

(1996) 07 KAR CK 0036

In the Karnataka High Court

Case No : Writ Petition No's. 35525/93 and Ors. Connected W.Ps

R. Pampapathi

APPELLANT

Vs

The State of Karnataka and Others

RESPONDENT

Date of Decision : 02-07-1996

Acts Referred:

Mines and Mineral (Development and Regulation) Act, 1957 — Section 2 (j), 3 (i), 4, 9 (2)

Citation : (1997) ILR (Kar) 1510

Hon'ble Judges : R.V. Raveendran, J

Bench : Single Bench

Advocate : M.R. Achar, D.L.N. Rao, R. Rangavittalachar, V.S. Ugrappa, Ravi B. Naik and B.T. Parthasarthy, Sri Jayaram and Jayaram and B. Anand, for Kesvy and Co. and Sundraswamy Ramdas and Anand, for the Appellant; S. Vijayashankar, General, M.B. Prabhakar, GP and T.M. Venkatareddy, for the Respondent

Final Decision : Allowed

Judgement

R.V. Raveendran, J.—The Petitioners have obtained mining leases from the State Government in regard to the mines, beds, veins and seams of Iron/ Manganese Ore in the lands leased to them, situated in forest areas. The petitioners, as lessees, are liable to pay annual dead rent at the rates specified in the Lease Deeds or Royalty on the ore removed by them from the leased area, as prescribed in the Second Schedule to the Mines and Minerals (Regulation and Development) Act, 1956 (hereinafter referred to as the MMRD Act or the Central Act) whichever is higher in amount, but not both. By notices issued in the years 1992 and 1993, the jurisdictional Senior Geologists of the Mines and Geology Department, have called upon the Petitioners to pay Forest Development Tax u/s 98A of the Karnataka Forest Act, 1963 (hereinafter referred to as the "Forest Act" or "State Act") from 1.4.1992 at the rate of Eight per cent per annum on the royalty amount paid by the Petitioners to the Department of Mines and Geology.

2. The Petitioners contend that such tax is not payable by them, in regard to the

royalty paid on the mineral removed by them from the leased area, in view of the following:-

(a) The grant of a mining lease for extraction of mineral from the leased land, subject to payment of royalty on the mineral removed, does not amount to disposal of forest produce by the State Government by sale or otherwise; and payment of royalty is not payment of consideration for disposal by sale or otherwise, but is a tax paid on the mineral won from the land; and therefore Section 98A of the Forest Act is not attracted;

(b) The State Legislature has no legislative competence to levy any forest development tax on royalty payable in respect of a mining lease granted under the MMRD Act as (i) the entire field relating to grant of mining leases and levy and collection of royalty is covered by the MMRD Act; and (ii) levy of any tax on royalty would result in the increase of royalty payable under the MMRD Act and therefore violate Section 9(2) of the MMRD Act.

3. The petitioners have therefore filed these petitions for the following reliefs, (a) Declaration that the forest development tax is not leviable on royalty payable in regard to mining leases to the State government under the provisions of the Central Act; (b) To restrain the Respondents from demanding or collecting forest development tax on royalty amount u/s 98A of the Forest Act, as the said Section is inapplicable; (c) For quashing the notices issued by the Senior Geologists demanding payment of Forest development tax and for a direction to the Respondents to refund the forest development tax, if any, collected from them. Some of the Petitioners have also sought a declaration that Section 98A of the Karnataka Forest Act, if it purports to levy any forest development tax on royalty payable on minerals, is unconstitutional.

4. The Respondents contend that minerals and products of mines and quarries are forest produce as defined in Section 2(7) of the State Act; and grant of mining leases by State Government to the Petitioners to mine, recover and remove minerals from the leased lands belonging to State Government amounts to disposal by "sale or otherwise" of the iron/manganese ore belonging to State Government; and royalty paid by the Petitioners to State Government is nothing but consideration for the mineral that is recovered and removed from the leased lands; and even if royalty is tax, it does not cease to be consideration. It is contended that, under the transaction between the State Government and the petitioners, the petitioners mine and remove the ore/minerals and the State does not retain any right in regard to such minerals, and therefore the transaction in so far as minerals so removed, is sale and not a lease. It is contended that grant of a mining lease is a sale of minerals (forest produce) by the State under Rule 85(1)(iii) of Karnataka Forest Rules, 1969; and even if it is not a sale under Rule 85(1)(iii), it will still be a sale falling under the category "disposal otherwise". The respondents next contend that levy of tax by the State Government on forest produce is within its legislative competence having regard to Entries 23, 49 and 54 of List-II to Schedule VII to the Constitution of India; and a

