

(1974) 03 OHC CK 0018

In the Orissa High Court

Case No : Original Jur. Case No. 336 of 1972

Phulchand Agrawal

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 12-03-1974

Acts Referred:

Mineral Concession Rules, 1960 — Rule 9

Mines and Minerals (Development and Regulation) Act, 1957 — Section 10(1)

Citation : AIR 1975 Ori 110

Hon'ble Judges : R.N. Misra, J;B.K. Ray, J

Bench : Division Bench

Advocate : G. Rath, for the Appellant; Govt. Advocate and R. Mohanty, for the Respondent

Final Decision : Allowed

Judgement

B.N. Misra, J.—This is an application under Article 226 of the Constitution of India for a writ of certiorari to quash the revisional order passed by the Union of India (Opposite Party No. 11 in exercise of powers vested in it under Chapter VII of the Mineral Concession Rules, 1960. The dispute relates to mineral rights in graphite over an area located in the District of Bolangir. On 14-10-1961, Mediratta (Opposite Party No. 3) applied for a prospecting licence over 833.53 acres. A fee of Rs. 24/- had been paid in support of the application as against the required fee of Rs. 32/-. On 27-10-1961, he moved the Collector to accept the deficit of Rs. 8/- (vide Annexure-B). The Collector, however, wanted the State Government's orders to be obtained in the matter and made a reference. On 28-12-1961, Mediratta deposited the said amount. In the meantime, on 2-11-1961, Phulchand (petitioner) applied for a similar prospecting licence in respect of 748.16 acres. 272.40 acres were a common area in both these applications.

As his application was not disposed of by the State Government, against the deemed refusal, Mediratta moved the Union Government in revision in April,

1963, and on 20th of October, 1964, the Union Government directed the State Government to reconsider the application dated 14-10-1961 for grant of a prospecting licence for graphite over an area of 833.53 acres in village Thalka etc., and to pass final orders thereon within nine months of the date of the receipt of the order by it (vide Annex-ure-5). In January, 1965, the State Government wrote a letter to Mediratta to find out if he was prepared to take a prospecting licence over 365.00 acres. Mediratta moved the Union of India in revision again in February, 1965. In May, 1965, the State Government offered 678.08 acres to Phulchand saying that that was the available area for grant to him. In June, 1965, the State Government actually directed a prospecting licence to be granted to Phulchand for that area (vide Annexure-1). In May, 1966, the Union Government rejected Mediratta's revision application by saying--

"..... The revision application will lie" only" after the State Government have passed a definite order on your above mentioned application for a prospecting licence."

On 2-4-1970 the State Government under Annexure-11 offered Mediratta a prospecting licence for 365.00 acres against his applied for area. On 30th of April, 1970, the prospecting licence in favour of Phulchand was executed. In May, 1970, Mediratta applied to the Union Government in revision against the offer of the State Government dated 2-4-1970 reducing the area applied for. In that revision Phulchand got himself impleaded. After hearing parties the Union Government in exercise of its revisional powers by order dated 12-4-1972 (Annexure-14) set aside the grant of the overlapping area of 272.40 acres in favour of Phulchand and directed that area to be included in the prospecting licence to be granted to Mediratta. The said order of the Union Government is challenged in this writ application.

2. Three counter-affidavits have been filed -- one by the Union of India, the second by the State of Orissa and the third by the successful party before the Union of India -- Mediratta. Mediratta has also filed an additional counter-affidavit. Thereafter the petitioner came with a further affidavit.

The Union of India had tried to Justify its order by taking the stand that the Central Government have rightly come to the conclusion that Mediratta's P. L. application dated 14-10-1961 although not complete in the sense that fee paid into the treasury fell short by Rs. 8/- yet, the State Government itself by giving a chance to the petitioner to rectify this mistake, acknowledged implicitly that it had in its hand an application otherwise valid. Hence the appropriate date for the purpose of priority u/s 11(2) of the Act was 14-10-1961 and not 28-12-1961 as interpreted by the State Government. The order of the State Government permitting the applicant to make good the deficit in the amount of fees originally paid into the treasury has nothing to do with the submission of the application by the respondent No. 3 (Mediratta) which was done on 14-10-1961. The State Government could, if it so wished, have refused the application dated 14-10-1961 as being imperfect. But since it did not do so and permitted the

application to remain under consideration, it recognised implicitly the request of the petitioner as an applicant. Once the application dated 14-10-1961 was taken to be a valid one, Mediratta was entitled to priority.

