

(1962) 03 OHC CK 0012
In the Orissa High Court
Case No : O.J.C. No. 121 of 1961

Serajuddin and Co.

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 16-03-1962

Acts Referred:

Constitution of India, 1950 — Article 226

Mineral Concession Rules, 1960 — Rule 54, 55

Mines and Minerals (Development and Regulation) Act, 1957 — Section 29, 30, 5, 9(1)

Citation : AIR 1962 Ori 183

Hon'ble Judges : R.L. Narasimham, C.J;G.K. Misra, J

Bench : Division Bench

Advocate : G.K. Dapthery, B.M. Patnaik, S.S. Basu and R. Choudhury, for the Appellant; D. Narasa Raju and A.G., for the Respondent

Final Decision : Dismissed

Judgement

Narasimham, C.J.—The applicant holds a lease under the Government of Orissa for extraction of manganese ore from a certain area in Keonjhar district. The lease was first taken, by him on 29-12-1947 from the then Ruler of Keonjhar, prior to its merger with Orissa. The lease contained a stipulation for payment of royalty at a certain rate. It also contained an arbitration clause (Clause 12) providing for the settlement of any dispute between the lessor and the lessee as regards payment of royalty or any other money under the terms of the lease. After the merger of the Keonjhar State with Orissa with effect 1-1-48 that lease was annulled by the Government of Orissa. Subsequently after some vicissitudes, (which need not be mentioned in detail here) there was a compromise between the Government of Orissa on the one hand and the petitioner on the other and another agreement dated 22-12-52 (Annexure B to the Writ petition) was entered into by which the original lease of 1947 was revived subject to certain modifications embodied in the latter agreement. This agreement also contained an arbitration clause (Clause 15) in the following terms :

"15(a). That in the event of any question, dispute or controversy arising between the parties touching this Agreement or in any clause contained therein or any matter connected with this Agreement the same shall be referred to the Chief Secretary to the Govt. of Orissa, whose decision, if not accepted by the lessee shall be referred for arbitration of two Arbitrators one to be nominated by the State and the other by the Company not later than 30 days, from the date of communication of the decision of the Chief Secretary or in case of disagreement between the Arbitrators, to the award of an Umpire to be appointed by the Arbitrators in writing before proceeding on the reference, and the decision of the Chief Secretary, or if his decision is not accepted by the lessee the decision of the Arbitrators or in the event of their not agreeing with the decision of the Umpire appointed by them shall be final and conclusive and binding on the parties. The provisions of the Indian Arbitration Act, 1940 and of the Rules made thereunder and any statutory modification thereof shall be deemed to apply to and be incorporated in the Agreement.

(b) That upon every and any such reference the assessment of the costs incidental to the reference and award respectively shall be left to the discretion of the Chief Secretary or the Arbitrators, or, in the event of their not agreeing? of the Umpire appointed by them.

(c) That this agreement shall continue in operation if reasonably possible, during the arbitration proceedings."

The aforesaid agreement was further modified by the Controller of Mining peases, Government of India by his order 3-8-1.959, in exercise of the power conferred on him by the Mining Leases (Modification of Terms) Rules 1956 (Vide annexure C to the Writ petition). The material modification made by him, for our purpose, was as regards payment of royalties, and that is in the following terms:

"3. It is further clarified that royalty shall be payable in accordance with Section 9 of the Mines, and Minerals (Regulation and Development) Act 1957, instead of according to the stipulations of the lease deed."

2. The statutory provisions dealing with mining leases may now be noticed. In 1948, the then Central Legislature passed an Act known as the Mines and Minerals (Regulation and Development) Act (hereinafter referred to as the old Act) for the regulation and development of mines. Section 5 of that Act conferred rule making power on the Central Government to make Rules for regulating the grant of mining leases. In exercise of this, power the Central Government made the Mineral, Concession Rules 1949 (hereinafter referred to as the old Rules) wherein in Schedule I, the royalty payable for manganese ores was regulated as follows:

"Manganese,

(a) Manganese dioxide 15 per cent of the sale value at the pit's mouth subject to a minimum of Rs 3/-per ton.

(b) Manganese Ore (High grade 45% Mng. and over) 12 1/2 per cent of the sale value at the pit's mouth subject to a minimum of Rs. 2/- per ton.

(Low Grade below 45 per cent Mang) 10% of the sale value at the pit's mouth subject to a minimum of Re. 1/-per ton.

