

(1986) 01 OHC CK 0020

In the Orissa High Court

Case No : Original Jurisdiction Case No's. 609 and 1144 of 1980

Orient Paper and Industries Ltd. and Another APPELLANT
Vs

Tahasildar-cum-Irrigation Officer and Others
 State Vs RESPONDENT
Orient Paper and Industries Ltd. and Others

Date of Decision : 15-01-1986

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Orissa Irrigation Act, 1959 — Section 20, 21, 21(2), 27, 28
Orissa Irrigation Rules, 1961 — Rule 26, 27, 47, 47(2), 47(5)

Citation : (1986) 61 CLT 209

Hon'ble Judges : J.K. Mohanty, J;D.P. Mohapatra, J

Bench : Division Bench

Advocate : Govind Das, Jagannath Das, K.K. Jena, in O.J.C. No. 609 of 1980 and Addl. Standing in O.J.C. No. 1144 of 1980, for the Appellant; A.K. Patra, Additional Government Advocate, S.K. Das, A.S.C. in O.J.C. No. 609 of 1980, G. Das, J. Das and K.K. Jena, in O.J.C. No. 1144 of 1980, for the Respondent

Final Decision : Dismissed

Judgement

D.P. Mohapatra, J.—These two applications under Articles 226 and 227 of the Constitution are directed against the order dated 13-2-1980 passed by the Revenue Divisional Commissioner Northern Division, Sambalpur, confirming with certain modifications the assessment of water rate, by the tahasildar-cum-Irrigation Officer, opposite party No. 1 under the Orissa Irrigation Act, 1959 (hereinafter referred to as "the Act").

O.J.C. No. 609 of 1980 has been filed by the Orient Paper and Industries Ltd., a company within the meaning of the Companies Act, 1956 and one Balkrishna Vyas, a share holder of that company, impleading the Tahasildar-cum-Irrigation Officer, Jharsuguda, the Subdivisional Officer, Sadar Sambalpur, the Revenue Divisional Commissioner, Northern Division, State of Orissa, through the Secretary Department Revenue the Certificate Officer and the Additional Tahasildar, Jharsuguda, the Subdivisional Officer, Jharsuguda and the Additional

Magistrate, Sambalpur as opposite parties.

O.J.C. No. 1144 of 1980 has been filed by the State of Orissa against the Orient Paper and Industries Ltd. and Balakrishna Vyas and others challenging the portion of the order of the Revenue Divisional Commissioner, Northern Division by which the water rate chargeable from the company has been reduced.

2. The gist of the Petitioners' case in O.J.C. No. 609 of 1980 is that Petitioner No. 1 carries on business, inter alia, of manufacturing of paper. It owns a paper mill (hereinafter referred to as "mill") situated at Brajarajnagar in the district of Sambalpur. The mill went into production in 1939. Paper and board are being manufactured therein since 1939. The company owns a compact block of 889 acres of land under different plots extending from the bank of river Ib. from east to west. According to the Petitioners several plots of land comprised in the said 889 acres of land abut on the river Ib. and other plots are connected with or are attached to or are contiguous to the plots abutting the said river Ib. The lands on which the said mill is situated, is at a distance of about 400 yards from the river bank.

Since the year 1939 when the mill went into production, the Petitioner No. 1 - company has been drawing water needed for manufacture of paper and beard at the mill and also for supply to the residential colonies of workmen and staff of the mill from the flowing stream of the river Ib. Water so drawn from the river is purified before use for the manufacturing process and for supply to the colonies. According to the Petitioners, the water after its use in the manufacturing process is discharged back into the said river Ib. after purification in the fibre and water recovery plant and sedimentation lagoon. The quantity of water drawn by the said mill varies within the range of 4 lakhs to 6 lakhs gallons per hour depending upon the manufacturing programme and other circumstances. During the lean period, i.e. from January to June, when the flow of water in the river is less, Petitioner No. 1 at its own cost constructs sand bundhs across the river at three or more places for impounding the water. Without construction of such bundhs, according to the Petitioners, it would not be possible to get water of the said river in sufficient depth at the drawing point of the pumps.