declaration made by the Parliament for Regulation of mines and mineral development under Entry 54 List-I does not totally divest the competence of the State Legislature to legislate on the subject and the erosion of the power of the State Legislature is only to the extent to which control is assumed by the Parliament as spelt out in the Central Act; and power to legislate Section 98A of the Forest Act is traceable to Entry 54 of List-II or alternatively under the residuary power under Entry 23 and entry 49 of List-II, and it does not trench upon an occupied field. Reliance is placed on the decision of the Division Bench of this Court in Gurusiddappa Nurandappa Uppin and etc. Vs. State of Karnataka and Another etc., . Lastly, it is contended that even if the levy is invalid, the petitioners are not entitled to refund as any declaration in regard to such invalidity need not automatically result in a direction for a refund and this Court should direct that the declaration should only operate prospectively.

5. On these contentions, the following points arise for consideration:-

(i) Whether the grant of mining leases in the lands belonging to Government under the M.M.R.D. Act would amount to disposal by sale or otherwise of minerals, by the State Government and whether the amount paid as royalty is "consideration" paid for such disposal by sale or otherwise.

(ii) Whether the State has legislative competence to levy forest development tax on the royalty amount paid by the Lessees to the State Government in regard to the mining leases granted under the M.M.R.D. Act.

(iii) If the levy is invalid, whether such declaration should be given effect only prospectively.

RE: POINT (I):

6. The relevant portions of Section 98A of the Forest Act reads as follows;-

"(1) Notwithstanding anything contained in this Act, in respect of forest produces disposed of by the State Government or by a Corporation owned or controlled by or a body notified by the State Government by sale or otherwise, there shall be levied and paid to the State Government, a tax at the rate of eight per cent on the amount of consideration paid therefore

XXX XXX XXX (2) The said Tax shall be collected along with such consideration.

(3) It is hereby declared that the said Tax shall be in addition to and not in lieu of any tax payable in respect of such produce under any other law in force,"

6.1. "Forest produce" defined in Section 2(7) of the forest Act includes surface soil, rock and mineral and all products of mines and quarries, found in, or brought from a forest.

6.2. Thus if the grant of a mining lease by the State Government to a Lessee, amounts to a disposal of mineral/product of a mine by the State Government, by sale or otherwise, for consideration and if the royalty paid is "consideration" for

such disposal by sale or otherwise, then the Lessee will be liable to pay forest development tax on the royalty amount at eight per cent.

7. Let me consider the statutory and contractual provisions relating to "mining leases" to find out whether they are transactions under which the State Government disposes by sale or otherwise, for consideration, minerals which are forest produce. Section 4 of the M.M.R.D. Act provides that no person shall undertake any mining operations in any area, except under and in accordance with the terms and conditions of a mining lease granted under the Act and the Rules made thereunder. A mining lease is defined in Section 3(c) of the Act as a lease granted for the purpose of undertaking mining operations. Section 3(i) of the M.M.R.D. Act read with Section 2(j) of Mines Act, 1952 defines "mine" as any excavation where any operation for the purpose of searching for or obtaining minerals has been or is being carried on.

8. The prescribed form of Deed of Mining Lease between the State Government and the petitioners discloses that, in consideration of the rent and royalty paid by the Lessees and other obligations undertaken by them, the State Government grants and demises unto the Lessees, all the mines, beds, veins, seams of the specified ore situated, lying and being in or under the lands which are referred to in Part I of the Schedule to the Lease Deeds, together with the liberties, powers and privileges to be exercised or enjoyed in connection therewith which are mentioned in Part II of the Schedule to the Lease Deed, subject to the restrictions and conditions as to the exercise and enjoyment of such liberties, powers and privileges which are mentioned in Part III of the Schedule to the Lease Deed, except and reserving out of the demise, unto the State Government, the liberties, powers and privileges mentioned in Part IV of the Schedule. The Lease Deed also specifies the period of lease during which the Lessee can hold the premises granted and demised. In consideration of the lease granted, the Lessee is required to pay every year, dead rent as specified and in addition, pay during the subsistence of the lease to the State Government, the royalty in respect of minerals removed by him from the leased area at the rate specified.