A model form of the mining lease was also issued by the Central Government along with the old Rules. In paragraph 2 of Part VI of that model form it was stated that the mode of arriving at the pit head value for the purpose of fixing; the rate of royalty should be specified in the lease.

3. In 1957 Parliament replaced the old Act by the Mines and Minerals (Regulation and Development) Act 1957 (hereinafter referred to as the new Act), Section 9(1) of the New Act expressly stated that:

"The holder of a mining lease granted before the commencement of this Act shall, notwithstanding anything contained in the instrument of lease or in any law in force at such commencement pay royalty in respect of any mineral removed by him from the leased area after such commencement, at the rate for the time being specified in the Second schedule in respect of that mineral."

In the Second schedule to the New Act the royalty payable in respect of manganese was shown against item 6 as follows.

6. Manganese,

(a) Manganese dioxide. Fifteen per cent of sale price at the pit's mouth subject to a minimum of Rs. 3/- per ton.

(b) Manganese ore : (i) High grade (45 % Mang. and over.) 12% of the sale price at the pit's mouth subject to a minimum of Rs. 2/-per ton.

(ii) Low Grade Below 45% Mang. 10% of the sale price at the pit's mouth subject to a minimum of Re. 1/-per ton.

It will thus be noticed that the rate of royalty as given in the second schedule to the new Act is almost identical with the rate as given to Schedule I of the old Rules except for the fact that the rate has been computed on the basis of the "sale price at the pit's mouth" instead of "sale value at the pit's mouth."

4. The old Rules however continued in force until 1960 by virtue of Section 29 of the new Act until they were replaced by the Mineral Concession Rules, 1960 (hereinafter referred to as the new Rules). In the new Rules also there was a model form of mining lease very similar to the model form attached to the old Rules. Here also in Part VI in paragraph 2 it was left to the parties to specify the mode of arriving at the "sale price at the pit's, mouth" for the purpose of calculation of the royalty payable.

5. Thus the original lease of 1947 between the petitioner and the then Ruler of Keonjhar stood modified by virtue of the compromise entered into between the petitioner and the Government of Orissa and embodied in the agreement dated

22-12-52 which again was modified by the Controller of Mining Leases on 3-8-1959. In consequence of this modification the Original contracted rate of royalty payable stood modified by the operation of Section 9(1) of the new Act and the rate of royalty was required to be determined in the manner indicated in item 6 of the Second schedule to the new Act. But there was considerable controversy between the parties in ascertaining what was the "sale price at the pit's mouth" in respect of manganese ores. There was also some ambiguity in construing the words. "sale value at the pit's mouth" as indicated in Schedule I to the old Rules. Apart from the difference in the meaning of the words "price" and "value" difficulties arose in respect of the petitioner's lease mainly because, as admitted by him in paragraph 13 of his petition, the bulk of the manganese ores extracted by him were exported outside India through Kidderpore Docks and there was practically no actual sale of the ore at the pit's mouth. Hence any mode of calculation of the price of manganese ores at the pit's mouth so far as the petitioner's lease is concerned must necessarily be notional. Anticipating this difficulty, as early as 19-12-52 the Government of Orissa published for the general information of all persons holding mining leases Executive Instructions Supplementary to the Mineral Concession Rules regarding the mode of computation of the royalty payable (vide annexure A to the affidavit filed by the Government of Orissa). I may quote below the relevant portions:

"2. Mode of arriving at the pit head value of for the purpose of computing royalty.

(a) Notwithstanding any proof that may be produced by the lessee of sale at the pit's mouth of the ore at any lower price, for the purpose of calculation of royalty, the pit's, mouth value shall be calculated back from the price of the ore at recognised markets for ore in the country. The State Government shall declare from time to time to the commercial bulletins or Government statistical bulletins from which the prevailing price shall be ascertained for important markets for the minerals. The State Government shall also declare from time to time what they consider fair prices for the mineral at the market or markets recognised by the trade and also what they consider fair transport and handling charges for me mineral from pit's head to the important markets either in general or for specific mines. The highest price at the pit's head on the basis of such prices and transport and handling charges shall be taken as the sale value at pit's mouth."

In other words by these Executive Instructions the State Government announced before hand that for the purpose of computing the royalty the actual price of the mineral at the pit's mouth will not be taken as a guide but that the State Government referred to themselves the power to declare from time to time what they considered to be the fair price of the mineral at markets recognised by the trade. It will be noticed that these Executive Instructions were published some days before the petitioner entered into an agreement with the Government of Orissa in pursuance of the terms of compromise on 22-12-52.