The State Government (Opposite Party No. 2) took the stand that the application of Mediratta made on 14-10-1961 was defective and became complete and valid only with effect from 28-12-1961. Phulchand's application being dated 2-11-1961, he was entitled to priority as recognised by the Statute and, therefore, in regard to the overlapping area of 272.40 acres, Phulchand had a preferential claim. When on an earlier occasion the Union of India in exercise of its revisional power directed the State Government to dispose of the application of Mediratta, on the principle indicated above, Mediratta was offered the remaining available area.

Mediratta has taken the stand that the defect in the application dated 14-10-1961 did not make it a nullity. He had offered to make good the deficit in the fee some time before Phulchand came into the scene by making his application dated 2-11-1961. The delay in acceptance of the fee was on account of the Collector making a reference to the State Government and the Director of Mines taking time in clarifying the position. As the application dated 14-10-1961 was not a bad one in law, with removal of the defect, Mediratta became entitled to the priority and the Union Government has rightly accepted that stand of his.

3. On the contentions of the parties, the sole question that has to be considered is as to whether the application dated 14-10-1961 was a nullity on account of the prescribed fee having not been paid. The answer to the question would very much depend upon whether the prescriptions in Rule 9 of the Mineral Concession Rules of 1960 are mandatory or directory. Mr. Rath for the petitioner has contended that the provision is mandatory while Mr. Mohanty for the opposite party no. 3 has taken the stand that it is directory. Both sides relied upon a number of authorities in support of their respective contentions.

4. The law on the point is available in the Mines and Minerals (Regulation and Development) Act, 67 of 1957 (hereinafter referred to as the Act) and the Mineral Concession Rules, 1960 (hereinafter referred to as the Rules) made in exercise of powers conferred by Section 13 of the Act on the Central Government. Section 4(2) of the Act provides

"No prospecting licence or mining lease shall be granted otherwise than in accordance with the provisions of this Act and the Rules made thereunder."

Section 5(1) provides--

"No prospecting licence or mining lease shall be granted by a State Government to any person unless he--

(a) holds a certificate of approval in the prescribed form from the State Government;

(b) produces from the Income Tax Officer concerned an Income Tax clearance certificate in the prescribed form; and

(c) satisfies such other conditions as may be prescribed."

Section 10(1) is to the following effect:--

"An application for a prospecting licence or a mining lease in respect of any land in which the minerals vest in the Government shall be made to the State Government concerned in the prescribed form and shall be accompanied by the prescribed fee."

Section 11 provides for preferential right in the following way:--

"(1) Where a prospecting licence has been granted in respect of any land, the licensee shall have a preferential right for obtaining a mining lease in respect of that land over any other person:--

Provided

(2) Subject to the provisions of Sub-section (1), where two or more persons have applied for a prospecting licence or a mining lease in respect of the same land, the applicant whose application was received earlier shall have a preferential right for the grant of the licence or lease, as the case may be, over an applicant whose application was received later.

Provided

(3)

(4) Notwithstanding anything contained in Sub-section (2) but subject to the provisions of Sub-section (1), the State Government may for any special reasons to be recorded and with the previous approval of the Central Government, grant a prospecting licence or a mining lease to an applicant whose application was received later in preference to an applicant whose application was received earlier.

Section 13(2)(c) categorically provides that a Rule can be made indicating the guideline where applications in respect of the same land are received on the same day. Section 19 provides:

"Any prospecting licence or mining lease granted, renewed or acquired in contravention of the provisions of this Act or any rules or orders made thereunder shall be void and of no effect.

Explanation:--"

As far as the Rules are concerned, Rule 9 is relevant. It provides:--

"(1) An application for a prospecting licence and its renewal in respect of land in which the minerals vest in Government shall be made to the State Government in Form B and Form E respectively through such officer or authority as the State

Government may specify in this behalf.