9. The petitioners, as Lessee under their respective mining lease, are entitled, among others, to the following privileges: (a) to enter upon the land and search for mine, bore, dig, drill or win, work, dress, process, convert, carry away and dispose of minerals; (b) to sink, drive and make pits, shafts, etc., in the land; (c) to erect construct, maintain and use plant, machinery, equipment, store houses, shops, bungalows, godowns, sheds and other buildings and other work; (d) to make Roads, Railways and other ways and use them for all vehicles; (e) to use water from any stream, watercourses, springs or other sources in the land; and (f) to carry away the beneficiated ore from the land.

10. A lessee under a mining lease, extracts minerals from the leased land, by providing machinery and equipment and by deploying labour. The lease of specified area enables the lessees to work on the mines and extract minerals. The extraction of minerals from the leased area by the lessee, by deploying men

and machinery and removal thereof cannot be considered as sale or disposal of such minerals by the State Government. The State government does not sell or dispose of any mineral to the lessee but grant a lease to the lessee which enables him to work on the mines and to extract minerals. Section 98A will apply where forest produce is sold or disposed of by the State for a consideration. In a mining lease, there is no sale or disposal of any forest produce, but transfer of an interest in a land enabling the transferee to enjoy the benefits in a manner specified, that is by extracting and removing the mineral. Any mineral that is recovered by the lessee, is extracted from the land by his efforts by deploying men and machinery and cannot be considered as a disposal of such minerals by way of sale or otherwise. Nor can royalty be treated as payment of consideration for disposal of minerals by "sale or otherwise".

11. The matter is also no longer res integra. In Sri Tarkeshwar Sio Thakur Jiu Vs. Dar Dass Dey and Co. and Others, the Supreme Court considered the question whether a mining lease is a "Lease" as defined in Section 105 of Transfer of Property Act, or whether it was a contract to sell mineral. It held:

"It is important to bear in mind that the term "Lease" occurring in the definition of. "mining lease" given in Section 3(c) of Act 67 of 1957 does not appear to have been used in the narrow technical sense in which it is defined in Section 105 of the Transfer of Property Act. But, as rightly pointed out by a Bench of the Calcutta High Court in Fala Krista Pal and Others Vs. Jagannath Marwari and Others, , a settlement of the character of a mining lease is everywhere in India regarded as "lease". A mining lease, therefore, may not meticulously and strictly satisfy in all cases, all the characteristics of a "lease" as defined in the Transfer of Property Act. Nevertheless, in the. legally accepted sense, it has always been regarded as a lease in this country.....

A right to carry on mining operations in land to extract a specified mineral and to remove and appropriate that mineral, is a "right to enjoy immovable property" within the meaning of Section 105; more so, when - as in the instant case - it is coupled with a right to be in its exclusive khas possession for a specified period. The "right to enjoy Immovable property" spoken of in Section 105, means the right to enjoy the property in the manner in which that property can be enjoyed. If the subject matter of the lease is mineral land or a sand-mine, as in the case before us, it can only be enjoyed and occupied by the lessee by working it, as indicated in Section 108, Transfer of Property Act, which regulates the rights and liabilities of lessors and lessees of immovable property....."

The Supreme Court referred with approval the decision of the Full Bench of the Patna High Court in COMMISSIONER OF INCOME TAX, BIHAR & ORISSA vs. KAMAKSHA NARAIN SINGH AIR .1940 Pat 633. In that case, after an exhaustive survey of all the decisions on the subject, it was held that coal-mining settlements whereby certain rights of entering upon the land of the settler, sinking shafts etc. and winning and taking away the coal are granted in consideration of receiving a salami and annual sums computed on the amount of

coal raised and the amount of coke manufactured, subject always to a minimum annual sum which was always payable irrespective of what coal was raised or coke manufactured, were not "sale of coal", but to be regarded as "leases" within the meaning of Section 105 read with Section 108, Transfer of Property Act, or within the legal acceptance of the term "lease" in this country. The said decision of the Patna High Court was affirmed by the Judicial Committee in AIR 1943 153 (Privy Council) . Thus a mining lease is a lease and does not involve sale of the mined mineral by the State to the lessee. On the application of the aforesaid principles, there can be no doubt that the leases granted to petitioners are transactions of lease and not sale.