The work for the construction of the Hirakud Dam commenced sometime in 1948 and the construction of the said dam was completed in the year 1956. The maximum level of the reservoir of the said dam is 630 R.L. The dam was constructed by the Central Government and made over to the State Government after completion. It is the case of the Petitioners that from authoritative maps it appears that the point at which water is drawn by the company is beyond the area of the Hirakud Reservoir. The pump house also does not fall within the area of the said reservoir.

The Orissa Irrigation Act 1959, enacted to consolidate and amend the laws relating to the irrigation, assessment and levy of water rate and cess in force in different parts of the State of Orissa, was brought into force with effect from the

1st June, 1961 by a notification dated 24th May, 1961. In March, 1969, the then Collector of Sambalpur addressed a letter to the Secretary of Revenue Divisional Commissioner, Northern Division Orissa relating to construction of the cross-bundhs by the Petitioner No. 1 on the river Ib. and drawing of water from the said river for use at its mill. Therein the Collector dealt with two points, one relating to permission to put up cross-bundhs and the other relating to the payment of water rate. He suggested that construction of cross-bundh in fact, benefited the villagers in various ways and the accumulated water was also utilised in some places for growing rabi crops. The Collector further suggested that the mill should pay salami at the rate of Rs. 1,000/- per bundh per year. In pursuance of the instructions contained in the letter the encroachment cases against Petitioner No. 1 were dropped. The opposite party No. 1 also passed an order in the year 1967-68 granting permission to the Petitioner No. 1 for construction of sand bundhs on payment of royalty was of Rs. 1,000/- per year. This arrangement was continuing till 1975-76. Thereafter the royalty was enhanced to Rs. 3,000/- per bundh per year from the year 1976-77.

As regards payment of water rate, the Collector in his letter stated that the Revenue Divisional Commissioner had suggested that the company should pay a lump sum of Rs. 10,000/- per annum towards water rate for the present and the amount so paid was to be adjusted against the water rate fixed under law. It was further stated that in the said letter that the construction of Hirakud Dam was completed in the year 1956, thereby impounding the flowing water of the river Ib and that the mill was using the natural flow for a part of the year when the level of the reservoir was below the level at which the pumping station was situated and that when the level of the reservoir rises above that level during the months of September to December, the said mill utilises the water of the reservoir. During the period from September to December the mill draws water from the artificial reservoir created by putting up cross bundh at their own cost and that they are liable to pay water rate only for that period of the year, from September to December, during which time they draw water from the reservoir level. Taking average period during which the water rate was payable by the Petitioner No. 1 to be four months and assuming that about six lacs gallons are used per hour, the water rate was roughly worked out at Rs. 12/- per hour or Rs. 280/- per day or Rs. 8,500. per month. It was suggested that the mill may be required to pay about Rs. 34,000/- to Rs. 40,000/- for 4 months depending upon the actual quantity of water used during a particular year. It was, however, stated by the Collector that after coming into force of the Act from the year 1961-62 the Petitioner No. 1 becomes legally liable to pay water rate so long it draws water from the reservoir.

The Petitioner No. 1 in its reply to the aforesaid letter of the Collector intimated the authorities that even when the level of the water rises above the level of the pump it uses the flowing water of the said river Ib. Hence, it is not liable to pay any levy under the Orissa Irrigation Act, 1959. Thereafter a case under the Act bearing Irrigation Case No. 1 (IRR) of 1972 was initiated by the Irrigation Officer,

opposite party No. 1 against the Petitioner No. 1. On receiving a notice to show cause why water tax should not be charged, the Petitioner No. 1 filed a show cause taking the stands inter alia, that the Act and the Orissa Irrigation Rules, 1961, did not apply to the case as the company was drawing water from the flowing stream of the river Ib and not from any irrigation work as defined under the statute; and since it has been drawing water from the natural flow of river Ib since 1939, it had acquired rights to enjoy free flow of water from the river and the said right cannot be abridged under the provision of the statute.

