

(1988) 08 PAT CK 0005

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No's. 5711 of 1987, 36, 92, 194, 195, 197, 702, 1150 and 1107 of 1988

Monghyr Construction Co. and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 01-08-1988

Acts Referred:

Bihar Minor Mineral Concession Rules, 1972 — Rule 21, 33, 40(1)
Constitution of India, 1950 — Article 14, 19, 19(1), 265
Gold (Control) Act, 1968 — Section 100

Citation : (1992) 1 PLJR 44

Hon'ble Judges : Uday Sinha, J; Krishna Ballabh Sinha, J

Bench : Division Bench

Advocate : S.D. Sanjay, in Civil Writ Jurisdiction Case No. 5711/87, L.K. Bajla and Hari Shankar, in Civil Writ Jurisdiction Case No. 36/88, Nand Kishore Singh, in Civil Writ Jurisdiction Case No. 92/88, Shankar Dayal Singh, in Civil Writ Jurisdiction Case Nos. 194-195/88, Nawal Kishore Singh, in Civil Writ Jurisdiction Case No. 197/88, N.K. Singh, in Civil Writ Jurisdiction Case No. 702/88, A.K. Singh, in Civil Writ Jurisdiction Case No. 150/88, G.C. Bharuka, Navniti Pd. Singh and Ramesh Kr. Agrawal, in Civil Writ Jurisdiction Case No. 1107/88, for the Appellant; R.S. Sinha, K.N.P. Singh and Nand Bansh Nr. Singh, in Civil Writ Jurisdiction Case No. 5711/87, Kamlapati Singh and Sangita Das Gupta, in Civil Writ Jurisdiction Case No. 36/88, L.S. Sinha, Prem Nath Singh, 1107/88, S.N. Jha, Civil Writ Jurisdiction Case No. 92/88, I.P. Singh and D.K. Singh, in Civil Writ Jurisdiction Case No. 194/88, Harendra Nr. Sinha in Civil Writ Jurisdiction Case No. 195/88, J.N. Thakur in Civil Writ Jurisdiction Case No. 197/88, J.N.P. Shukla in Civil Writ Jurisdiction Case No. 702/88, L.S. Sinha, I.P. Singh and A.K. Sinha, in Civil Writ Jurisdiction Case No. 1150/88, for the Respondent

Judgement

Krishna Ballabh Sinha, J.—In this batch of nine writ applications the Petitioners have challenged constitutionality of the Government Circular bearing Memo No. 2939/2192 dated the 26th March, 1987", sent to all the District Mining Officers of the State of Bihar. In all the applications prayer has been made for a writ of mandamus commanding the Respondents to forebear and desist from enforcing

the provisions of the said Circular of the Government, as contained in Annexure-3 to C.W.J.C. No. 702 of 1988.

2. The case of all the Petitioners is almost identical. The questions for determination are the same in all the writ Petitions. The counter affidavits filed in two of the petitions were sought to be used in all the cases and so this judgment win govern all the petitions.

3. Undisputedly, all the Petitioners are contractors and they have been doing works of contract allotted by different departments of the Government of Bihar "and some of them by the Union of India also. It is the common case of the Petitioners that they submitted their bills for the work done by them. The concerned departments, while making payment, deducted some amount from their bills as royalty and cess for the minor minerals used by them in course of execution of their respective work. In their applications, the Petitioners have given the details of their bills submitted on different dates as also the amount deducted as royalty and cess from the amount payable to them. The stand of the Petitioners is that there is no provision in the Bihar Minor Minerals Concession Rules, 1972 (herein-after referred to as "the Mineral Rules") or under any other law according to which they are liable to pay royalty and cess on minor minerals used by them in execution of contract work. They approached the Respondents and requested them not to make any deduction" from their bills on account of royalty and cess but on one plea or the other their request was not heeded to. In course of execution of work of contract, the Petitioner stored bricks, stone-chips, stone-metals and sand etc. after purchasing from the dealers. So they are only consumers of minor minerals and have been purchasing the materials for execution of work of contract from the open market. They neither lessees of any mine nor holders quarrying permit and thus they are not liable to pay royalty and cess. In pursuance Circular, as contained in Annexure-3, Respondents have been naking deductions of royalty and cess from the amount payable to them J the basis of bills submitted by them.

