals in Form "H' by the 15th of the following month.

32. The impugned letter dated 27.11.2013 as contained in Annexure-7 only describes about the direction issued by the Principal Secretary to different technical wings of Irrigation, Health, Road Construction Department with regard to royalty realized for consumption/supply of minor minerals in construction activities by works contractors and kept under different head under the provision of Rules 40(10) Bihar Minor Mineral Concession Rules, 1972, be transmitted to the concerned Mining Office.

33. Under rule 40(10) of Bihar Minor Mineral Concession Rules, 1972, it is the District Mining Officer/Assistant Mining Officer in whose discretion not to take action against the contractor in the event works contractor deposits or pays the royalty in respect of the mineral so consumed/supplied by him as shown in the aforesaid affidavit and particulars.

34. The petitioner in the instant case has not been able to show that the amount which has been retained by the Mines Department was for the amount of sand excavated from the mining area of the petitioner for which he has issued valid Challan to Carriers in Form 'F' in terms of Rule 33 of Bihar Minor Mineral Concession Rules, 1972, and maintained details of all such dispatch in the Register in From 'G' in which day to day transaction is maintained.

35. The Hon'ble Court in a judgment reported in 1996 (1) PLJR [HC] 723 (M/s Madhusudan Choudhary & Ors. Vs. State of Bihar and others) has held that "Rules 40(8) and (10) have been framed with a view to regulate mining leases and to check unauthorized evasion of royalty and illegal mining and it is difficult to hold them ultra vires to Section 15 or 21 of the Mines & Minerals (Regulation & Development) Act. The State Government is competent to ensure that royalty is paid for the minerals being used in execution of works".

36. In the instant case, the petitioner has not been able to satisfy this Court that valid Challan was issued to the carriers of work contractors by the petitioner in terms of Rule 33 of Bihar Minor Mineral Concession Rules, 1972. There is definite case that work contractors did not produce required affidavit in form 'M' with particulars in Form 'N' of the Rules with regard to minerals consumed.

37. The Mining Department was fully competent under Rule 40(10) of Bihar Minor Mineral Concession Rules, 1972, to direct to deposit the royalty in respect of minor minerals so consumed/supplied by the works contractors with the

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concerned Mining Office as it plays a pivotal role in augmenting departmental revenue target and, accordingly, direction was issued to the departmental heads to order their technical wings to transmit those amount to Mining Department.

38. Therefore, this Court does not find any illegality in the impugned direction issued by the respondent in the letter dated 27.11.2013 as contained in Annexure-7.

39. Accordingly, this Court does not find any merit in this application.

40. This writ application is, accordingly, dismissed.

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