6. It was contended by Mr. P. Narasaraju for the State Government that though

the mode of computing the value or price of manganese ore at pit's mouth was not embodied in the agreement (Annexure B to the written petition) nevertheless having regard to the aforesaid Executive Instruction it was one of the implied terms of the agreement that the State Government should rationally fix the price for the mineral at the pit's mouth by notification issued by them from time to time bearing in mind the price of the mineral prevailing in recognised trade markers.

7. On 28-10-1953 the Government of Orissa issued a notification stating that for the purpose of ascertaining the pit's mouth value of manganese ore they will first ascertain the F.O.R. price of the samp at Kidderpore docks, notified from time to time, and then make some deductions for handling and transport charges from pit's mouth to Kidderpore docks (see annexure D to the writ petition). Then on 27-5-58, 19-6-59 and 1-8-60 (annexures E, F, G and H to the writ petition) the State Government issued several further notifications declaring the price of manganese ore as published in the Bengal Chamber of Commerce bulletin to be the prevailing price and directed certain deductions to be made in respect of handling and transport charges, with a view to arrive at the pit's mouth price of the mineral for the purpose of computing royalty. In these notifications they also gave retrospective effect to the aforesaid mode of calculation from the year 1953. Acting in pursuance of these notifications the Collector of Keonjhar district issued a demand notice dated 7-4-61 (annexure L to the writ petition) calling upon the petitioner to pay arrear royalty to the extent of more than 20 lakhs of rupees with a threat to distrain his property if the royalty was not paid within the time prescribed. Being aggrieved by the orders, contained in the aforesaid notifications and also by the demand notice issued by the Collector the petitioner has applied to this Court for relief under Article 226 of the Constitution.

8. A preliminary objection was taken by Mr. Narasaraju for the opposite party, against the exercise of this Court's extraordinary jurisdiction under Article 226. He urged that u/s 30 of the new Act the Central Government has wide powers of revision; against any order passed by the State Government or by any other authority as regards the mode of computing royalty payable and that the petitioner should therefore have sought relief before the Central Government in the first instance. Secondly he contended that the parties themselves had agreed to abide by the arbitration of the Chief Secretary to the Government of Orissa and the petitioner should have availed himself of the remedy provided in the arbitration clause Subject of course to such interference by the Civil Court as may be permitted by the provisions of the Indian Arbitration Act, or otherwise. In my opinion both these contentions must prevail.

9. It is no doubt well settled that no provision in any Act passed by any Legislature, Union or State, can cut down the extensive jurisdiction conferred on this Court by Article 226 of the Constitution and in special circumstances there may be jurisdiction) for this court to exercise its extraordinary jurisdiction even if there is an alternative remedy. As pointed Out in (1962) 1 SCJ 170 : (AIR 1961

SC 1505), Venkateshwaran v. Ramchand Sobhraj, the question, is not whether the jurisdiction of this Court is barred but whether in the peculiar facts and circumstances of this case this Court should decline to exercise its jurisdiction. In my opinion the alternative remedies suggested above are more efficacious and should have been availed of by the petitioner. The position would be different if any question of the constitutional validity of the new Act or the new Rules arises for consideration. Clearly no such, question arises here. The simple question in controversy is as regards the mode of calculating the sale price at pit's mouth, in respect of a mineral which is not sold at the pit's mouth but mostly exported abroad as admitted by the petitioner himself: There is no express agreement between the parties as to how such sale price should be computed though the model form of the lease provides for it. The lessor (Government of Orissa) claimed that there was an implied agreement between the parties, by virtue of Executive Instruction quoted above, published prior to the date of agreement, of which the lessee must be presumed to be aware that the State Government reserved to themselves the right to declare from time to time the fair price of the mineral (manganese ore) at recognised markets. This was also reiterated in the subsequent notification dated 28-10-53 (Annexure P to the writ petition already referred to). Hence it was contended on behalf of the State of Orissa that the impugned notifications were issued in exercise of this implied term in the agreement between the lessor and the lessee. The petitioner, on the other hand, emphatically denied the existence of any such implied term and contended that neither under the new Act nor under the new Rules did the State Government have authority to arbitrarily fix the price of manganese as published in the Bengal Chamber of Commerce's bulletins as a fair price and make deductions therefrom towards transport and handling charges from the pit's mouth to Kidderpore docks, with a view to arrive at the amount of royalty payable. The question thus ultimately depends on a construction of the terms of the agreement entered into by the parties On 22-12-52 bearing in mind the surrounding circumstances existing at that time and the modifications to this agreement so far as payment of royalty is concerned authorised by Section 9(1) of the new Act read with the Second Schedule to that Act. The arbitration clause (Clause 15) expressly provides for the decision of any dispute between the parties by the Chief Secretary if it is referred to him in the First instance and if the parties do not abide by the decision by two other Arbitrators, appointed in that behalf. The clause expressly says that "any question, dispute or controversy arising between the parties touching this agreement or any clause contained therein or any matter connected with the agreement will be referred to arbitration." These words are wide enough to include any controversy between the parties, as to the question of royalty payable, which again depends on the mode of calculation of the sale price of the ore at pit's mouth. When the parties themselves have thus agreed to have any dispute Settled by an arbitrator it will obviously be not proper for this court to exercise its extraordinary jurisdiction under Article 226.