4. Counter affidavits have been filed on be half of Respondent No. 1 in C.W.J.C. No. 92/81 and No. 195/88 stating therein that the aforesaid Circular dated 13-10-87 (Annexure-3 C.W.J.C. No. 195/88) was issued in accordance with law and does not suffer from any legal infirmity. The said Circular was only regulatory in nature and it was issued to prevent evasion of payment of royalty and cess by the lessees. It was found that the lessees in collusion with the contractors were evading payment of royalty and cess and thereby the State was put to substantial loss of revenue. At times, it was found that the contractors purchased minor minerals from the agencies who did not possess any valid lease or permit under the Minerals Rules. After giving anxious thought to this problem, the said Circular (Annexure-3) was issued making provisions for the bonafide contractors to disclose the source of purchase so that the royalty and cess could ultimately be realised from the lessee from whom such contractor purchased the materials used in execution of the work.

5. It is worthwhile to mention at the outset that in C.W.J.C. No. 36/88, 194/88, 195/M and 197/88 the Petitioners have challenged the validity of Circular No. C-1055/79-2931 dated 26-5-80 issued by Respondent No. 1. It is manifest from Circular dated 13-10-87 (Annexure 3 of C.W.J.C. No. 702/88) that in view of the judgment of this Court, the (sic) Circular was withdrawn and thus, now, there is no occasion to consider the legality of said Circular. In course of argument learned Counsel appearing in the said writ, application did not challenge the Circular dated 26-5-80. Their main target of attack was Circular dated 13-10-87.

6. When the hearing of these writ applications commenced on 25-3-88, learned Advocate General appearing on behalf of the Respondents informed the Court that the said Circular dated 13-10-87 was under consideration of the State Government for making necessary modification and so the case was adjourned on his prayer. The Government of Bihar (Respondent No. 1) issued a fresh Circular bearing No. BM/4-15-87-2262/M dated the 14th April, 1988, a copy of which was produced in Court at the time of hearing. The Petitioners seriously challenged the constitutionality of the latter circular dated 14th April, 1988 as well.

7. The main ground of attack, on behalf of the Petitioners was that the Circular dated 14.4.88 was ultra vires of the Constitution as it imposed a liability upon the contractors who were mere consumers, to pay royalty and cess although there was no provision for fixing such liability on them in the Minerals Rules. It was argued that the said Circular was discriminatory in its effect as the contractors engaged in execution of work entrusted by any private agency were not required to give any information on affidavit with regard to source of purchase, but those engaged in execution of work entrusted by the Government were required to do so. So, on the one hand big building builders and contractors engaged in contract work entrusted by any individual or private body would not come within the sweep of the Circular but the contractors entrusted with such work by the State Government or Union of India or their agents were compelled to collect and furnish information.

8. It was also argued that a provision was incorporated in the said Circular requiring the contractors to make statement that they were satisfied that the royalty and cess had been paid on the goods purchased by them. This clause was clear infringement over the right of the Petitioners guaranteed under Article 19(1) (g) of the Constitution of India. Submission was made that the discrimination, as pointed out above, resulted in violation of principle of equal protection of law to the Petitioners and infringement of their right guaranteed under Article 14 of the Constitution. It was contended that the businessmen had a fundamental right to trade and the impugned Circular put unreasonable restriction casting cloud on the right of carrying on business. It was also urged that besides being discriminatory and violative of Articles 14 and 19 of the Constitution, it would cause great harassment to the Petitioners and such other work contractors by imposing obligation to do something which was not only difficult rather

impossible to perform properly.

9. It was further argued on behalf of the Petitioners that according to Article 265 of the Constitution no tax could be levied or collected without any authority of law. Because of failure of Respondent No. 1 and its officers in making collections of royalty and cess, the contractors could not be made liable to make such payment. According to Circular dated 14.4.88, the contractors were sought to be used as machinery for collection of tax. The legislative competence for imposing tax by Respondent No. 1 was not challenged but it was contended that if no machinery was provided to collect tax under the Rules, that could not be done by an executive order. It was "emphatically argued that a similar provision was made in the Gold Control Act, 1968, which was struck down as being violative of Article 265 of the Constitution. In support of this contention reliance was placed on *Harakchand Ratanchand Banthia and Others Vs. Union of India (UOI) and Others*, .