12. The respondents relied on the decision of the Supreme Court in D.K. TRIVEDI & SONS vs. STATE OF GUJARAT AIR 1986 SC 1323 to contend that "Royalty" is the consideration paid for mineral removed by the lessee The relevant portion is extracted below:-

"In a mining lease the consideration usually moving from the lessee to the lessor is the rent for the area leased (often called surface rent), dead rent and royalty. Since the mining lease confers upon the lessee the right not merely to enjoy the property as under an ordinary lease but also to extract minerals from the land and to appropriate them for his own use or benefit, in addition to the usual rent for the area demised, the lessee is required to pay a certain amount in respect of the minerals extracted proportionate to the quantity so extracted. Such payment is called "royalty". It may, however, be that the mine is not worked properly so as not to yield enough return to the lessor in the shape of royalty. In order to ensure for the lessor a regular income, whether the mine is worked or not, a fixed amount if provided to be paid to him by the lessee. This called "dead rent".

"Dead rent" is calculated on the basis of the area leased while royalty is calculated on the quantity of minerals extracted or removed. Thus, while dead rent is a fixed return to the lessor, royalty is a return which varies with the quantity of minerals extracted or removed. Since dead rent and royalty are both a return to the lessor in respect of the area leased looked at from one point of view dead rent can be described as the minimum guaranteed amount of royalty payable to the lessor but calculated on the basis of the area leased and not on the quantity of minerals extracted or removed. In Fact, Clause (ix) of Rule 3 of the Rajasthan Minor Mineral Concession Rules, 1977, defines "dead rent" as meaning "the minimum guaranteed amount of royalty per year payable as per rules or agreement under a mining lease". Stipulations providing for the lessee's liability to pay surface rent, dead rent and royalty to the lessor are the usual covenants to be found in a mining lease.

The grant of a mining lease would thus provide for the consideration for such grant in the shape of surface rent, dead rent and royalty....."

This decision underlines the position that a mining lease is a lease, and not a sale of minerals nor a transaction disposing minerals. It is of no assistance to

respondents, as it merely holds that royalty is part of the rent for the mining lease.

13. in GURULINGAPPA's case relied on by the respondents, this Court held that Section 98-A which imposes forest development tax on the purchase price of forest produce disposed of by sale by the State Government, whatever be the method of sale, is within the legislative competence of the State, under Entry 54 of List II and therefore valid. But the said decision is of no assistance to sustain a demand for payment of forest development tax in regard to a transaction which is not a sale. Payment of royalty amount by holders of mining leases, in regard to ore won by them from the land leased to them, is not consideration for sale. In fact, this Court specifically stated, "We do not express any opinion on the question of the validity of the section, if it is used to levy tax on transactions other than sale".

14. The respondents referred to certain decisions to contend that regardless of the nomenclature of the Deed, as a "mining lease", it is possible to prove that the transaction is a sale by grant of licence to remove the forest produce - State of Orissa and Others Vs. Titaghur Paper Mills Company Limited and Another, and Shantabai Vs. State of Bombay and Others, . They are not relevant as on facts it is concluded that the "mining lease" is a lease" and not a "sale".

15. Let me now refer to the contention of respondents based on Rule 85(1)(iii) which contemplates sale of forest produce by issue of licences at the sanctioned seignior age rates. It is contended that "seignior age" is nothing but a royalty payable to the State, by a person permitted to collect and remove forest produce, and a "mining lease" is nothing but a "licence" to extract, collect and remove minerals (forest produce) from the forest subject to payment of royalty (seignior age). This contention is liable to be rejected on two grounds. A "mining lease", as seen above is a "lease" and a lease cannot be equated to a licence. In a lease, there is a transfer of interest in the land. In a licence, there is no transfer of interest, but only a permission to use the land or the permission to cut and remove specified trees. Hence, a mining lease cannot be termed as a licence. Secondly, sale under Rule 85(1) (iii) is by issue of licence at the sanctioned seignior age rates. Sub-rule (3) of Rule 85 provides that seignior age rates referred to Rule 85(1)(iii) shall be those specified in Rule 83. Rule 83 specifies the seignior age rates to be charged in the case of 167 items - several kinds of trees and other forest produce - none of which is a mineral. Hence, Rule 85(1)(iii) does not apply to minerals.