(2) Every such application shall be accompanied by--

(a) a fee calculated in accordance with the provisions of Schedule II, and

(b) an Income Tax clearance certificate in Form C from the Income Tax Officer concerned,

(c) a certificate of approval in Form A or if the certificate of approval has expired, a copy of application made to the State Government for its renewal;

(d) a valid clearance certificate. In the form prescribed by the State Government, of payment of mining dues, such as royalty or dead rent and surface rent payable under the Act or the rules made thereunder, from that Government or any officer or authority authorised by that Government in this behalf;

Provided

(3) The State Government may, for reasons to be recorded in writing, relax the provisions of Clause (d) of Sub-rule (2) of Rule 9.

(4)

An analysis of the relevant provisions of the Act and the Rules would thus show that--

(1) no prospecting licence shall be granted otherwise than in accordance with the provisions made under the Act and the Rules; and

(2) no prospecting licence shall be granted unless the applicant holds a certificate of approval, has produced an Income Tax clearance certificate and has applied to the State Government in the prescribed form and the said application is accompanied by the prescribed fee.

5. Section 10(1) of the Act requires that the application for a prospecting licence shall be made to the State Government in the prescribed form and shall be accompanied by the prescribed fee. Rule 9 (1) of the Rules prescribes the form and Sub-rule (2) (a) makes provision for the fee. If the application in order to be a valid one must necessarily accompany the fee prescribed in Schedule II, the application of Mediratta dated 14-10-1961 was not a valid one. What would be the fate of an application which is not, accompanied by the prescribed fee would depend upon a determination as to whether the requirement u/s 10(1) of the Act and Rule 9 (2) of the Rules is mandatory or directory. Judicial opinion is almost unanimous that language alone of the statute or the Rule would often not be decisive and regard must be had to the context, subject-matter and object of the statutory provision in question. Lord Campbell in *Liverpool Borough Bank v. Turner* (1861) LJ Ch 379, said:--

"..... there is no universal rule to aid in determining whether mandatory enactments shall be considered directory only or obligatory with an implied

nullification for disobedience. It is the duty of the Court to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed."

This test has been approved by the Supreme Court in the case of H.N. Rishbud and Inder Singh Vs. The State of Delhi, and in many other cases thereafter. The observation in Crawford on "Statutory Construction" (Article 261 page 516) to the following effect:

"The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other."

has also been accepted by the Supreme Court in State of U.P. Vs. Manbodhan Lal Srivastava, .

Subba Rao, J. (as the learned Judge then was) spoke for the court thus in The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya, .

"..... For ascertaining the real intention of the Legislature the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."

If the object of the enactment will be defeated by holding the same to be directory, it would be construed as mandatory Seth Bikhraj Jaipuria Vs. Union of India (UOI), . Where by holding it mandatory, serious general inconvenience would be created to innocent persons without very much furthering the enactment, the same would be construed as directory The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya, and Raza Buland Sugar Co. Ltd. Vs. Municipal Board, Rampur, . Law is fairly settled that if a provision is mandatory, an act done in breach thereof would be invalid. But where it is directory, the act would not be invalid though non-compliance may give rise to other consequences. Law requires that a mandatory enactment must be satisfied with exactitude while in respect of a directory provision it would be sufficient if it is fulfilled to a substantial extent. As indicated in State of U.P. Vs. Manbodhan Lal Srivastava, , even an act in breach of a directory requirement may not be invalid at all. A Bench of the Patna High Court in Sudhansu Kanta Vs. Manindra Nath, , dealing with the provisions of the same Act and Rule 37 of the Rules which prohibits transfer of a lease without previous consent in writing of the State

Government has said:--

"..... The object for which the Mines and Minerals Act was enacted is the regulation of mines and the development of minerals under the control of the Union Government. In the case of Mineral Development Ltd. v. Union of India AIR 1960 SC 1373 their Lordships of the Supreme Court observed that this Act was made in the public interest providing for the regulation of mines and for the development of minerals. The intention was that the mineral wealth of the country should be conserved and should be worked properly without waste and by persons qualified in that kind of work. There are two main features in connection with the working of the mines and one of them is the person who would work such mines. His capacity, financial resources and experience are to be taken into account before a mineral lease is granted to him. He is also to be possessed with a certificate of approval and Income Tax clearance certificate. In order to ensure a proper check about the person who may actually control the working of any particular mine, the Mineral Concession Rules ensure that before a transfer of any mining lease is made the transferee's suitability must necessarily undergo the scrutiny of the State Government and in some cases that of the Central Government; and that is why the transferor has been prohibited from making any such transfer before obtaining the consent of the Government in writing.