10. It is well settled, by innumerable decisions of the High Courts as well as of the Supreme Court, that where rights in relation to a contract are involved there is no question of violation of any fundamental right and that writ jurisdiction will not be invoked or exercised. I need only refer to *Achutan v. State of Kerala* AIR 1959 SC 499, *Shantabai Vs. State of Bombay and Others*, , and *Indian Tobacco Corporation v. State of Madras*, AIR 1954 Mad 549. In *C.K. Achuthan Vs. The State of Kerala and Others*, their Lordships of the Supreme Court have further observed that the fact that the State is one of the contracting parties (as in the instant case) will not make any difference to the aforesaid principle. I may, quote the following observations:

"Similarly a contract which is held from Government stands on no different footing from a contract held from a private party."

11. During the course of argument an affidavit was filed on behalf of the petitioner in support of his contention that sometime in 1956 there was some correspondence between him and the Government of Orissa for the appointment of the Chief Secretary as the arbitrator to decide some of the disputes including the question of royalty and that no action was taken, on his request. It was urged on, the basis of this affidavit that the State, of Orissa were themselves to blame for not having referred the dispute to the arbitrator, A counter affidavit has also been filed by the State of Orissa challenging the aforesaid statement of fact. But these affidavits do not really help the petitioner's case. Here the impugned notifications commence from 27-5-58 and extend upto 1-6-60. It is not stated that any application was made to the State Government to appoint an arbitrator to decide the dispute regarding the authority of the State Government to issue the notifications. Even if there was delay on the part of the State Government in appointing an arbitrator the petitioner could have invoked the jurisdiction of the Civil Court for the purpose of appointing an arbitrator as provided in the Arbitration Act.

12. Moreover the relief which the Arbitrator can give to the petitioner will be much more efficacious than, any relief which this court can possibly give in exercise of its writ jurisdiction. Even if the petitioner succeeds in this application, all that this Court can do is to quash the impugned notifications and also cancel the demand notice issued by the Collector of Keonjhar. But this Court cannot solve the main controversy between the parties as to how the sale price at pit's mouth is to be ascertained for the purpose of computing the royalty. The arbitrator on the other hand will be able to decide this question by virtue of the wide powers conferred on him by the arbitration clause. Thus the alternative remedy chosen by the parties themselves if availed of, will be more efficacious and complete.

13. Moreover Section 30 of the new Act confers revisional jurisdiction on the Central Government. I may quote the section in full:

"30. The Central Government may of its own motion or on application made

within the prescribed time by an aggrieved party, revise, any order made by a State Government or other authority in exercise of the powers conferred on it by or under this Act."

Rules 54 and 55 of the new Rules contain detailed provision for the exercise of this revisional jurisdiction by the Central Government, the proviso to Sub-rule (1) of Rule 54 of the new Rules confers discretion on the Central Government to condone the delay in applying under this section. Rule 55 says that after calling for records and hearing the State Government the Central government may "confirm, modify or set aside the order and pass such other order in relation thereto, as the Central Government may deem just and proper". Sub-rule (2) of Rule 55 confers powers on the Central Government to stay the Operation of an order passed by the State Government or any other authority until the final disposal of the application for revision.

