

**(2023) 11 GAU CK 0044**

**In the Gauhati High Court**

**Case No : Writ Petition (Civil) No. 5305 Of 2022**

Muslim Ali

APPELLANT

Vs

State Of Assam And 4 Ors

RESPONDENT

**Date of Decision : 24-11-2023**

**Acts Referred:**

Assam Minor Minerals Concession Rules, 2013 — Rule 5, 5(1), 5(2), 5(3), 8, 18, 23  
Assam Minor Mineral Concessions Rules, 1994 — Rule 16(a)  
Income Tax Act, 1961 — Section 194(c)  
Central Goods and Service Tax Act, 2017 — Section 51  
Mines and Minerals (Regulation and Development) Act, 1957 — Section 3(e), 4, 9

**Citation : (2023) 11 GAU CK 0044**

**Hon'ble Judges : Devashis Baruah, J**

**Bench : Single Bench**

**Advocate : D. Das, D. Gogoi, P. Nayak**

**Final Decision : Disposed Of**

## **Judgement**

1. 1. The instant writ petition has been filed by the Petitioner seeking a direction to refund the amount of Rs.22,50,799/- which was deducted from the bills of the Petitioner towards the Forest Royalty and Rs.2,00,000/- which is withheld from the 3rd R.A. Bill of the Petitioner thereby seeking a direction that the total entitlement of the Petitioner which is Rs.24,50,799/- should be directed to be paid to the Petitioner.

2. The facts involved in the instant case are that the Petitioner herein is a Class-I(A) Contractor under the Assam Public Works Department. The Respondent No.3 who is the Chief Engineer, Public Works Department (Border Roads) issued a notice dated 18.01.2019 thereby initiating a tender process for the work of construction of road from L 138 Paschim Chaysimana to Baladmari via Rahmania MEM including CD works and routine maintenance for 5 years package member AS-01-211. The estimated cost of the work was Rs.16,47,00,000.16/- and the completion period was 12 months. The Petitioner submitted his bid along with others and the Respondent No.3 vide its Letter of Acceptance bearing No.CE/

Commn/PMGSY/02/2017-18/157 dated 08.03.2019 informed the Petitioner that his tender for the above work had been accepted by the employer for the contract price of Rs.17,24,37,355/- and the Petitioner was directed to furnish the performance security for an amount of Rs.43,10,934/- within 10 days of the receipt of the Letter of Acceptance. Accordingly, the Petitioner furnished his performance security and signed the contract agreement with the Respondent No.3. Thereupon, the formal work order dated 13.06.2019 was issued thereby instructing the Petitioner to proceed with the execution of the said work in accordance with the contract documents.

3. It is the further case of the Petitioner that during execution of the said work, the authorities have prepared running account bills in the name of the Petitioner from time to time and released the same. However, in respect to four running account bills, the Respondent Authorities had deducted a huge amount towards Forest Royalty including Income Tax and Monopoly on Forest Royalty and altogether an amount of Rs.22,50,799/- was deducted towards Forest Royalty. The details of such deduction corresponding with the Running Account Bills were Rs.6,30,112/-, Rs.11,71,302/-, Rs.1,84,950/- and Rs.2,64,435/-thereby totaling to Rs.22,50,799/-. Further to that, it is also the case of the Petitioner that the Respondent Authorities while preparing and passing 3rd R.A. Bill on 21.08.2006 in respect to the work in question withheld an amount of Rs.2,00,000/- without any justifiable reason. It is under such circumstances, the instant writ petition has been filed challenging the deduction of Rs.22,50,799/- on account of Forest Royalty and withholding of an amount of Rs.2,00,000/- from the 3rd R.A. Bill.

4. Upon filing of the instant writ petition, this Court vide an order dated 14.09.2022 issued notice and in the interim directed that no coercive action shall be initiated against the Petitioner for recovery of the Forest Royalty till the returnable date. The records reveals that in spite of the notice being issued, none of the Respondents have chosen to file any reply.

5. I have heard Mr. D. Das, the learned Senior counsel appearing on behalf of the Petitioner as well as Mr. D. Gogoi, the learned Standing counsel appearing on behalf of the Forest Department and Mr. P. Nayak, the learned Standing counsel appearing on behalf of the PWD.