10. As regards the above mentioned decision, relied upon by the Petitioners, I think, it is of no aid to them. In that case besides other sections of the Gold Control Act (Act No. 45 of 1968) the validity of Section 100 was also under challenge which imposed a statutory obligation upon the dealers, of gold to take all reasonable steps to satisfy themselves regarding identity of the persons from whom they purchased gold. It was argued before the Supreme Court that this Section did not specify as to what steps the dealers had to take for satisfying themselves as to the identity of the person from whom gold was purchased. It was held that the said statutory obligation imposed on the dealers was vague, uncertain and incapable of proper compliance resulting in unreasonable restrictions on trade.

11. Appearing on behalf of the Respondents learned Advocate General contended that the impugned Circular by itself did not create any charge for payment of royalty and cess. It was issued to prevent evasion of payment of royalty and cess by the lessees, as it had come to the notice of the concerned authorities that the lessees in collusion with the works contractors were evading payment of royalty and cess putting the State to loss of substantial revenue. Some works contractors were also found to have purchased minor minerals for use in execution of their works from the persons who did not hold any valid lease or licence under the Minerals Rules, as result of which conservation and proper development of minor minerals was hampered to a great extent. According to the Circular dated 14.4.88 the works contractors were required only to furnish relevant information affidavit on the basis of which royalty and cess, if not paid earlier, could, be realised from the lease holder or licensee or action could be taken against those who sold minor minerals to the works contractors by extracting the materials illegally. It was urged that no provision had been made in the said Circular to safeguard the interest of bonafide works contractors to prove the source of their purchase. If after verification, the information contained in the affidavit filed by the contractors would be found to be incorrect, only in such condition action

was contemplated against them.

12. In order to appreciate the contention raised on behalf of the parties, it is useful to quote the relevant provisions of the Circular" dated 14.4.88, which are thus:

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13. According to para "Ka" of Circular dated 14.4.88, the work contractor has to file an affidavit with his bill stating the quantity of minor minerals, date of purchase and the name and addresses of the lessee/permit holders from whom it was purchased. If the contractor does not purchase minor minerals from the lessee/permit holder and purchase is made from other vendor, according to para "Kha", he has to furnish on oath his full address, date of purchase and quantity of the minor minerals. Para "Ga" provides that every work contractor before making purchase of minor minerals has to* satisfy himself whether the vendor selling the minor minerals is a lessee or permit holder and is entitled to sell minor minerals. Apart from this at the time of purchase from the lessee/permit holder or from any person, as the case may be, the contractor has to obtain a certificate in the Form annexed to the Circular regarding the following facts:

- (i) Name and address of the vendor if he, is a lessee or permit holder as also the "mines from which the minor minerals sold was extracted;
- (ii) If the vendor is not the lessee or permit holder, name and address of the person from whom the contractor purchased the material.
- (iii) The date and (quantity of the material purchased.

In para "Gha" it is stated that the bill submitted by the work contractor cannot be entertained unless it is accompanied by an affidavit, as mentioned above. In case the vendor refuses to give certificate to the work contractor, the latter will himself fill up the Form and state the fact within his knowledge which will be taken to be true. According to paragraph "Ja", if the affidavit is found to be false and incorrect it would be presumed that the minor minerals used by the contractor was extracted illegally and he is liable for action is provided under the

Minerals Rules for illegal mining and at the same time he will also be liable for prosecution for filing false and incorrect affidavit. However, if royalty and cess is paid by the work contractor on minor minerals used by him, then no legal action could be taken against him.