By order dated the 27th of April, 1974, the Irrigation Officer imposed water tax for the years from 1961-62 to 1973-74 amounting to Rs. 19,13,184/- and for the year 1974-75 Rs. 1,47,168/-, aggregating to Rs. 20,60,352/-. The said opposite party No. 1 held in the order that the Act and the Rules framed thereunder were applicable to the Petitioner No. 1 as it was drawing water from the Hirakud Reservoir. Water tax was calculated on the basis of consumption at 6 lacs gallons per hour. By the said order the Petitioner No. 1 was also directed to enter into an agreement for supply of water as required under the Act and the Rules.

Being aggrieved by the aforesaid order of the opposite party No. 1, Petitioner No. 1, preferred an appeal before the Subdivisional Officer, Sadar, Sambalpur; opposite party No. 2 in this writ application. This appeal was disposed of by opposite party No. 2 vide order dated 23rd December, 1975, wherein he remanded the case to opposite party No. 1 for re-enquiry and fresh disposal, since, according to the appellate authority, proper enquiry had not been made to come to a finding whether the lifting of water was being done at point within the Hirakud Reservoir.

The matter was again considered by the opposite party No. 2. In course of the hearing of the Case, the Petitioner No. 1, examined 3 witnesses and one witness, the Subdivisional Officer Hydrology was examined on behalf of the department (opposite party No. 4). Some documents were also produced on behalf of the parties. By order dated 10th of August, 1975, opposite party No. 1 held that the Petitioner No. 1 was liable to pay a sum of Rs. 1,89,21,600/- for the years 1961-62 to 1975-76 and a further sum of Rs. 12,61,440/- for the years 1976-77, totalling to Rs. 2,01,83,040/-. In the said order the opposite party No. 1 held that the Petitioner No. 1 was drawing water from the reservoir area and it was liable to pay for the unauthorised use of water and further that the water discharged by the Petitioner No. 1 was not purified before being discharged in the river. The assessment of the levy was made at the maximum rate applicable for unauthorised use of the water.

The Petitioner No. 1 preferred an appeal against the aforesaid order passed by the opposite party No. 1. The said appeal was disposed of by the opposite party No. 2 by order dated 22nd June, 1977 upholding the findings of the opposite party No. 1. The appellate authority, however, modified the calculation of the amount due for the Petitioner No. 1 by deleting the period prior to coming into force of the Act.

Not satisfied with the aforesaid order of the appellate authority, the Petitioner No. 1, filed a revision application u/s 48 of the Act before the opposite party No. 1, the Revenue Divisional Commissioner, Northern Division, Sambalpur, which was disposed of by an order dated 13th of February, 1980. The revisional authority rejected the revision petition with modification to the extent that the rate of tax for the unauthorised use of water was reduced to four times the bulk rate for filling tanks instead of six times as imposed by the opposite party Nos. 1 and 2.

The authority formulated the questions raised before it in the following manner:

- (i) whether in the second enquiry the- Tahasildar could go into the question of fresh assessment of water rate instead of restricting his finding out if the intake point is within the Hirakud Reservoir?
- (ii) whether the intake point of the Mill is below 630 R.I.?
- (iii) If so whether this point is within the reservoir of Hirakud Project?
- (iv) Whether the definition of reservoir to include the bed of river Ib is valid?
- (v) Whether the drawal of water is from an Irrigation work as defined under the Act?
- (vi) Whether drawal of water can be treated as supply on which water rate is payable?
- (vii) Whether drawal of water can be held as unauthorised?
- (viii) Whether water discharged is polluted; and
- (ix) Whether any levy is possible for unauthorised use under Rule 47(2) within the frame work of the Orissa Irrigation Act?

All the aforesaid questions were answered in the affirmative. This order which is filed as Annexure-13 to the Writ application is questioned by the Petitioners on various grounds.