16. It is thus evident that the essential condition necessary for levying forest development tax u/s 98-A of the Forest Act, viz., disposal by State of forest produce, by way of sale or otherwise for consideration, is absent in regard to extraction and removal of minerals by a lessee under a mining lease granted to him, by the State, and payment of royalty by the lessee in regard to such minerals. Therefore, forest development tax cannot be levied or collected u/s 98-A of the Forest Act in regard to the ore/mineral that is extracted by the

petitioners from the leased lands under mining leases granted by the State Government.

Re: Point (ii):

17. In view of the decision on point (i), it is really unnecessary to examine the second point. However, as this point was specifically raised for consideration, I will deal with it briefly. The validity of Section 98-A of the Forest Act, in regard to levy of tax on forest produce disposed of by the State Government by way of sale, whatever be the method of sale, has been upheld in GURUSIDDAPPA'S case. The question is, even if mining ore/mineral is to be treated as a disposal by way of sale or otherwise, whether the State Legislature has competence to levy forest development tax on the royalty amount.

18. The legislative competence of State Legislature to impose a tax on royalty is traced by the respondents to Entry 54 of List II and alternatively to Entries 23 and 49 of List II. It is not necessary to consider this question in detail as the question is covered by three decisions of the Supreme Court.

18.1. In *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, the Supreme Court while dealing with the validity of a cess on royalty on mineral rights u/s 115 of Tamil Nadu Panchayats Act, 1958, held as follows:-

"In any event, royalty is directly relatable only to the minerals extracted and on the principle that the general provision is excluded by the special one, royalty would be relatable to entries 23 & 50 of list II, and not entry 49 of list II. But as the fee is covered by the central, power, under entry 23 or entry 50 of list II, the impugned legislation cannot be upheld....

"In the aforesaid view of the matter, we are of the opinion that royalty is a tax, and as such a cess on royalty being a tax on royalty, is beyond, the competence of the State Legislature because Section 9 of the Central Act covers the field and the State Legislature is denuded of its competence under entry 23 of list II. In any event, we are of the opinion that cess on royalty cannot be sustained under entry 49 of list II as being a tax on land."

18.2. In *M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others*, , considering the validity of levy of cess on royalty under State enactments by Orissa, Bihar and Madhya Pradesh, the Supreme Court held:-

(a) Royalty for carrying on mining operations or tax thereon cannot equated to land revenue. Hence, imposition of a tax on royalty cannot be brought under or justified by having recourse to Entry 45 of List II.

(b) A tax on royalty cannot be treated as tax on land within the meaning of Entry 49 of List II.

(c) Section 9(3) of M.M.R.D. Act is a clear bar on the State Legislature taxing royalty, treating it as a tax on minerals under Entry 50 of List-II;

(d) Entry 23 of List II relates to Regulation of mines and mineral development subject to the provisions of List I with respect to Regulation and development under the control of the Union. Under Entry 54 of List I, Regulation of mines and mineral development is in the field of Parliament Legislation to the extent to which such Regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest. As such a declaration is contained in Section 2 of M.M.R.D, Act, it follows that any State Legislation to the extent it encroaches on the field covered by M.M.R.D. Act will be ultravires. Therefore, imposition of any cess or tax on royalty is beyond the purview of the State Legislature;

(e) Considering Sections 9, 9A, 13, 18 and 25 of M.M.R.A. Act (67 of 1957) and bearing in mind that, in assessing the field covered by the act of Parliament in question, one should be guided not merely by the actual provisions of the Central Act or the Rules made thereunder but should also take into account matters and aspects which can legitimately be brought within the scope of the said statute, the conclusion is evident that any enactment by the State Legislature levying tax on royalty payable under the M.M.R.D. Act trespasses into the field covered by the Central Act. The scope of the powers conferred by M.M.R.D. Act is very wide. Read as a whole, the purpose of the Union control envisaged by Entry 54 and the M.M.R.D. Act, 1957, is to provide for proper development of mines and mineral areas and also to bring about a uniformity all over the country in regard to the minerals specified in Schedule I in the matter of royalties and, consequently prices. The prices of their exports are fixed and cannot be escalated with the enhancement of the royalties and if different royalties were to be charged in different States, their working would become impossible. The Central Act bars an enhancement of the royalty directly or indirectly, except by the Union and in the manner specified by the 1957 Act.

