
(2013) 08 OHC CK 0018

In the Orissa High Court

Case No : Writ Petition (C) No. 1289 of 2010

M/s. Rajat Kumar Biswal

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 30-08-2013

Acts Referred:

Citation : (2014) 117 CLT 10

Hon'ble Judges : C. Nagappan, C.J; Pradip Mohanty, J

Bench : Division Bench

Advocate : J.B. Sahoo, M.K. Rout and P. Mohapatra, for the Appellant;

Judgement

Pradip Mohanty, J.—In this Writ Petition, the Petitioner challenges the action of the Opp. Parties in deducting royalty from the running account bills of the Petitioner on the ground that the same is illegal, arbitrary & contrary to the rules. The brief facts leading to filing of the present Writ Petition are that the Petitioner is a special class contractor registered under rule 6 of the P.W.D. Contractors Registration Rules, 1967. On being duly selected as a successful bidder, the Petitioner was awarded with different packages of work for "Construction & Maintenance of Rural Roads" under the Pradhan Mantri Gram Sadak Yojana in the district of Mayurbhanj vide Annexure-2 series. On receipt the work orders & entering into agreement, the Petitioner proceeded with execution of the three packages of work bearing number OR-21-197, OR-21-199 & OR-21-200 & around 70% of these work have already been completed by now. But, when the Petitioner submitted running account bills, the Opp. Parties deducted a substantial amount therefrom towards the cost of royalty on the materials used in the work & demanded for submission of Form-K under Orissa Minor Minerals Concession Rules, 2004. Aggrieved with the aforesaid action of the Opp. Parties, the Petitioner has come up before this Court with the present Writ Petition.

2. The contention of the Petitioner is that for execution of the aforesaid construction & maintenance work the Petitioner was to collect materials, such as, chips, metals & moorum as per the terms & conditions contained in the tender

agreement. The Petitioner collected such materials from different leaseholders of mines/quarries from whom the Government have already collected lease value, surface rent, dead rent & royalty as provided under rule 24 of the Orissa Minor Minerals Concession Rules, 2004. The Petitioner contractor being not a lessee or a quarry permit holder is no way concerned with payment of royalty to the Government & is only concerned with the payment of cost of the materials collected from the quarries. Royalty is collected from the quarry permit holders, who are obliged to pay the same to the Government under rule 24 of the aforesaid Rules. Hence, it is not permissible under law to demand royalty from the contractors like the Petitioner & to deduct the same from their bills. Further contention of the Petitioner is that in a batch of cases (Akuli Charan Das, etc. etc. v. State of Orissa & others) the issue relating to reimbursement of royalty paid by the contractors was raised before this Court & by interpreting Rules 23 & 24 of the Orissa Minor Minerals Concession Rules, 2004 this Court held that the Petitioners are justified in claiming reimbursement of royalty inasmuch as there cannot be payment of royalty twice, i.e., by the leaseholder so also by the contractor in respect of the selfsame material. The deduction of royalty from the running account bills of the Petitioner is highly illegal as the Petitioner is neither a leaseholder nor a licensee of any quarry & the Petitioner is to purchase the materials from different quarries which are legally operated by the quarry leaseholders. It is not the duty of the Petitioner to submit Form-K under Orissa Minor Mineral Concession Rules, 2604 which relates to the application for quarry lease & its renewal under Rule 26(2) of the said Rules. Such arbitrary demand of the Opp. Parties for submission of Form-K by the Petitioner & deduction of royalty from the running account bills in respect of the work in question is illegal & arbitrary. In support of his contention, Learned Counsel for the Petitioner relies upon a decision reported in Akuli Charan Das, Vs. State of Orissa and Others,

3. The Opp. Parties have filed their counter affidavit denying & disputing the averments in the Writ Petition. Referring to clauses 39.1 & 41.1 of the D.T.C.N., an extract of which is annexed as Annexure-A to the counter affidavit, the Opp. Parties have specifically stated that the Petitioner contractor is to give royalty to the revenue authority before lifting minerals from the leased quarry & produce the royalty receipt/K Form/R Form during submission of its bill in support of payment made by it towards royalty, failing which the royalty amount would be kept withheld from the bill & the same would be deposited with revenue authority. Clause (ii) of rules 24 & 28 of the Orissa Minor Minerals Concession Rules, 2004 provides that the royalty shall be leviable on minor minerals from the leased area at the rates specified in Schedule-II of the said Rules. Rule 73 of the said Rules postulates that no minor minerals shall be dispatched from the leased area without a valid transit pass issued by the competent authority & no authority In-charge of execution of public work shall pass any bill for reimbursement of royalty paid on any minor mineral unless the person claiming such reimbursement produces the transit pass. In view of this, the Petitioner in order to procure the minor minerals has to obtain the transit pass for the