On the aforesaid averments," the Petitioners pray for the following reliefs:

- (a) A writ of and/or order and/or direction in the nature of mandamus commanding the opposite parties and such of them to withdraw, cancel and/or rescind the said purported dated 10th of August, 1976 (Annexure-9), 22nd of June, 1977 (Annexure-11) and 13th of February, 1980 (Annexure-13) and the purported certificate proceedings pending before the opposite party Nos. 6 and 7 and to act according to law;
- (b) A writ of and/or order and/or direction in the nature of mandamus commanding the opposite parties not to levy any rates, taxes or charges under the said Act and/or the said Rules in respect of the water drawn by Petitioner No. 1 from the said river Ib for its sa id mill and not to interfere with Petitioner No. 1 s

right to draw water from the said river for its said mill;

(c) A writ of and/or order and/or direction in the nature of certiorari calling upon the opposite parties to transmit and certify the records relating to the said purported orders dated. 10th of August, 1976, 22nd of June, 1977 and 13th of February, 1980 and the said purported certificate proceedings so that the said purported orders and/or purported certificate proceedings may be set aside and/or quashed and conscionable justice might be rendered;

(d) A writ of and/or order and/or direction in the nature of prohibition commanding the opposite parties to forbear from giving any effect to and/or taking any further Step whatsoever pursuant to and/or in furtherance of the said purported orders dated 10th of August, 1976, 22nd of June, 1977 and 13th of February, 1980 and/or in the said certificate proceedings and/or in any poceedings relating thereto;

(e) Rule nisi in terms of prayers (a), (b), (c) and (d) above and make the Rule absolute.

3. The opposite parties 1, 2, 5 and 7 in their counter affidavits have taken the stand that the order of the Revenue Divisional Commissioner, Northern Division, rejecting the revision petition filed by the Petitioner-company is legal and justified excepting that portion of the order reducing the rate of water rate, which is the subject matter of the writ petition filed by the State Government in O.J.C. No. 1144 of 1980. They assert that the Petitioner-company was drawing water for use in its mill and also for supply to the colonies situated near by, from the Hirakud Reservoir, which comes within the definition of "Irrigation work" under the Act and therefore, it was liable to pay water rate/water cess for such drawing of water in accordance with the provisions under the statute and the rules framed thereunder. It is also their contention that since the Petitioner-company has been drawing water from the reservoir without seeking permission and without entering into an agreement with the competent authority for the purpose, as required under the Act, the use of the water by the company was unauthorised. Regarding the question whether the Petitioner-company has a riparian right to use water from the river without payment of any charge, the said opposite parties submit that it being a hew point raised before the revisional authority for the first time and since it involves determination of facts, the authority rightly rejected the plea. The opposite parties also contend that in view of the decision reported in the case of Titaghur Paper Mills Co. Limited v. State of Orissa and Anr. ILR 1975 Cutt. 1095, there is no merit in the contention raised by the Petitioner No. 1.

4. The contentions raised on behalf of the Petitioners can be summed up as follows;

(i) Since the Petitioners do not use the water from the river to for the purpose of irrigation; but for industrial purposes and for supplying drinking water to the employees of the company and other residents of the colonies, the Act and the

Rules framed thereunder have no application to such user of the water.

(ii) On the point at which water is drained by the Petitioners does not lie within the Hirakud Reservoir area and as such the use of water by the Petitioners is not from any "irrigation work" as defined u/s 4(9) of the Act.

(iii) Even assuming that the Petitioners are liable to pay water rate for use of water in their mill and for supply to the residential colonies nearby, they are not liable to pay at the penal rate assessed by the authorities under the Act. On the other hand it is contended by the opposite parties that there is no merit in the contentions raised on behalf of the Petitioners and the matters are concluded by concurrent findings of fact arrived at by the statutory authority which are not available to be interfered with in these proceedings. It is also contended by the opposite parties that the impugned order of assessment is legal and valid.

Before proceeding to consider the contention raised on behalf of the parties it will be helpful to refer to same relevant provisions of the statute, the Orissa Irrigation Act, 1959 and the Orissa Irrigation Rules, 1961.

Section 4(4) defines "compulsory basis water rate" as follows:

"Compulsory basis water rate" means a flat water rate per acre of land within the culturable commended area of an irrigation work payable to the State Government for supply of water, whether used or not from an irrigation work for irrigation of staple cereal crop generally grown in such area.

Section 4(8) defines "Irrigation Revenue" to mean:

"Irrigation Revenue" includes all sums payable to Government for the use of or right to use of waste of water from an irrigation work.