6. Mr. D. Das, the learned Senior counsel appearing on behalf of the Petitioner submitted that the issue involved in the instant case is settled by a Division Bench Judgment as well as also by a judgment passed by the Co-ordinate Bench of this Court. The learned Senior counsel has referred to the judgment of the Division Bench dated 08.11.2012 in the case of State of Assam and Others Vs. Muslim Ali reported in 2013 (2) GLR 505 as well as the judgment dated 30.06.2022 of the Co-ordinate Bench of this Court rendered in the case of M/S RCN Constructions Pvt. Ltd. Vs. State of Assam and 3 Others [WP(C) No.9227/2019] and submitted that both the Division Bench of this Court as well as the Co-ordinate Bench have categorically held that no appropriation of money from the contractual dues was permissible unless backed by statutory provisions

or by expressed provisions contained in the contract agreement binding the parties to the Contract. The learned Senior counsel appearing on behalf of the Petitioner therefore submitted that in the instant case, there is no statute which empowers the Public Works Department to make deduction at source in respect to Forest Royalty in the present facts. The learned Senior counsel further referred to the provisions of Section 194(C) of the Income Tax Act, 1961 as well as Section 51 of the Central Goods and Service Tax Act, 2017 to show that these are statutory provisions which empowered deduction of Income Tax as well as GST at source. He submitted that Rule 5 of the Assam Minor Minerals Concession Rules, 2013 (for short "the Rules of 2013") though permits deduction at source but the said Rule 5 shall only be applicable when the contractors engaged for works/projects of the Government Departments/Agencies are granted mining permits for the required quantity as specified in the detail project report for execution of the works/projects on making an application under Sub-Rule (1) of Rule 5 of the Rules of 2013. He submitted that as neither the terms of the contract specified that the Petitioner has to obtain a mining contract for the purpose of procuring the minor minerals and as the Petitioner herein has procured such minor minerals from outside source and not on the basis of granting mining permit, the question of deduction of Royalty at source does not arise. He further submitted that as per Rule 8 of the Rules of 2013, it is only the lessee who has to pay the Royalty in advance in respect of each of the minor minerals extracted or removed or re-consumed by him or by his agent, manager, employee, etc. He further submitted that as the Petitioner is not a lessee being granted a mining contract, the question of deduction of Forest Royalty at source does not arise. The learned Senior counsel further referring to the judgment of the Division Bench of this Court in the case of Muslim Ali (supra) referred to paragraph Nos. 11, 13 as well as 18 of the said judgment. The learned Senior counsel further referred to the judgment of the Co-ordinate Bench in the case of R.C.N. Constructions Pvt. Ltd. (supra) and submitted that exactly the issue involved in the instant proceedings was dealt with by the Coordinate Bench of this Court and it was held that in absence of any contract condition, when a contractor is unable to produce a certificate showing the use of forest produce on which Royalty has been collected, the recovery from the bill against Forest Royalty cannot be made.

7. I have heard Mr. D. Gogoi, the learned Standing counsel appearing on behalf of the Forest Department who submitted that the judgment in the case of Muslim Ali (supra) was rendered in respect to Assam Minor Minerals Concession Rules, 1994 and without taking into note the provisions of Rule 5 of the Rules of 2013. He therefore submitted that the said principles so laid down in the case of Muslim Ali (supra) cannot be made applicable to the facts of the instant case. Further to that, he submitted that although the judgment in the case of R.C.N. Construction Pvt. Ltd. (supra) had held that Rule 5 of the Rules of 2013 is only a mode of permit provided under the Rules of 2013 and it is not mandatory always for the contractor under the State agencies to procure the minor minerals through the

permit issued under Rule 5 of the Rules of 2013 and on the basis of the said had held that sans any contract conditions, the recovery from the bills against Forest Royalty cannot be made, the learned Standing counsel appearing on behalf of the Forest Department submitted that the said judgment was put to challenge before the Division Bench of this Court in the case of N.C. Das - Allied Infra (JV) Vs. Union of India and Others (WA No.258/2022) wherein the Division Bench of this Court vide its judgment and order dated 16.10.2023 held that the direction of the employer, Railways in that case to demand for the Forest Royalty Clearance Certificate from the contractor was upheld and therefore, it is the submission of the learned Standing counsel for the Forest Department that in view of the judgment and order passed in the case of N.C. Das - Allied Infra (JV) (supra), the Petitioner be directed to produce the Forest Royalty Clearance Certificate before the PWD so that the amounts which have been kept on hold be released.