14. Learned Advocate General drew attention of the Court to Rule 40(1) of the Mineral Rules which says that whosoever is found to be extracting or removing minor mineral or on whose behalf such extraction removal is being made, he be an agent manager, an employee or a contract or a sub-lessee, otherwise than in accord with these Rules, shall be presumed to, party to the illegal removal of the mineral minerals. It also provides punishment such illegal action. It is, therefore, manifest that unauthorised extraction or removal minor minerals is not permissible under law. According to Rule 21 every mining lease shall be in Form "D" or in a. Form near, thereto as circumstances of each case may require. Clause (2) of this rule says that the conditions embodied in Form "D" shall be deemed to be conditions imposed under this rule. Clause 10 of Part VII of Form "D" imposes a duty on the lessee to keep or cause to be kept correct and intelligible books of account containing, besides other details, accurate entries showing quantity and quality of the minor minerals realised from the land leased out to him. Sub-clause (3) of Clause 10 provides that in such book of account, full particulars together with address of the party or parties to whom mineral minerals has/have been sold, the date of sale the number of railway wagon together with the station from which despatched and in the case of despatches by trucks the names, address of owners of the trucks, have to be or entered. Rule 33 requires that every lessee or permit holder who intends to dispatch minor 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 Director of Mines or any other officer authorised by them. In Form "A" besides the date of-issuing such Form, "A" name and address of lessee/permit holder, name and address of the persons/contractors to whom minerals have been sold and supplied, -quantity, Truck/R.R. number, Carrier number, place of delivery of materials and Site and time of despatch have to be mentioned.

15. Therefore, it is absolutely clear that it is obligatory on the lessee/permit holder to maintain a Register showing, besides other things, the name of the vendor, but BISO to issue challan for transport of minor minerals in Form "F" disclosing the name and address of the contractor to whom materials have been sold. When a lease holder is legally bound to issue Form "A" giving all the necessary details, it will not be difficult for the [work contractor to obtain relevant information] that he has to furnish on affidavit to the authority concerned at the time of submission of his bill. In view of the provisions of Rule 21 and Form "D" part VII clause (8) and Form "F", it is not possible to accept that Circular "dated 14.4.88 puts unreasonable restrictions on "trade of the Petitioners resulting in harassment to them. It was argued by the learned Advocate General that the said Circular did not create liability for payment of tax but only required the work contractors to give information disclosing SOUIM of

purchase. I find Considerable force in his argument that the provisions of the said Circular will be effective in preventing evasion of payment of royalty and cess in larger interest of public. It is neither levy nor collection of tax. But if the relevant information's are not given by the Work contractors to the authority concerned on, affidavit, the presumption would be that the minor minerals used by such contractors in execution of the work were extracted illegally. This is a presumption of fact which is rebuttable by giving correct information to the authority concerned.

16. It is manifest on plain reading of the impugned Circular that it is specific regarding the information that the Petitioners and other contractors have to gather from the vendors from whom they purchase minor minerals. In my opinion, the conditions laid down in the Circular dated 14.4.88 cannot be held to be vague and uncertain as it discloses in unequivocal terms the type of information that the work contractors have to gather from the vendor of minor minerals.

17. In order to test the reasonableness of any statute in the light of the provision of Article 19 of the Constitution, the underlying purposes of the restriction imposed, the nature of right alleged to have been infringed, the extent of the evil sought to be remedied and its urgency and the prevailing condition which necessitates imposition of such restriction are some of the important judicial considerations that have to be kept in view (See *State of Madras Vs. V.G. Row*,). In the case of *Harakchand* (supra) relied upon by the Petitioners, it has been observed as follows:

It is necessary to emphasise that the principle which underlies the structure of the rights guaranteed under Article 19 of the Constitution is the principle of balancing of the need for individual liberty with the need for social control in order that the freedoms guaranteed to the individual subserve the larger public interests. It would follow that the reasonableness of the restrictions imposed under the impugned Act would have to be judged by the magnitude of the evil which it is the purpose of the restraints to curb or eliminate.

As I observed earlier, this case does not help the Petitioners in any way. The impugned Circular, in any view does not invade the fundamental right to carry on any trade or business of the Petitioners, because proper balance has been maintained between the freedom guaranteed under Article 19(1)(g) and the social control permitted by Clause (6) of the said Article.