Section 4(9) defines "Irrigation work" as follows:

Irrigation work- (a) all reservoirs, tanks, anicuts, dams, weirs, canals, barranges, channels, pipes, wells, tube-wells and Artisan wells constructed, maintained or controlled wholly or mainly by the State Government (or by any panchayat samiti, constituted under the Orissa Panchayat Samiti and Zilla Parishad Act, 1959, on behalf of such Government) for the supply or storage of water;

(b) all works, embankments, structures, supply and escape channels connected with such reservoirs, tanks, anicuts, dams, weirs, canals, barrages, channels, pipes, wells, tube-wells and Artisan wells and all roads constructed for the purpose of facilitating the constructions or maintenance of such reservoirs, tanks, anicuts, dams, weirs, canals, barrages, channels, pipes, wens, tube-wells and Artisan wells;

(c) all water-courses and drainage works as herein defines;

(d) all lands occupied by the Government for the purpose of such resavoirs tanks, anicuts, dams. weirs, canals, barrages, channels, pipes, wells, tubewells and Artisan wells and bad building machinery, fences, gates and other structures

occupied by or belonging to the State Government upon such lands;

"Water cess" is defined u/s 4(16) thus:

"Water cess" is the amount payable in respect of any land under the irrigable command of certain classes of irrigation works to be notified from time to time for the maintenance and repairs of such works;

Section 4(18) which defines "Water rate" reads as follows:

"Water rate" is the amount of revenue payable to Government for the supply of water for any crop, other than staple cereal crop, to be notified by the State Government in this behalf and generally grown in the area whether the water is used or not.

Explanation - When water rate is charged for irrigation, it shall be with reference to single crop per acre of land.

Section 20 of the Act provides that all supplies of water from an irrigation work shall be subject to such rules or orders as may be prescribed or issued by the State Government from time to time with respect to rates conditions or any other matter Section 21 of the Act which prescribes that water is to be supplied on written application reads as follows:

Water to be supplied on written application-(1) Any person desiring to have supply of water from an irrigation work shall submit a written application to that effect to the Officer duly empowered to receive such applications within such date, in such form and in such manner as shall from time to time be prescribed by the State Government in this behalf:

Provided that no such application shall be necessary for irrigation of the crop or crops for which a compulsory basic water-rate is levied by the State Government u/s 28.

(2) Water supply for purposes other than those of irrigation-If the application be for a supply of water to be used for purpose other than those of irrigation, the officer duly empowered may, subject to the rules to be made under this Act, give permission for water to be taken for such purpose under such special conditions and restriction as to the limitation, control and measurement of the supply as may be imposed in each case and subject to such special rates as may be fixed for the purpose.

Section 28 provides for levy of water rates and compulsory basic water rates in the following manner:

Levy of water rates and compulsory basic water rates-The Irrigation Officer or such officer duly empowered by the State Government shall thereupon in the prescribed manner fix the compulsory basic water rate and the water rate payable in respect of each such work in any district or in any specified area according to the classification and the rates as finally determined u/s 27:

Provided that levy of compulsory basic water rate shall not be made in respect of low lands which are ordinarily liable to be water logged, the particulars whereof shall be as may be prescribed:

Provided further that such levy with respect to low lands which do not ordinarily require irrigation except in years of drought shall be at such concessional rates as may be prescribed:

Provided also that such levy with respect to areas where lift irrigation is allowed to be provided at the expense of the owners and occupiers shall be at such reduced rate as may be prescribed:

Provided further that in respect of lands which are already under irrigation from private sources, the basic water rate to be levied shall be the difference between the compulsory basic water rate of the irrigation work which is provided and the estimated rate for the existing source of irrigation.

Similarly, levy of water cess is dealt with u/s 30 of the Act. This provision is quoted hereunder:

Levy of water cess - In addition to, or in lieu of the water rates payable under the provisions of this Act, the State Government may, levy a water cess at such rates and in such manner as shall be prescribed by the State Government from time to time:

Provided that no water cess shall be levied in addition to the compulsory basic water rates. Section 31 of the Act deals with unauthorised use of water in the following manner:

Unauthorised use of water-Water is said to be used in an "unauthorised" manner when it is taken from any irrigation work, outlet or water-course in contravention of any of the provision of this Act or the rules made thereunder or of any order passed by an Irrigation Officer thereunder and its use gives rise to, or may be expected to give rise to benefits of any kind.