It will thus be seen that section 30 of the new Act read with the aforesaid new Rules, give wide power to the Central Government (1) to condone the delay, (2) to grant interim relief to the petitioner and (3) to pass any order as they may deem just and proper. This would include not only quashing of the impugned notifications but also deciding the question as to what should be the fair method of computing the sale price at pit's mouth, so far as the present petition is concerned. The petitioner need not have any apprehension that the Central Government would decide the matter in its executive capacity. Their Lordships of the Supreme Court in *Shivji Nathubhai Vs. Union of India (UOI) and Others*, while construing a similar provision in the old Rules held that the General Government in exercise of their revisional jurisdiction act as a quasi-judicial authority and that they must give to the parties concerned a reasonable opportunity of being heard. They can go into disputed questions of fact also which this Court cannot do while exercising its writ jurisdiction.

14. Thus when the Act itself confers on another superior authority quasi judicial powers to decide, in revision, any dispute arising out of the agreement it will not be proper for this court to exercise its extraordinary jurisdiction under Article 226. This is especially so when the revisional jurisdiction of that superior authority is plenary as will be clear from the language of the new Rules quoted above. I may also, in this connection, refer to the observation of the Supreme Court in *Purshottam Lal Dhawan Vs. Dewan Chaman Lal and Another*, where their Lordships, while construing similar provisions in, the Administration of Evacuee Property Act, held that the revisional jurisdiction was plenary."

15. It was then contended that the remedy provided by Section 30 of the new Act may not be available because the impugned notifications were not issued, nor was the demand by the Collector of Keonjhar made in exercise of the power conferred on these authorities by or under the new Act. This is a matter which has, to be decided by the Central Government if the parties choose to take it up before that Government in revision. But as the learned counsel for both sides have argued this point before us, I may indicate what appears to be the prima

facie position. It is well settled that if an authority purports to act under the provisions of a statute a statutory Rule, the statutory authority (either appellate or revisional) exercising the powers under the statute or statutory rule will have jurisdiction to interfere. The preamble to the impugned notifications shows that the State Government issued them "in pursuance of paragraph 2(a) of part VI of the model form of the mining lease contained in the Executive Instruction supplementary to the Mineral Concession Rules 1949". The Executive Instructions have already been referred to. Apparently the State Government has taken the view that the model form of mining lease was part of the old Rules (or the new Rules, as the case may be) and that even in the absence of any express agreement between the parties Government may specify the mode of arriving at the pit head value or price under paragraph 2(a) of part VI of the model form under the old Rules, (which corresponds to paragraph 2 of part VI of the model form contained in the new Rules). Whether this view of the State Government is right or wrong has to be decided by the superior authority in revision, but it is clear from the preamble to the notifications that the State Government purported to exercise this power under the old Rules (the new Rules having come into force only on 11-11-60). By virtue of Section 9(1) of the new Act, any term in the mining lease between the parties, in so far as it relates to the payment of royalty shall be deemed to have been amended in the manner specified in the Second Sch. to that Act. Hence the claim to royalty made by the State Government under any method of computation of the pit head sale price or sale value, must be held to have been made in exercise of the statutory power conferred by Section 9(1) of the new Act read with the model form attached to the mining lease. Section 30 of the new Act confers revisional jurisdiction on the Central Government, to revise any order passed by the State Government or other authority purporting to exercise the powers conferred on it by or under that Act. The powers conferred "by" the Act may be somewhat restricted: to those powers, which are directly conferred by the provisions of the statute itself, whereas the powers conferred "under" the Act are wider and will include the powers conferred not only by the statute and the Rules made under it, but also by the model form of the lease which has been taken by the State Government to be part of the Rules themselves.

16. As regards the demand of arrear royalty made by the Collector of Keorjhar, Section 25 of the new Act is, directly attracted. On behalf of the petitioner, however an affidavit was filed to show that the Collector has not been authorised to act u/s 25, whereas on behalf of the State a counter affidavit has been filed to the effect that the Collector has been so authorised. It is unnecessary for us to decide this controversial question here because this again will have to be decided by the Revisional authority u/s 30 of the new Act.

17. The same reasoning would apply as regards the contention, that as the new Act came into force only in 1957, the State Government had no jurisdiction to give retrospective effect to the demand from 1953 by virtue of the impugned notifications--from a period when the old Rules and old Act were alone in force.

This matter also may legitimately be canvassed before the Central Government in revision if the parties are so advised, or before the arbitrator if the matter is taken up before him.

18. For the aforesaid reasons, I am satisfied that this is not a fit case for this court to interfere by exercising its extraordinary jurisdiction under Article 226 of the Constitution.

The appeal is dismissed with costs. Hearing fee Rs. 100/- (Rupees one hundred Only).

Misra, J.

19. I agree.