purpose of transportation & has to produce the same for the purpose of passing its bills. Therefore, the allegation of the Petitioner that royalty has been collected twice, i.e., from the leaseholder of the quarry as well as the Petitioner is not tenable in the eye of law. Apart from this, there is a condition in the agreement that the VAT, Income Tax, Royalty & other taxes are to be recovered from the contractor at the rate fixed by the Government from time to time. The Petitioner has entered into agreements in respect of three packages of work. In all the three agreements, the aforesaid clause exists &, therefore, the Petitioner's claim that he is not liable to pay the royalty is not acceptable.

4. In the background of the above factual matrix & the stand taken by the respective parties, the following question is formulated for consideration by this Court;

Whether the Opp. Parties are justified in claiming that they are entitled to deduct royalty from the bills of the contractors at the time of effecting payment to the contractors, if no receipt with regard to payment of royalty and/or transit pass is produced by those contractors at the time of raising such bills, when rule 24 read with rule 28 of the Orissa Minor Minerals Concession Rules, 2004 has fixed the liability for payment of royalty on the holder of a quarry lease.

5. This Court carefully perused the Mines & Minerals (Regulation & Development) Act, 1957 (as amended by Act 67 of 1957), the Orissa Minor Minerals Concession Rules, 2004, the pleadings & documents filed by the respective parties & the decision cited by the Learned Counsel for the Petitioner in Akuli Charan Das, Vs. State of Orissa and Others,

6. It is asserted by the Petitioner that the Opp. Parties are insisting on production of Form-K at the time of effecting payment against the running account bills of the Petitioner. In support of such assertion; not a single scrap of paper has been filed by the Petitioner. In absence of any documentary evidence it is difficult to believe that in fact such a demand is being made by the Opp. Parties. Furthermore, Form-K, as provided in rule 26 (2) of the Orissa Minor Minerals Concession Rules, 2004, is the format of a register maintained by the competent authority in which application received for quarry lease & its renewal is entered. The Petitioner has nothing to do with same. It is not believable that the Opp. Parties are asking the Petitioner to produce Form-K which the Petitioner is not obliged to maintain. For all these reasons, by no stretch of imagination can it be presumed that the Opp. Parties have been demanding for production of Form-K by the Petitioner contractor.

7. As it appears, the claim of the Petitioner is laid on the basis of the provisions contained in rule 24 read with rule 28 of the Orissa Minor Minerals Concession Rules, 2004 (for short "2004 Rules"). On careful perusal of both the aforesaid rules, it is seen that as per rule 24 "the holder of a mining lease" & as per rule-28 "the lessee" is liable to pay dead rent, surface rent, royalty & fees for compensatory afforestation in terms of clauses (i), (ii) & (iii) thereof. In the face

of such clear & unambiguous statutory provisions, now it is to be seen if the Opp. Parties, who are public authorities, are well within their jurisdiction in deducting royalty from the running, account bills of the Petitioner on its failure to produce receipt with regard to payment of royalty or transit pass.

8. Before delving into the question formulated in this case, it is to be borne in mind that the legislative intention behind the enactment of the Orissa Minor Minerals Concessions Rules, 2004 is only to protect the State's interest. The minor minerals of the State should not be allowed to be used by any person without paying the State's entitlements by way of various levies, taxes, royalties, etc. To prevent evasion of payment of royalty, various precautionary measures have been undertaken by the legislators by incorporating different rules in the Orissa Minor Minerals Concession Rules, 2004. Rule 73 of the 2004 Rules is one of those rules, which assumes much importance so far as collection of royalty is concerned. Sub-rules (1), (2) & (3) of Rule 73, being relevant for the purpose of this case, are extracted hereunder:

73. (1) No licensee/lessee or permit holder or auction holder or auction purchaser shall dispatch any minor minerals from an area without a valid Transit Pass issued by-

(a) the Deputy Director or the Mining Officer having jurisdiction in case of decorative stones; &

(b) the competent authority in case of other minor minerals; in Form-R, printed & machine numbered, which shall be supplied by the respective authority as aforesaid on payment of the cost thereof.