Under Section 38 of the Act, meaning of the term "water-rate".

used in the Chapter is given as:

For the purposes of this Chapter, the term "water rate" shall mean "compulsory basic water-rate" or "water-rate" as the case may be.

The Rules relevant for the purpose of the present proceeding are Rules 26, 27 and 47. They are quoted hereunder:

Rule 26. Application for supply of water for any purpose other than irrigation- (Section 21(2)): An application for supply of water for any purpose other than irrigation shall be made to the Irrigation Officer in Form J in triplicate.

Rule 27. Mode of enquiry and execution of agreement. (Section 21(2)):

(1) On receipt of the application, the Irrigation Officer shall cause to be published in a conspicuous place of each of the villages through which the distributory or the minor passes a notice inviting objections to be filed within 15 days from the date of publication. On expiry of the last date for filing objections the Irrigation Officer shall after making an enquiry in the prescribed manner pass orders relating to the supply of water.

(2) The order shall be communicated in writing to the applicant and where the application is allowed the applicant shall be asked to execute an agreement in Form "K" within the date specified therein. Supply of water shall be made only after execution of the agreement.

Rule 47. Levy of rates of unauthorised use of or waste of water- (Section 32):

(1) The rate for water used in unauthorised manner for irrigation of lands or misuse of water in excess of the crop for which irrigation has been sanctioned shall be made at a rate not exceeding six times the compulsory basic water rate payable for the lands under the culturable commended area of the class of irrigation work from which the water is used.

(2) The rate for water used in unauthorised manner otherwise than irrigation shall be made having regard to the volume of water used and the benefit produced by such use at a rate not exceeding six times the bulk rate fixed for filling of tanks in the schedule attached to these rules.

(3) The charge for waste of water shall be made having regard to the volume of waste water at a rate not exceeding six times the bulk rate fixed for filling of tanks in the schedule attached to these rules. For habitual wastage of water the charge shall be made at the maximum of the above prescribed rate.

(4) The Irrigation Officer on receipt of a report unauthorised use or waste of water, shall, after examination of such witnesses as he may consider necessary, record his orders fixing the levy of rates for such unauthorised use or for wastage of water and the person or persons liable to pay the same with reasons therefor.

(5) The Irrigation Officer shall issue a demand notice along with a copy of the order passed by him to each person so assessed to make payment of the amount within a specified date not exceeding 30 days from the date of service of notice. The amount when paid shall be credited as irrigation revenue.

(6) An appeal may be filed before the Collector within 30 days of service of notice mentioned in Sub-rule (5). Collector may stay recovery of the assessment till the disposal of appeal.

(7) If the amount is not paid within 30 days of the service of notice mentioned in Sub-rule (5) or where an appeal has been filed and recovery is stayed, within 30 days from the date of disposal of appeal by the Collector, it shall be recovered as arrears of land revenue with interest at 6 per cent per annum.

6. In the case of Titaghur Paper Mills Co. Limited v. State of Orissa and Anr. ILR 1975 Cutt. 1095, contentions similar to those raised in the present case were considered by a Division Bench of this Court. In that case the company filed the application under Articles 226 and 277 of the Constitution, challenging the levy of water rate under the Orissa Irrigation Act, 1959. The Paper Mills owned by the company was situated at Choudwar on the north bank of the river Mahanadi. The company was drawing water from the river for drinking purposes of its employees and of the inhabitants of the villages surrounding the mill as well as for use in its Mill. For this purpose, it had dug a channel which it was maintaining at its cost from the river Mahanadi to the pump house erected by the company. The company was called upon to pay Rs. 101,44 paise per day for 3.17 million gallons of water which was drawing from the river on the plea that the water was being taken from the reservoir maintained by the State Government for construction of two anicuts. i.e. Birupa and Mahanadi. The company questioned levy mainly on two grounds: (1) that it was not taking water from any irrigation work of the State, but from a place in the river where there was normal flow of water and; (2) that the Birupa reservoir had no connection with the said place.

