

(2012) 11 GAU CK 0038

In the Gauhati High Court

Case No : WA Sl. No. 121041 and WA No. 316 of 2012

State of Assam and Others

APPELLANT

Vs

Muslim Ali (Md.)

RESPONDENT

Date of Decision : 08-11-2012

Acts Referred:

Mines and Minerals (Development and Regulation) Act, 1957 — Section 3(e), 4, 9

Citation : (2013) 2 GLT 945

Hon'ble Judges : Adarsh Kumar Goel, C.J;Ujjal Bhuyan, J

Bench : Division Bench

Advocate : I. Choudhury, SC, PWD, for the Appellant; Diganta Das and Mr. P. Sharma, for the Respondent

Judgement

Ujjal Bhuyan, J.—Delay condoned. Office to register this appeal.

2. This writ appeal has been preferred by the State against the Judgment and Order dated 11.06.2009 passed by the learned Single Judge allowing W.P.(C) No. 5258/2007 filed by the respondent/writ petitioner.

3. The facts of the case may be briefly noted.

4. Respondent is a Class-1A contractor registered with the Assam Public Works Department (PWD) (Roads). Pursuant to Notice Inviting Tender (NIT) dated 30.08.2005 issued by the Chief Engineer, PWD (Roads), respondent was issued a work order dated 30.01.2006 awarding a contract for construction of rural roads, culverts, minor bridges, routine maintenance etc. for a period of 5 years. It may be mentioned that the Chief Engineer and the respondent had entered into a contract agreement relating to the work awarded, pursuant to which notice to proceed with the work was issued to the respondent on 30.01.2006. While executing the work, respondent had used stones, gravel, sand and other materials, which were procured from the open market. According to the respondent, it was confirmed by the supplier that the payment received from the contractor was at a rate which included forest royalty, taxes etc. In connection

with execution of the awarded work, respondent raised running bill of Rs. 1,58,82,341/- for the period from April, 2005 to March, 2007. However, an amount of Rs. 8,66,864/- was deducted from the total amount towards forest royalty, including income tax and value added tax on forest royalty. Respondent filed the related writ petition challenging the aforesaid deduction from his contractual dues. Respondent contended that the tender documents as well as the contract agreement did not provide for such deduction. Therefore, such deduction was unauthorized.

5. The appellants, who were arrayed as respondents in the writ petition, contested the claim of the petitioner by filing counter affidavit. The stand of the department was that as per office memorandum dated 17.06.2000 issued by the Finance Department, Government of Assam, the executing agency is debarred from paying any bills in connection with construction works of Government Departments or Government Undertakings using forest produces unless the Forest Department certifies that the forest produces so utilized were collected from legal sources and necessary royalty/price due to the Government has been paid. The office memorandum further provides that in cases where such certificates are not furnished, the bills may be passed only after deduction of the amount due as royalty, which would be deposited in the Government account. As no such certificates were furnished by the petitioner, the deduction was made.

6. Petitioner filed re-joinder affidavit denying the contention of the department and generally reiterating the averments made in the writ petition.

7. Learned Single Judge by the Judgment and Order dated 11.06.2009 allowed the writ petition. Referring to the provisions of the Mines and Minerals (Regulation and Development) Act, 1957 and the Assam Minor Mineral Concessions Rules, 1994, learned Single Judge observed that it is the responsibility of the mining lessee to make payment of forest royalty, not that of the contractor and that in the absence of specific provision in the contract, deduction of forest royalty from the dues of the contractor was not justified. Allowing the writ petition, learned Single Judge directed refund of the deducted amount of Rs. 8,66,864/- to the petitioner.

8. Feeling aggrieved, the department is in appeal.

9. Heard Mr. I. Choudhury, learned Standing Counsel, PWD for the appellants as well as Mr. D. Das, learned Senior Counsel assisted by Mr. P. Sharma, learned Counsel for the respondent.

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

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

11. From a cumulative reading of the above clauses, it would be evident that there is a contractual presumption in favour of the contractor that the rates quoted by him shall be deemed to be inclusive, amongst others, of royalties. Duty is also cast on the department to deduct taxes at source which are so required to be done as per applicable law.