To find out the proper import and implication of any particular provision in an enactment, one has to keep in view the object for which that provision is made. One has to look to the import of the provision and the relation of that provision to the general object intended to be secured by the Act. Upon a review of the case in that respect one has to decide whether the statutory provision is what is called imperative or merely directive. Viewed in that light it cannot be accepted that Rule 37 is of a directive nature. If the requirements under that rule are not fulfilled that will frustrate the very purpose for which the Act and the Rules were made; the working of the mines will go to a person who may not be properly qualified or competent or financially capable for such work. If the Government is to control the mineral operations by persons of its choice they will not be able to perform that if lessees or sub-lessees indiscriminately transfer the mineral lease to some other person. It may be that a transferee may not have been approved for the grant of a mining lease but he can still have the benefit of such a lease by taking a transfer from a mining lessee without complying with the provision of Rule 37. In other words, what a person cannot do directly he can do the same thing indirectly."

Undoubtedly, the, considerations which weighed with the learned Judges of the Patna High Court in view of the provision in Rule 37 and the effect of the breach of that Rule may not be available in the present case, where the defect is in relation to the deficit fee only. One cannot, however, lose sight of the fact that Parliament has intended to make the scheme under the statute somewhat peremptory in character. The statute deals with a subject which hardly touches

the common man. Those who offer to trade in minerals come to be regulated by the statute and those few are expected to be conversant with the requirements of the law. Section 10(1) of the Act obliges every applicant to apply in the prescribed form and to support the application by prescribed fee. From the very inception of the process strict regulation is intended so" that frivolous applications may not be made. The fee is intended more as a regulatory measure than a fee for any actual service rendered. The form is prescribed for detailed particulars so that the suitability of the applicant may be known. Rule 9 (2) requires four items to accompany the application and Sub-rule (3) vests power in the State Government to relax the requirement in regard to one of these only as contained in Sub-rule (2) (d). Mr. Rath for the petitioner has emphasised upon this feature. According to the learned Counsel, the Rule makes a distinction in regard to the requirement of Sub-rule (2) (d). While requirement can be waived or relaxed, in regard to the other requirements, the State Government has been given no powers of relaxation.

6. In *C. Buchivenkata Rao Vs. The Union of India (UOI) and Others*, , the Court was considering the nature--mandatory or directory--of Rule 27 of the Mineral Concession Rules, 1949. That Rule dealt with application for mining lease and required particulars to be furnished. The Court observed:--

"It is clear to us that the details mentioned in Rule 27 are intended for the correct identification of the individual to whom the lease is to be granted, the minerals which are to be mined, the area in respect of which the lease was to be granted, and the qualifications of the applicant. Considerable emphasis was placed on the word "shall" in Rule 32 with regard to the priority to be given between different applicants. This rule does not directly affect the question whether an application for a lease could be considered a proper application or not by the authorities concerned. The second proviso to this rule however, provides for the manner in which certain defects may be cured. Rule 32, Sub-rule (2) introduced in 1955 before the grant of the application of Venkatagiri, shows that the individual qualifications of the applicants including their special knowledge, their capacity to engage, technically efficient staff, their financial soundness and stability, had to be taken into account in determining the question of priority. Again, Rule 26, imposing certain restrictions, prohibits the grant of the lease to any person who does not hold a certificate of approval from the State Government or who has not Produced an Income Tax clearance certificate. It does not prohibit any grant on the ground that the application for it is defective or not accompanied by a map. The form of the application seems to be subordinate to the essential facts to be taken into account before granting a lease.

There is no provision in the Act showing that the defects in an application which is accompanied by the fee prescribed in Rule 28 cannot be subsequently removed. The information given in the application is intended for the satisfaction of the authorities granting the lease so that, after considering merits and making

a grant, proper details are embodied in the lease actually granted."

As we find the Supreme Court was dealing with a case where particulars which may be necessary to be incorporated in the lease to be ultimately granted were wanting and they could be collected at any time before the actual grant for incorporation in the deed of lease. The position here is somewhat different. The application was to be accompanied by the fee prescribed.