8. Mr. P. Nayak, the learned Standing counsel appearing on behalf of the PWD has drawn the attention of this Court to the General Terms and Conditions of the contract and emphasized on Clause 7.2(c) and stated that the contractor as per the contract terms was not required to obtain any consent from the employer for the purchase of the materials which are in accordance with the standards specified in the contract. He further submitted that as per Clause 41.1 of the Standard Bidding Document for PMGSY, the rates quoted by the contractor shall be deemed to be inclusive of the sales and other levies, duties, royalties, cess, toll, taxes of Central and State Governments, local bodies and authorities that the contractor will have to pay for the performance of the contract. It was further stipulated that the employer will perform such duties in regard to deduction of such taxes at source as per applicable law. He therefore submitted that on the basis of Clause 41.1 of the General Conditions of Contract which is a part of the Standard Bidding Document for PMGSY, the Respondent Authorities were within their jurisdiction as regards deduction of the Forest Royalty as it was the mandate of Rule 5(3) of the Rules of 2013 to deduct such Royalty.

9. This Court have heard the learned counsels for the parties and have perused the materials on record including the judgments so referred to by the learned counsels appearing on behalf of the parties.

10. Before dealing with the provisions of law, this Court finds it relevant to take note of some of the relevant conditions contained in the General Conditions of the Contract for the purpose of the instant dispute. The said Clauses which this Court finds it relevant taking into account the submissions so made are Clause 39.1 and 41.1 of the General Conditions of the Contract. The said Clause 39.1 and 41.1 are quoted hereinunder:

"39.1. Payments shall be adjusted for deductions for advance payments, security deposit, other recoveries in terms of the Contract and taxes at source, as applicable under the law. The Employer shall pay the Contractor the amounts the Engineer has certified, within 15 days of the date of each certificate.

41.1. The rates quoted by the Contractor shall be deemed to be inclusive of the sales and other levies, duties, royalties, cess, toll, taxes of Central and State Governments, local bodies and authorities that the Contractor will have to pay for the performance of this Contract. The Employer will perform such duties in regard to the deduction of such taxes at source as per applicable law.”

11. From the above quoted Clauses, it reveals that payment shall be adjusted for deduction for advance payments, security deposit, and other recoveries in terms with the contract and taxes at source as applicable under law. The employer was required to pay the contractor the amount the engineer had certified within 15 days of the date of each certificate. From a perusal of Clause 41.1, it would be seen that the rates of the contractor shall be deemed to be inclusive of sales and other levies, duties, royalties, cess, toll, taxes of the Central and the State Government, local bodies and authorities that the contractor will have to pay for the performance of the contract. The contract visualized and empowered the contract employer to perform such duties as regards the deduction of such taxes at source as per the applicable laws.

12. The learned counsels appearing on behalf of the Respondents however could not place before this Court any term of the contract which mandates that the contractor was required to obtain a mining permit for the required quantity of minor minerals and it was only on the basis of such mining permit that the minor minerals shall be used or consumed by the contractors in respect to the tendered work of the Respondent PWD. The learned counsels for the Respondents have also failed to show any condition which empowers the Respondent PWD being the employer to deduct Forest Royalty in the contract.

13. In the backdrop of the above terms and conditions, this Court now finds it relevant to take note of the judgments which have been referred to by the learned counsels for the parties. The first judgment which has been referred to is the judgment of the Division Bench in the case of Muslim Ali (supra). The said case was rendered by taking into account the provisions of the Mines and Minerals (Regulation and Development) Act, 1957 (for short “the Act of 1957”) and the Assam Minor Minerals Concession Rules, 1994. It is also seen that the terms which have been taken note by the Division Bench i.e. Clause 7.2 and Clause 41.1 are similar terms which are there in the present contract and this aspect of the matter could be seen from paragraph No.11 of the judgment of the Muslim Ali (supra). This Court finds it relevant to reproduce Paragraph Nos. 11, 13, 14, 15 and 18 of the said judgment which are quoted hereinbelow:

“11. Under clause 7.2 of the tender documents, the contractor was not required to obtain any consent from the employer for the purchase of materials, which should be in accordance with the standards specified in the contract. Clause 41.1 of the tender documents provides that the rates quoted by the contractor shall be deemed to be inclusive of the sales and other levies, duties, royalties, cess, toll, taxes etc. that the contractor will have to pay for the performance of the contract and that the employer will perform such duties in regard to the

deduction of such taxes at source as per applicable law. As per clause 39.1 of the tender documents, payment shall be adjusted on account of deductions for advance payments, security deposit, other recoveries in terms of the contract and taxes at source as applicable under the law.

13. Under Section 3(e) of the Mines and Minerals (Regulation and Development) Act, 1957 (Mines Act), "minor minerals" have been defined to mean building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed purposes and any other mineral which the Central Government may by notification in the official gazette declare to be a minor mineral. Thus, from a reading of the above definition, it is clear that stones, gravels and ordinary sand are minor minerals. Section 4 of the Mines Act provides that no person shall undertake any prospecting or mining operation without a mining lease granted under the Mines Act and the Rules made thereunder. Section 9 deals with royalties in respect of mining lease. As per Section 9, holder of a mining lease is required to pay royalty in respect of any mineral removed or consumed by him or by any person acting on authority on his behalf from the leased area at the rate specified.

14. Assam Minor Mineral Concessions Rules, 1994 (Mining Rules) have been made under the Mines Act. As Per Rule 16(a) of the Mining Rules, the lessee shall pay royalty on the minor mineral/minerals removed or consumed by him or by any person acting on authority on his behalf from the leased area at the specified rate.

15. From a conjoint reading of the aforesaid provisions, it is quite clear that it is the duty of the lessee to pay royalty for use of forest produce. Failure to pay royalty would invite consequences as provided.

18. We are in agreement with the views expressed by the learned Single Judge. No appropriation of money from the contractual dues is permissible unless backed by statutory provision or by express provision contained in the contract agreement binding the parties to the contract. In absence thereof, such deductions would be unauthorized. Learned Counsel for the appellants have not been able to show any such provision to persuade us to take a different view."

14. From the above quoted portion of the judgment, it would be seen that the Division Bench of this Court had taken note of Section 3(e) of the Act of 1957 which defined the term "minor minerals" and came to a finding that stones, gravel and ordinary sand are minor minerals. Further, taking note of Section 4 of the said Act of 1957, it was observed that no person shall undertake any prospecting or mining operation without mining lease granted under the Act of 1957 and the Rules made thereinunder. Reference was made to Section 9 of the said Act of 1957 which dealt with Royalties in respect of mining leases wherein it has been mentioned that it is the lessee who would be under statutory obligation to pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area at the

rate specified in the second Schedule in respect to that mineral. In Paragraph No.14 of the said judgment, the Division Bench further referred to the provisions of the Assam Minor Mineral Concessions Rules, 1994 and opined that as per Rule 16(a) of the Rules of 1994, it is the lessee who shall pay the Royalty on the minor mineral/minerals removed or consumed by him or by any person, acting on authority on his behalf or from the leased area at the specified rate and came to an opinion that it is the duty of the lessee to pay the royalty for use of the forest produce. The Division Bench further took note of the Office Memorandum of the Finance Department dated 17.06.2000 and opined that the same being not a condition incorporated in the contract agreement and therefore would have no binding force on the contractor. The Division Bench further observed in its conclusion that no appropriation of money from the contractual dues was permissible unless backed by statutory provisions or by express provisions contained in the contract agreement binding the parties to the contract and held that in absence thereof, such deductions would be unauthorized.