(2) No authority in charge of execution of public work shall pass any bill for reimbursement of royalty paid on any minor mineral unless the person claiming such reimbursement produces the transit pass referred to in Sub-rule(1).

(3) The provisions of Sub-rule (2) shall apply mutatis mutandis to cases where any bill claiming the reimbursement of the cost for purchase of any minor mineral is submitted before any authority in charge of execution of public work. Such authority shall not pass the bill unless the receipt of the amounts so paid is produced.

As is evident, sub-rule (1) of Rule 73 clearly provides that no minor minerals shall be despatched by the permit holder from the leasehold area without a valid transit pass issued by the competent authority described in clause (a) & (b) thereof in Form-R. The term "transit pass" has been defined in rule 2 of the Orissa Minerals (Prevention of Theft, Smuggling & Illegal Mining & Regulation of Possession, Storage, Trading & Transportation) Rules, 2007 (for short "2007 Rules"). This 2007 - Rules have been framed in exercise of the powers conferred by Section 23-C of the Mines & Minerals (Regulation & Development) Act, 1957 {amended vide Act 67 of 1957}. Section 23-C of the aforesaid Act clearly empowers the State Governments to make rules, by notification in the Official

Gazette, for preventing illegal mining, transportation & storage of minerals & for the purposes connected therewith. Rule 2 of 2007 Rules in clause (q) defines "transit pass" as a pass issued by the competent authority for lawful transportation of any mineral, raised in accordance with the provisions of the Act & Rules made thereunder, by a carrier. Further in clause (r) thereof the term "transit permit" has been defined to mean that the permission granted by the competent authority in the prescribed form for removal of mineral from one place to another. This means, no minor mineral can be transported without a transit pass/transit permit from the source of a leaseholder. So, on bare reading of sub-rule (1), it can be safely concluded that without transit pass/transit permit neither the holder of a mining lease can dispatch any minor mineral from the lease area nor any carrier can carry such minor mineral to any destination. The necessity of transit pass has also been highlighted in rule 56(xiv) of the 2004 Rules which speaks in clear term that the auction holder shall not remove any minor mineral from the area without obtaining prior permission from the competent authority or any other officer authorized by him & that no minor mineral shall be dispatched from the area without valid transit pass issued by such officer. A conjoint reading of both the provisions would go to show that if anybody intends to lift minerals from a source of a lease holder or auction holder, the same can be done only on the strength of a transit pass in Form-R by procuring the same from the lease holder or auction holder. In the case at hand, the Petitioner contractor is admittedly executing public work by using minor minerals &, as such, it must have procured transit pass in Form-R from the lease holder or auction holder while purchasing the minor minerals.

At this juncture, it is to be seen whether the Petitioner is liable for production of transit pass along with its running account bills. In this connection, sub-rule (2) of Rule 73 is very clear. Sub-rule (2) clearly mandates that unless the person claiming reimbursement of royalty produces transit pass referred to in sub-rule (1), no authority in charge of execution of public work shall pass any bill for reimbursement of royalty paid on any minor mineral. Here, the question arises whether the running account bills submitted by the Petitioner are inclusive of expenditures incurred by him towards royalty and/or payment already made by him towards royalty, & if so, whether such claim of the Petitioner for payment on account of royalty is a "reimbursement". According to Chambers Dictionary "reimbursement" means to repay or compensate someone for money already spent, losses, damages, etc. If the running account bills of the Petitioner are inclusive of royalty, then payment claimed by the Petitioner on account of royalty obviously is in the nature of reimbursement. But, the fact remains, whether the running account bills of the Petitioner includes royalty. Undoubtedly, the bills are raised by the contractors on the basis of the rates quoted by them in their bids. In clause 41.1 of Detailed Tender Call Notice (D.T.C.N.), an extract of which is annexed as Annexure-A to the counter affidavit, it is clearly provided that the rates quoted by the contractors shall be deemed to be inclusive of sales tax & other levies, duties, royalties, cess, toll, taxes of Central & State Governments,

local bodies & authorities that the contractor will have to pay for performance of the contract. Thus, it can be safely concluded that the running account bills submitted by the Petitioner are inclusive of royalty, which is deemed to have already been paid by the Petitioner, & as such the claim for such payment in its running account bills is in the nature of reimbursement. This aspect has been clarified in the Judgment rendered in Akuli Charan Das (supra), on which reliance has been placed by the Petitioner, & in paragraph 16 thereof it has been observed as follows:

16. In other words, while "Royalty" does find mention in the "Abstract of Rates", yet the payment of the same cannot be treated as a payment to the contractor towards his profits but only as a reimbursement towards the royalty borne by him, & is a separate & distinct head for computation of costs.