The stand taken by the State Government was that the Petitioner-company had no riparian right to use the water from the river. The levy in question is a licence-fee for services rendered. By the construction of anicuts and creation of a reservoir it was possible to store water in huge quantity for irrigation and other purposes throughout the year. These anicuts are kept in proper state by constant repairs undertaken by the State Government. The fee is levied under a special benefit and advantage.

The Division Bench on consideration of the submissions by the parties and several decisions, came to conclusions that the claim of the Petitioner that the entire area of 541.00 acres in its occupation over which its mill situated is riparian in nature and that it is a riparian owner in respect of the entire area is not at all tenable. On the factual aspect relating to this point the court held that the plots over which the Petitioner had constructed its tank for storing water drawn from the river being at a distance of 600 yards from the bed of the river cannot be said to be within a reasonable proximity from the river. The court accepted the observation made in the decision reported in *Lakshminarasu v. Secretary of State* AIR 1919 Mad. 1152, that half R furlong is the reasonable depth to which a riparian can extend from the bank of the river. The court further held that prior to the constitution the State had the paramount right to regulate in public interests collection, retention and distribution of waters of rivers and streams flowing in the natural channels and of waters introduced into such rivers by means of works constructed at the public expenses. Thus, even if it is assumed that the Petitioner is a riparian owner in respect of the entire area of 541.00 acres which it occupies, still its exercise of riparian right can be controlled and regulated by the State through proper legislation and if such a legislation provides for imposition of fees for use of water no objection can be taken under the law. Such a restriction would be an unreasonable restriction in the interests

of general public. Imposition of a fee by the opposite parties on the Petitioner for its use of water from the river Mahanadi as provided under the Act is fully justified in law. In coming to the aforesaid conclusions the court rejected the contention raised by the company that since its mill was functioning long before the Orissa Irrigation Act came into force and the Petitioner was drawing water from the river Mahanadi before the enforcement of the Act, its right could not be affected by the legislature.

7. We have carefully considered the contentions raised by the learned Counsel for the Petitioners. As stated earlier, many of the contentions raised before us, were considered by the Division Bench in the case of Titaghur Paper Mills Co. Ltd. v. State of Orissa and Anr. ILR 1975 Cutt. 1095, (supra). Though Sri G. Das, learned Counsel appearing for the Petitioners made an attempt to show that the decision in the said case needs reconsideration, after careful consideration, we are unable to accept the submission. In view of the principles laid down in the decision the contention of the Petitioner that they have a riparian right to use water from the river and the said user of water is not available to be charged under the Act has to be rejected.

8. From the provisions of the Act, particularly Section 21(2), it is dear that supply of water for purposes other than irrigation is also covered the statute and levy of water rate or water cess for such supply is also provided therein. Therefore, the contention of the Petitioners that since they draw water for purposes other than irrigation, the statute has no application, has to be rejected as without merit. All that it is necessary to empower levy of water rate/water cess is that the source from which supply is made should be an "irrigation work" as defined u/s 4(9) of the Act.

9. Coming to the question whether the point from which the Petitioner No. 1-company draws water lies within the Hira kud Reservoir area, the matter was enquired into by the Irrigation Officer. On the basis of the materials placed in course of the said enquiry, he came to the conclusion that the point was within the reservoir area. This finding of fact was agitated before the appellate authority as well as the revisional authority and the said authorities confirmed the finding of the Irrigation Officer on a consideration of the materials on record. We have carefully perused the order passed by the authorities and we do not find any scope for interfering with the finding of fact arrived at by them in exercise of writ jurisdiction. The map, Ext. A. on which much reliance was placed by the Petitioners was considered by the authorities under the statute and the plea of the Petitioners, that the point from which the company draws water does not lie within the Hirakud Reservoir area, was negatived. As such, this contention of the Petitioners also has to be rejected.