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

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

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

15. Though the office memorandum of the Finance Department dated 17.06.2000 provides that bills of contractors engaged in construction works of Government Departments and Government Undertakings using forest produce will not be paid unless the Forest Department certifies that the forest produce so utilized has been collected from legal source and necessary royalty has been paid, the same is not a condition incorporated in the contract agreement and, therefore, would have no binding force on the contractor.

16. Learned Single Judge, on due consideration, held as under:-

7. Having regard to the above contention made by the departmental counsel, I find that it was not specified as one of the contract conditions that it was incumbent on the contractor to apply to the executing agency i.e., PWD for issuance of forest permit from the nearest forest division for procuring the

materials used in the contract. It was also not specified that such materials are to be procured from a particular Government source or a particular Government lessee. It is also not incorporated as part of the tender condition that if the petitioner is unable to produce a certificate showing use of forest produce on which royalty has been collected, his bills to the extent of royalty payable would be deducted at source. Under these circumstances it is difficult for this Court to accept that the action taken by the authority is in accordance with law.

8. If such obligation would have been incorporated as one of the contract condition that the contractor has to secure his supply from a particular Government quarry and then if he would have acted contrary to such requirement, the department may have been justified in deducting amounts on account of royalty, from the running bills of the contractor. But in the absence of such clause in the contract, the action seems to be unauthorized.

9. It must also be borne in mind that even in cases where supplies are secured from a forest approved lessee, there can be no guarantee that the materials used by the contractor were royalty paid materials, as even approved forest contractor may supply materials on which royalty has not been paid.

10. Therefore in my view it was firstly necessary for the department to incorporate appropriate conditions in the contract to bind the contractor that he has to procure his forest material requirement from a specific source and on his failure to procure materials from such source, there could have been an adverse presumption drawn against the contractor.

Secondly, the conditions incorporated in the Memorandum issued by the Finance Department on 17.06.2000 should have also been specifically incorporated as one of the contract conditions, as the contract in question was awarded in the year 2005 i.e. 5 years after the Circular of the Finance Department. Not having incorporated the requirement insisted upon by the Finance Department as a contract condition, would disentitle the PWD from realizing royalty on forest produces, which really is a burden of either the Forest Department or the Mines and Minerals Department.

11. The action against the contractor is initiated by the department on the basis of presumption and surmises as there is no absolute certainty that no royalty is paid on the materials used by the contractor. No opportunity was afforded to the contractor before such adverse assumption was made by the department, to order deduction of amounts from the running bill of the contractor. If royalty had actually been paid on the materials used by the contractor, deduction of further amount as forest royalty, would amount to double charging of royalty, which cannot be permissible in law. In any case revenue recovery cannot be permitted by presuming facts without statutory support.

12. Having regard to the fact that under the provisions of Mines Act and the Mineral Rules, it is the responsibility of Mining lessee to make payment of forest royalty and it is not the obligation to be discharged by the contractor, in the

absence of specific provision incorporated in the contract, I am of the considered opinion that the impugned action of the respondents to deduct amounts towards forest royalty from the running bill of the petitioner is not at all justified. Accordingly it is ordered that the bills of the contractor be paid without insisting on such deduction for the subject contract.

13. As a consequence of this order, department would take necessary steps to pay to the petitioner his due amount without deducting any amount as royalty payment. The deduction of Rs. 8,66,864/- already made, will be paid to the contractor within 6 weeks from the date of receipt of this Court's order.

17. We are in agreement with the views expressed by the learned Single Judge. No appropriation of money from the contractual dues is permissible unless backed by statutory provision or by express provision contained in the contract agreement binding the parties to the contract. In absence thereof, such deductions would be unauthorized. Learned Counsel for the appellants have not been able to show any such provision to persuade us to take a different view. In view of above, we find no merit in this appeal. Appeal is accordingly dismissed but without any order as to cost. Appellants shall comply with the directions of the learned Single Judge within eight weeks from today.