15. This Court further finds it relevant to take note of the judgment of the Co-ordinate Bench in the case of M/S R.C.N. Constructions Pvt. Ltd. (supra) wherein amongst the various issues so framed, one of such issue was whether the State Authority i.e. the Public Works Department, Railways etc. can deduct forest royalty from the bills/security deposit of the contractors in absence of any stipulation in the contract agreement empowering the employer State to do so. The Co-ordinate Bench had also decided the issue as to whether the contractor executing works for Government and its Departments are bound to procure minor minerals/forest produce only through permit granted under Rule 5 of the Rules of 2013. The Co-ordinate Bench of this Court after taking note of various contentions opined that in absence of any contract condition, when a contractor is unable to produce a certificate showing the use of forest produce on which royalty has been collected, the recovery from the bills against the forest royalty cannot be made. It was also opined that those contracts where the Office Memorandum dated 17.06.2000 was a part of the contract and the same has been signed by the contractors and the employer, the contractors shall be bound by the Office Memorandum dated 17.06.2000 only when a specific clause was incorporated in the contract that the materials required should be collected either through permit etc. under the Rules of 2013 and/or through permit issued under the Assam Forest Regulation, 1891 and the Rules and Notifications issued thereunder. It is also seen from the judgment of the Co-ordinate Bench wherein it was opined that Rule 5 of the Rules of 2013 is only a mode of permit provided under the Rules of 2013 and it is not mandatory always for a contractor under the State Agencies to procure the minor minerals through the permit issued under Rule 5 of the Rules of 2013. It was observed that the contractors would be compelled to do so when the contract conditions stipulated that the minor minerals must be collected through the permit under Rule 5 of the Rules of 2013. It was further observed that Rule 5 was not mandatory in each and every contractual work inasmuch as the Rules of 2013 itself provided that mining lease/

contract/query permits can be granted under Rule 8 or Rule 18 or Rule 23 of the Rules of 2013 and therefore, the contractors are within their liberty to purchase/procure the minor mineral from other agencies who are holding mining lease/contract/query permits until the same is barred under the conditions of the contract.

16. This Court had also taken note of the judgment of the Division Bench in the case of N.C. Das - Allied Infra (JV) (supra) which was rendered in an appeal against the judgment passed by the Co-ordinate Bench of this Court in the case of M/S R.C.N. Construction Pvt. Ltd. (supra). In the said case, the challenge was made to the legality and validity of the notice dated 08.02.2021 issued by Northeast Frontier Railway requiring the Appellants therein to provide the Forest Royalty Clearance Certificate regarding 5 components of the work order in question i.e. (i) earth work, (ii) total sand, (iii) quarry dust, (iv) stone chips, and (v) boulder. The letter mentioned that the Forest Royalty Clearance Certificate of the quantities of the materials utilized by the Appellants would have to be submitted before clearing the next bill submitted towards the construction work awarded by the Northeast Frontier Railway to the Appellants viz. B.G. standing formation; minor bridges including retaining wall; side drains, catch water drains, ground improvement works and all other connected ancillary works in between km 44.13 (including Digaru Station yard) to km 98.00 in connection with Digaru-Hojai Double Line project of N.F. Railway. The said communication was put to challenge by the Appellants in the case of N.C. Das - Allied Infra (JV) (supra) in WP(C) No.9227/2019. The Division Bench took into consideration the submission made by the Appellants therein to the effect that as in Condition 13.2 of the contract, ordinary earth was not covered, the employer Railways was not at liberty to demand the Forest Royalty Clearance Certificate from the Appellants regarding the said mineral used in the construction works. The Division Bench rejected the said contention opining that Clause 13.2 is not exhaustive in its operation because it only referred to sand, stone and timber in a generic sense as covered under forest produces. It was observed that the governing phrase of the said clause is forest produces and the examples in the form of sand, stone, timber are given but thereafter, the word "etc." being used means that whichever forest produce/mineral is used in the construction works, the contractor would have to furnish documentary proof that the requisite Royalty on such produces have been paid to the concerned Department. It is under such circumstances, the Division Bench found no infirmity with the judgment rendered by the Co-ordinate Bench in the Case of M/S R.C.N. Constructions Pvt. Ltd. (supra).

17. Before further proceeding, this Court finds it relevant to observe two vital aspects of the matter. First, neither the Forest Department nor the PWD have assailed the judgment rendered in M/S R.C.N. Constructions Pvt. Ltd. (supra) or for that matter apprised this Court that the said Departments have assailed and the issue is pending. Under such circumstances, the said judgment rendered by the Co-ordinate Bench in M/S R.C.N. Constructions Pvt. Ltd. (supra) is binding on this Court sans anything being shown that the said judgment is per incuriam.