18. As mentioned above, it was argued on behalf of the Petitioners that an impossible task was imposed on the work contractors by Circular dated 14-4-88. There is no merit in this argument. It is the statutory duty of every lease and permit holder to issue Challan in Form "F" to the contractor/purchaser and so it would not be difficult for any work contractor to obtain correct information on the basis of Form "F" issued by the lease holder.

19. To establish the validity of the impugned order, learned Advocate General

referred to the case of Mohan Meakin Breweries Ltd. Vs. Excise and Taxation Commr., Chandigarh and Others, . The Appellants, in that case, on the basis of permit issued under rule 7 of the Punjab Bonded Warehouse Rules, 1957, had transported various quantities of Indian made foreign liquors from the distilleries situated in Uttar Pradesh and Himachal Pradesh to Chandigarh. There was provision under Rule 8 to permit Wastage allowance during, transport of the liquor not exceeding 1 per cent. Under Rule 7, the-"Officer-in-charge, on immediate arrival of consignment to the Bonded Warehouse, had to verify the actual quantity of foreign liquor received According to Rule 9, if the report of the-"Officer-in-charge showed that the wastage exceeded the permissible limit the licensee was made liable to pay duty at the prescribed rate as if the said wastage in excess of the permissible limit had actually been removed from the Warehouse. It was contended before the Supreme Court that Rules 8 and 9 of the Bonded Warehouse Rules, under which liability was imposed on the transporter, were ultra vires the rule making power of the Financial Commissioner, as the State alone, u/s 31 of the Punjab Excise Act, 1914 (hereinafter referred to as "the Act"), had power to impose duty. Delegation of the said power was also prohibited u/s 13(a) of the Act. The court accepted the argument that the State alone had power to impose excise duty on any excisable article and to prescribe the rate thereof but observed that the argument advanced on behalf of the appellant proceeded on misconception of the correct legal position. It was held that the said rules neither imposed any duty nor prescribed the rate thereof and thus no liability was created. According to their Lordships, in essence the rules were of regulatory character meant to guard against perpetration of fraud or deception on the Revenue. The provisions were made under the said Rule for regulating and storage of liquor in the Bonded Warehouse without payment at the initial stage of the duty payable under the Act and subsequently the removal of the liquor from the Warehouse on payment or otherwise of the duty.

20. Reliance was also placed by learned Advocate General on Sodhi Transport Co. and others Vs. State of U.P. and others, . In that case Section 28-B of U.P. Sales Tax Act (15 of 1948) fell for consideration, which is thus:

28-B. Transit of goods by road through? the State and issue of transit pass.-- When a vehicle coming from any place outside the State and bound for any other place out-side the State passe through the State, the driver or other person-in-charge of such vehicle shall obtain in the prescribed maner a transit pass from the officer-in-charge of the first check-post or barrier after his entry into the State and deliver it to the officer-in-charge of the check-post barrier before his exit from the State, failing which it shall be presumed that the goods carried thereby have been sold within the State by the owner or person-in-charge of the vehicle.

21. According to the said provision if the transit pass is not handed over to the Officer-in-charge of the check-post or barrier by the person-in-charge of the

goods before his exit from the State, it shall be presumed that the goods carried thereby had been sold inside the State by him. Contention was raised that the said rule virtually made a person, who had not actually sold the goods liable to pay the sales-tax. It was further contended that a transporter being only a transporter could not be treated as a dealer within the meaning as defined in the Act. 22. After surveying a number of earlier decisions, it has been held as follows:

In our opinion a statutory provision which creates a rebuttable presumption as regards the proof of a set of circumstances which would make a transaction liable to tax with the object of preventing evasion of the tax cannot be considered as conferring on the authority concerned the power to levy a tax which the Legislature cannot otherwise levy. A rebuttable presumption which is clearly a rule of evidence has the effect of shifting the burden of proof and it is hard to see how it is unconstitutional when the person concerned has the opportunity to displace the presumption by leading evidence.