In the above circumstances, the irresistible conclusion is that the Petitioner's running account bills being inclusive of royalty & the claim for payment on account of the same being in the nature of reimbursement, the Petitioner is liable to submit transit pass referred to in sub-rule (1) along with the running account bills. In the Writ Petition, nowhere the Petitioner has stated that it has filed transit pass along with its running account bills. Therefore, in terms of sub-rule (2), the bills of the Petitioner claiming payment on account of royalty should not have been passed for payment. In other words, such claim for payment of royalty being in the nature of reimbursement should have been withheld/deducted from the running account bills of the Petitioner in absence of transit pass. As such, no fault can be found with the Opp. Parties for deducting royalty from the running account bills of the Petitioner in absence of transit pass.

9. Sub-rule (3) of Rule 73 envisages that sub-rule (2) shall be applicable mutatis mutandis to the cases where any bill claiming reimbursement of the cost for purchase of any minor mineral is submitted before any authority in charge of execution of public work & that such authority shall not pass such bills unless the receipt of the amounts so paid is produced. From a bare reading of this provision, it is evident that no bill claiming reimbursement of the cost for purchase of any minor mineral shall be passed by any authority in charge of execution of public work, if the receipt showing payment of such amount is not produced. The expression "sub-rule (2) shall be applicable mutatis mutandis" appearing in sub-rule (3) denotes that production of transit pass is mandatory in cases of claim for reimbursement of the cost for purchase of the minor mineral. In this case, the running account bills submitted by the Petitioner must have included the cost of minor minerals, as it is averred in the Writ Petition that the Petitioner is executing the work in question by procuring minor minerals from different quarry holders. As such, the claim of the Petitioner on that account can be construed as claim for reimbursement of cost of minor minerals purchased by it. In such view of the matter, the Petitioner, in terms of sub-rule (3), is liable to produce transit pass as well as the receipt showing payment of cost of minor minerals along with the bills. In the Writ Petition, the Petitioner has not uttered

a" single word with regard to either production of transit pass or receipt showing payment of cost of minor minerals along with the running account bills. In the circumstances, it cannot be said that deduction of royalty by the Opp. Parties from the running account bills of the Petitioner is illegal & unjust.

10. The above apart, there is a condition in the agreements, the copies of which have been annexed as Annexure-1 series to the written note submitted by the Opp. Parties, that the VAT, income tax, royalty & other taxes are to be recovered from the contractor at the rate fixed by the Government from time to time. The Petitioner has entered into agreements in respect of three packages of work. In all the three agreements, the aforesaid clause exists. Therefore, the Petitioner's claim that it is not liable to pay the royalty is not acceptable.

11. For the foregoing discussions, this Court arrives at the conclusion that the running account bills submitted by the Petitioner are inclusive of the amount charged towards royalty & the cost of the minor minerals purchased by it for the purpose of execution of the PMGSY work. The claim for such payment is in the nature of reimbursement. Therefore, the Petitioner in terms of sub-rule (2) is liable to produce "transit pass" & in terms of sub-rule (3) is liable to produce the receipt showing payment of cost of minor minerals as well as transit pass. Since in the instant case the Petitioner has failed to comply with the requirements of sub-rules (2) & (3), the Opp. Parties have rightly deducted royalty from its running account bills & such deduction cannot amount to collection of royalty twice, as alleged by the Petitioner. The conclusion arrived at by this Court gets support from the observations made in Para 17 of the Judgment rendered in the case of Akuli Charan Das (supra) which are extracted hereunder:

17. We are of the view that under 2004 Rules, although no obligation is cast on the State to effect deduction of royalty from the bills of the Petitioner, but before releasing the bills of the Petitioners the State is justified in seeking evidence of such payment of royalty, since the payment claimed by the Petitioners on account of "royalty", is clearly in the nature of a reimbursement & therefore, any claim for reimbursement has to be claimed upon furnishing evidence of payment & not otherwise.

In view of the above, the action of the Opp. Parties in deducting the royalty from the running accounts bill of the Petitioner in respect of the work under PMGSY cannot be said to be illegal or arbitrary. This Court therefore does not find any merit in this Writ Petition which is accordingly dismissed.

C. Nagappan, C.J.

I agree.