Secondly, the submission made by the Standing counsel for the Forest Department that the Division Bench in *N.C. Das – Allied Infra (JV)* (supra) mandated that the Forest Royalty Clearance Certificate is to be produced before the employer in all cases is totally misconceived inasmuch as in the said case, there was a term in the form of Clause 13.2 which is not there in the present case.

18. Now, coming to the merits, it is seen that Rule 5(2) of the Rules of 2013 stipulates that the contractor engaged for works/projects of the Government Department/Agencies shall be granted mining permit for the required quantity as specified in the detailed project report for execution of the works/projects on making an application under Sub-Rule (1) of Rule 5 of the Rules of 2013. It is also relevant to take note of that upon being granted the mining lease, the contractor would step into the shoes of the lessee of a mining contract. Further to that, Rule 8 of the Rules of 2013 stipulates that it is the lessee who is responsible/statutorily obligated to pay the Royalty. Therefore unless and until the contract terms mandatorily obligates the contractor to obtain mining lease for use and consumption of minor minerals in the tendered works, the contractors merely by using the minor minerals does not become a lessee to be statutorily obligated to pay Royalty. Therefore, if the contractor is not required to pay Royalty, the question of deduction of Royalty from the dues of the contractor cannot be made by the Respondent PWD as done in the instant case.

19. This Court also finds it relevant to deal with the submissions made by Mr. P. Nayak, the learned Standing counsel for the PWD that the contract price being inclusive of all the dues includes the Royalty as stipulated in Clause 41.1 of the General Conditions of the Contract. It is well settled that the shifting of liability is permitted by mutual agreement. However, it cannot be lost sight of that the incidence for payment of Royalty would arise only if the mining lease is taken. Therefore, it is the opinion of this Court that Clause 41.1 of the General Conditions of the Contract cannot be invoked to include Royalty unless and until the mining lease is/are granted to the contractors or the contract forbids obtaining minor minerals from any other source other than mining lease. This Court further finds it appropriate to mention that in the contract in question there is no clause that the Forest Royalty Clearance Certificate was required to be submitted as per the Conditions of the Contract unlike in the case of *N.C. Das - Allied Infra (JV)* (supra). Therefore, the Respondent PWD cannot insist upon the Forest Royalty Clearance Certificate for releasing the amounts deducted as Forest Royalty.

20. Having analyzed the above and taking into account the terms and conditions of the contract in question, this Court therefore finds no reason to defer with the judgment of the Co-ordinate Bench in the case of *M/S R.C.N. Constructions Pvt. Ltd.* (supra). This Court is also of the opinion that sans any term in the agreement between the Petitioner and the Respondent PWD to the effect that the Petitioner can only use or consume minor minerals after obtaining the mining

permit as stipulated in Rule 5 of the Rules of 2013, the Respondent PWD Authorities, in the opinion of this Court, had no authority to deduct any Forest Royalty from the bills of the Petitioner. Accordingly, the deduction so made of an amount of Rs.22,50,799/- towards Forest Royalty by the Respondent PWD authorities is declared as illegal and unauthorized.

21. Consequently, this Court directs the Respondent PWD authorities to release the amount of Rs.22,50,799/- to the Petitioner which have been deducted from the bills of the Petitioner on account of Forest Royalty within a period of 15 days from the date a certified copy of the instant judgment is served.

22. This Court further had taken note of that the Petitioner claims a further amount of Rs.2,00,000/- which have been alleged to have been illegally withheld from the 3rd R.A. Bill. It is not known for what reason(s) the said amount had been withheld and the Respondents in spite of various opportunities being given have not filed any affidavit disclosing the reasons. Under such circumstances, this Court therefore directs the Respondent No.3 to make necessary verification as to why the amount of Rs.2,00,000/- have been withheld from the 3rd R.A. Bills of the Petitioner; and taking into account Clause 13.1 of the tender conditions, directs Respondent No.3 after carrying out necessary verifications, if it is found that the Petitioner is entitled to, the same be released to the Petitioner within a period of 3 (three) months from the date of receipt of the certified copy of the instant judgment.

23. With above observations and directions, the instant writ petition stands disposed of.