10. The point that remains for consideration is whether on the facts and in the circumstances of the case the authorities were justified in holding that the use of the water by the Petitioner-company was unauthorised and it was liable to be charged on that basis. It is relevant to mention here that the rate at which the

water was charged, i.e. six times the bulk rate for filling tanks, was reduced by the Revenue Divisional Commissioner, Northern Division, Sambalpur to four times. As observed by the revisional authority instead of paying at the rate of Rs. 10/- per one lakh gallons of water which is the usual rate, the Petitioners have been assessed at Rs. 16/- per one lakh gallons of water. Against this reduction in rate, the State Government has filed a writ application bearing O.J.C. No. 1144 of 1980. The contention of the Petitioner-company is that in the facts and circumstances of the case and in view of the nature of controversy raised by the parties and the adjudication made by the forums under the statute, it cannot be said that the user of the water by the Petitioners was unauthorised. It is further contended that assuming that technically the user of the water by them was not in accordance with the provisions of the statute, they cannot be made liable to pay for the water used at special rate which is in the nature of penalty. In deed, according to the Petitioners, there was sufficient justification for them not to apply for permission in the prescribed form and enter into agreement with the Irrigation Officer since they were claiming to be entitled to user of the water free of charges as they had been doing it since 1939, in exercise of their riparian right. On behalf of the opposite parties, it is contended, on the other hand, that in view of the provisions of the Act, it was incumbent upon the Petitioners to apply in Form "J" for permission to use the water from the reservoir. Since the Petitioners failed to comply with the statutory provision, use of the water by them was unauthorised and the authorities were entitled to assess the water rate/ water cess at the special rates.

11. From the facts discussed earlier, it is clear that the Petitioner-company had been drawing water from the river Ib since 1939 and during the lean months in the year i.e., January to June, the company used to collect water by constructing sand bundhs on the river bed. The Letter from the Collector referred to earlier clearly indicates that construction of the crossbundhs every year was being made with the permission of the authorised concerned. From the maps and other materials produced by the parties, it is also clear that there has been serious controversy between the parties on the question whether the point at which the Petitioner-company draws its water lies within the area of Hirakud Reservoir. The initial assessment made by the Irrigation Officer was set aside by the appellate authority on the ground that proper enquiry on this question had not been made. In view of these facts and circumstances, it cannot be said that the Petitioners deliberately violated the provisions of the statute and their failure to apply for permission or enter into an agreement lacked bona fide. On a perusal of the provisions of Sections 31 and 32 of the Act and Rule 47 of the Rules, it is clear that levy of water rate at special rate is made only on the ground of violation of the provisions of the statute. Thus the levy is in the nature of penalty. Mere infraction of the provisions of the statute without materials to show that it was done deliberately in defiance of law or dishonestly or in conscious disregard of legal obligations and that the party concerned was guilty of conduct contumacious, levy in the nature of penalty would not be attracted. This view

gains support from the decision of the Supreme Court in the case of Hindusthan Steel Limited v. State of Orissa. Therefore, it has to be held that the orders of the Revenue Divisional Commissioner, Northern Division, directing the Petitioners to pay water rate at special rate, i.e., at the rate of Rs. 16/- per one lakh gallons of water cannot be sustained. The Petitioners will be liable to pay water rate at the usual rate, which is, as observed by the Revenue Divisional Commissioner, Northern Division, Rs. 10/- per one lakh gallons. The Irrigation Officer, opposite party No. 1 shall revise the demand rate accordingly.

12. In course of their argument, learned Counsel for the parties cited several decisions on different points. Many of these decisions were noticed in the case of Titaghur Paper Mills Co. Limited v. State of Orissa and Anr. ILR 1975 Cutt. 1095, (supra). In view of the said decision and the discussions in the foregoing paragraphs, we do not consider it necessary to refer to the other decisions cited by learned Counsel for the parties.

13. In view of the discussions in the foregoing paragraphs, contentions (i) and (ii) raised on behalf of the Petitioners are rejected and contention (iii) is accepted. Accordingly while declining to interfere with the orders of assessment, we modify the rate at which water rate is to be charged, to the extent indicated above. O.J.C. No. 609 of 1980 is disposed of in terms aforesaid and O.J.C. No. 1144 of 1980 is dismissed. Parties are to bear their respective costs.

J.K. Mohanty, J.

14. I agree.