Mr. Rath placed reliance on the recent decision in Charan Lal Sahu Vs. Nandkishore Bhatt and Others, , where the effect of non-deposit of the security along with the election petition as provided u/s 117 of the Representation of the People Act was being considered. The Court came to hold that the election petition was not maintainable in the absence of compliance of the requirement u/s 117 of the said Act.

7. Mr. Mohanty for Mediratta (Opposite Party No. 3) relied upon two decisions of the Supreme Court. In Virjiram Sutaria Vs. Nathalal Premji Bhavadia and Others, , the non-compliance with the requirement under Article 173 of the Constitution in regard to subscribing to an oath or affirmation according to the form set out for the purpose in the Third Schedule of the Constitution was in issue. The Court found a part of the form to be merely descriptive and the other part to be containing the substance. The deviation being in regard to a descriptive portion there was substantial compliance. The principle indicated in that decision has no application to the present case.

The other case is of M.S.R.T. Corporation v. B.G.R.M. Service, Warora AIR 1910 SC 1926. In an application made for a stage carriage permit under the Motor Vehicles Act, certain particulars were wanting and the Transport Authority obtained the particulars from the applicant. The Court found that there was nothing wrong in the action of the Transport Authority and the defect in the application could be rectified. We also do not find any direct support for the point in issue from this decision.

8. The tests to determine whether the provision is mandatory or directory have been indicated already. In our view, keeping the object of the statute in view, taking the effect of non-compliance into consideration and the general tenor of the statute, we are of the view that the requirement that the application shall be accompanied by the prescribed fee is mandatory and an application not accompanied by the prescribed fee is not an application in the eye of law. The language used in Section 10(1) and Rule 9 also lends support to such a construction.

9. The application of 14-10-1961 made by Mediratta was, therefore, not an application in the eye of law. It was open to the State Government to ignore the application. They have, however, taken an equitable view and treated the application to have been made when the full fee was paid thereon on 28-12-1961. The application of Phulchand is dated 2-11-1961. The State Government, therefore, had correctly come to hold that Phulchand was entitled

to priority over Mediratta. The view taken by the Union of India while disposing of the revision of Mediratta does not seem to be in accord with the law.

10. There is another feature which must also be taken into consideration. The regular prospecting licence was granted to Phulchand on 30th April, 1970. In the revision filed by Mediratta on 27-5-1970, he did not challenge the grant of the prospecting licence to Phulchand. He actually challenged the State Government's offer dated 2-4-1970 reducing the area over which prospecting licence could be granted to him. The prospecting licence had already been executed long before the Union of India exercised its revisional jurisdiction. In paragraph 6 of the impugned order, it has been stated;

"The only question in this case is about the area of 272.40 acres now held under prospecting licence by the impleaded party Phulchand Agarwal which overlaps with the original area of 833.53 acres applied for by you (Mediratta). Even if this 272.40 acres are taken away from the prospecting licence of the impleaded party, the impleaded party will still be left with an area of slightly over 355 acres. The prospecting licence held by the impleaded party is going to expire on 30-4-1972. On consideration of the facts of the case and all connected issues, it is clear that the interests of justice will be met if the revision petition is allowed to the extent of granting the overlapping 272.40 acres to you over and above the area of 365 acres already granted to you by the State Government."

The revisional order, therefore, did not set aside the grant of the prospecting licence in favour of Phulchand. Section 11(1) of the Act provides that a person who held a prospecting licence would have priority. That seems to have been completely lost sight of by the Union Government while disposing of the revision. The validity of the prospecting licence in favour of Phulchand having not been disputed and that grant having not been set aside, the priority of Phulchand could not have been overlooked.

11. As we have already indicated, both parties had applied for separate areas, but 272.40 acres were overlapping. On the analysis made by us above to the overlapping area, Phulchand had a preferential claim. The State Government in recognition of that claim had granted that area to Phulchand.

12. We would accordingly allow the writ application and quash the revisional order of the Union Government dated 12th April, 1972 (Annexure-14) as being contrary to law. Parties shall bear their own costs before us.

B.K. Ray, J.

13. I agree.