23. In view of the principle laid down by the Supreme Court in the cases mentioned above. I am of the view that the impugned order by itself does not create any liability on the Petitioners or on other contractors to pay royalty and cess for the minor minerals used by them in execution of the contract work it does not levy any tax on the Petitioners. The provision has been incorporated in the said Circular in the larger interest of the public to prevent evasion and to ensure payment of royalty and cess and so it is regulatory in nature.

21. Lastly, it was argued that the impugned order came in existence on 14-4-88 and it could not justify deduction of any amount as royalty and cess from the bills earlier submitted by the Petitioners. It was submitted that it would not be legal and proper to give effect to the impugned order with retrospective effect. There is considerable force in the argument. It is well settled that the restrictions imposed by a Notification issued by the Government in general language can only be exercised prospectively and it cannot be given retrospective effect. Consequently the amount deducted so far from the bills of the contractors prior to the date of issuance of impugned Circular dated 14-4-88 cannot be justified and as such the Respondents are legally obliged to refund the same.

25. In view of the foregoing discussions, I find that the impugned order is not violative of the provisions of Articles 14, 19(1)(g) and 265 of the Constitution and thus the applications are dismissed, but, in the circumstances, without costs.

Uday Sinha, J.

I am in complete agreement with the judgment just delivered. I, however, consider it desirable to state something of my own.

26. The large number of applications which have been disposed of by the present judgment were initially for quashing a circular dated 26.5.1980, issued by the department of Geology and Mines. The Circular is Annexure-1 in C.W.I.C. No. 195 of 1988. The said circular was withdrawn in view of some decision of this

Court. A fresh circular was issued on 13.10.1987 with certain modifications which have been mentioned by my learned brother at paragraph 5. The number of the said annexure differs in the various writ applications. This circular called upon various departments of the State Government concerned with works contracts e.g. Bridge, Construction Corporation, Public Works Department, Irrigation Department, Police Building Construction Corporation, Housing, Board, etc. to deduct royalty and cess from the bills of contractors who did not produce certificate of payment thereof and transfer the said sums to District Mining Officer. When writ applications were taken up for hearing, the impugned circular was withdrawn by the State Government and a new Circular dated 14.4.1988 was issued. The original thrust thus disappeared. We are thereafter called upon to deliberate upon the validity of the new circular. Brother Sinha has dealt with the matter in detail and has held that the new circular does not impose any tax nor does it provide a machinery for collection of tax. I am in complete agreement with the view that the circular is only a measure for checking leakage in the collection of royalty and cess.

27. In the matter of payment of royalty and cess of mine and minerals the main items are sand, earth (for making bricks) and stone chips. The question of realisation of royalty and cess is not germane to the circular of April, 1988, in regard to sand and earth for the reason that in terms of separate rules prescribed for realisation of royalty and cess thereon will be payable on the basis of the area from which earth or sand will be exploited. It is not based on the volume or weight of the sand or earth removed by the lessees or permit holders. The question therefore, calling for consideration in these writ applications relate generally to royalty and cess on stone chips used by COM tractors. The contractors are required only to make certain declarations. The obligation placed upon contractors is not too onerous to be complied.

28. In course of argument Mr. L.K. Bajla appearing in C.W.J.C. No. 36 of 1988 contended that Government has no power to seek any information which may be germane to realisation of royalty/cess. According to him, the power to seek information must be derived from some statute. Since there is no statute to that effect the State Government cannot seek information required in the circular of April, 1988.

29. This submission has only got to be stated to be rejected. It cannot be denied that the State has the power to enact laws for payment of royalty and cess. In order to check evasion thereof the State must be deemed to be vested with all powers to check that evasion. Calling for any information is only a step in that direction. It should be appreciated where there is conflict between private interest and interest of the society or State the interest of private individual must give way to the social or public interest. The realisation of royalty and cess is a statutory right of the State. For the fulfilment of that purpose it can certainly call upon all citizens to furnish the necessary information it is, therefore, well within the power of the State to seek relevant information although it may cause some

strain--certainly not unbearable strain--to fulfil that object. I have not the least hesitation in rejecting this submission of Mr. Bajla. The stand of Mr. Bajla that the Government has no right to seek any information which is not inculpatory and that the Petitioners are not obliged to cooperate in this behalf is rather unfortunate. It is anti-social.