18.3. In State of M.P. Vs. Mahalaxmi Fabric Mills Limited and others, , the Supreme Court reiterated that royalty is to be treated as a tax, following the decision in India Cement case. The Supreme Court observed:-

".....It is, therefore, a clear bar on the State legislature taking royalty so as to in fact amend find Schedule of the Central Act. As seen earlier in Paragraph 32 of the report in India Cement case, it has been clearly mentioned that in view of the express provisions of Mines & Minerals Act, 1957, Entry 50 cannot be of any assistance to sustain such legislation by the State. Oza, J in his concurring judgment has highlighted one additional dimension of the matter in Para 40 of the report. It has been observed by Oza, J that it is no doubt true that mineral is extracts from the land and is available but it could only be extracted if there are three things:

(1) land from which mineral could be extracted; (2) capital for providing machinery, instruments and other requirements, and (3) labour. It is, therefore, clear that unit of charge of royalty is not only land but land + labour + capital. It is also clear that if royalty is a tax or an imposition or a levy, it is not on land

alone but it is a levy or a tax on mineral, including land, labour and capital employed in extraction of the mineral. It is therefore clear that royalty if imposed by the Parliament could only be a tax not only on land but also on these three things stated above.

In view of the decision of Constitution Bench it is no longer open to the Writ Petitioners to submit that Entry 50 of List II can still be available to State Legislature. It is easy to visualise that once the Parliament has occupied the field in connection with Regulation of mines and minerals development in the country and when the Parliament declares that it is expedient in the public interest so to do, Entry 23 of the State List regarding Regulation of mines and minerals development would be of no avail to the State legislature as Entry 23 List II is subject to the provision of List I nor will entry 50 of the State list can be of any assistance to the State authorities. In short, both the entries will be out of way in enacting appropriate legislation imposing the rates or royalty to be paid by those who extract minerals in the country. Once these Entries are out of picture, it is Entry 54 in the Union list which will operate....."

19. In view of the above, if Section 98-A is to be interpreted as authorising levy of Forest Development Tax on royalty payable under the M.M.R.D. Act, then to that extent, Section 98-A will have to be held invalid and ultravires the power of the State Legislature.

Re: Point (iii)

20. The last contention of the respondents is that even if the levy is found to be invalid, it should be held that the petitioners are not entitled to refund and effect should be given to the decision only prospectively. Reliance is placed on the decision of the Supreme Court in ORISSA CEMENT'S case, wherein it was held that a finding regarding the invalidity of the levy need not automatically result in a direction for refund of all collections made earlier and the courts have discretion in the matter either to grant, mould or restrict the relief in a manner appropriate to the situation in such a way as to advance the interests of justice. In this case, Section 98A was inserted in the Forest Act with effect from 24.12.1975. But demand for forest development tax on royalty was made by an attempt to make Section 98A applicable to mining leases only from the year 1992. The petitioners have approached this. Court immediately, challenging the said demand. By this decision, the said Section 98-A is held to be inapplicable to mining leases. Therefore the question of restricting the operation prospectively or refusing to direct refund does not arise.

21. In view of the above, the petitions are allowed as follows:-

a) It is declared that the Forest Development Tax u/s 98-A of Karnataka Forest Act, 1963 is not leviable on royalty payable to the State Government in regard to mining leases under the provisions of the Mines and Minerals (Regulation & Development) Act (Act 67 of 1957).

- b) The respondents are restrained from demanding or collecting Forest Development Tax u/s 98-A of the Karnataka Forest Act, 1963, from petitioners, on royalty paid by them in regard to mining leases.
- c) The Notices issued by the respective senior Geologists to the petitioners demanding payment of forest development tax, are quashed; and
- d) Wherever the respondents have collected any amount as Forest Development Tax from the petitioners, the same shall be refunded to them.