

(2021) 12 PAT CK 0017

Patna High Court

Case No: Civil Writ Jurisdiction Case No. 13251 Of 2021

Broad Son Commodities Private
Limited

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision: Dec. 8, 2021

Acts Referred:

- Bihar Minerals (Concession, Prevention of Illegal Mining, Transportation & Storage) Rules, 2019 - Rule 2(15), 2(17), 29A(1), 47, 50, 50(1), 77, 77(2)
- Mines and Minerals (Development and Regulation) Act, 1957 - Section 15, 23C, 26
- Indian Contract Act, 1872 - Section 56
- Bombay Shops and Establishment Act, 1948 - Section 70

Hon'ble Judges: Chakradhari Sharan Singh, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

1. Heard Mr. S.B. Upadhyay, learned Senior Counsel assisted by Mr. Suraj Samdarshi, learned counsel for the petitioner, Mr. Naresh Dixit, learned Special Public Prosecutor for the Department of Mines and Geology, Government of Bihar and Mr. Gyan Prakash Ojha, learned G.A.-7 for the State of Bihar.

2. The petitioner has put to challenge a communication issued vide Memo No. 2985 dated 07.07.2021 by the District Magistrate-cum-Collector, Bhojpur, whereby a demand of Rs. 1,39,50,39,924/- has been raised against second, third and fourth installments of royalty for the extended period of settlement (01.04.2021 to 30.09.2021).

3. Further, the petitioner seeks a declaration by this Court that it is not liable to pay second, third and fourth installments of the royalty as it had already surrendered its settlement, which cannot be treated to be in contravention of Rule 50 (1) of the Bihar Minerals (Concession, Prevention of Illegal Mining, Transportation & Storage) Rules, 2019 (â€˜2019 Rulesâ€™ for short). The petitionerâ€™s surrender of settlement has been rejected by the respondents with reference to Rule 50 (1) of 2019 Rules. The petitioner is, therefore, seeking declaration that said rejection is not justified as Rule 50 (1) of 2019 Rules does not have any application in respect of extension granted under Rule 77 (2) of the said Rules.

4. Facts of the case, which are not in dispute, are that the petitioner, pursuant to an auction notice for a period of five (05) years (from 2015 to 2019), had applied for settlement of Sand Ghats and, upon having become the highest bidder, work order was issued for mining activities at the sand ghats in the district of Bhojpur for the year 2015. For the subsequent years, i.e. 2016, 2017 and 2018, separate work orders were issued. The period of agreement ended on 31.12.2019. In the meanwhile, the Government of Bihar came out with a new Bihar Sand Mining Policy, 2019, notified on 14.08.2019. Further, in exercise of the powers conferred under Section 15 read with Section 23-C and Section 26 of the Mines and Minerals (Development and Regulation) Act, 1957, the State Government framed the 2019 Rules repealing Bihar Minor Mineral Concession Rules, 1972 and Bihar Minerals (Prevention of Illegal Mining, Transportation and Storage) Rules, 2003 and Bihar Minor Minerals Rules, 2017. A copy of 2019 Rules has been brought on record by way of Annexure-4 to the writ application. The Rules came into force with effect from its publication in the Official Gazette on 17.09.2019. Chapter-V of 2019 Rules deals with settlement of sand as minor minerals. Rules 29 A(1) of the 2019 Rules lays down mode of settlement. Chapter XII of the said Rules deals with cancellation of mineral concession, which has been defined under Rule 2 (15) as a mining lease or settlement in respect of minor minerals permitting, inter alia, the mining of minor minerals in accordance with the provisions of the Rules. Rule 50 under Chapter XII of the Rules gives exit option for a mineral concession holder within the meaning of Rule 2 (XVII) of the Rules. Rule 50 of 2019

Rules contemplates, inter alia, that a mineral concession holder may opt to exit the business upon giving six months' notice to the Collector. Rule

77 of 2019 Rules confers upon the State Government power to relax operation of any provision of the Rule. Sub Rule (2) of Rule 77 is a non obstante

clause and reads as under :-

“77(2) Notwithstanding anything contained in these rules, the State Government, in such case as it deems proper in public interest, may grant a

mining lease/mining settlement and may also authorize the grant of a quarrying permit or movement permit to any person on terms and conditions other

than those prescribed in these rules for reasons to be recorded in writing: Provided that the State Government may grant a mining lease/settlement/in

any area under its jurisdiction to any Government Department or State owned Corporation on terms and conditions other than those prescribed in

these Rules.”

5. Indisputably, invoking the aforesaid Rule 77 (2) of 2019 Rules, the State Government, through its Department of Mines and Geology came out with

a notification dated 27.12.2019 permitting extension of settlement of period of existing settlees of sand ghats in Bihar which were ending on

31.12.2019, till 31.10.2020 or till new settlees obtained environmental clearance, whichever was earlier. It was decided to increase the settlement

amount by 50 per cent. The settlements of the existing settlees were further extended till 31.12.2020 vide a resolution dated 14.09.2020 and, till

31.03.2021 vide resolution dated 30.12.2020. The petitioner availed the benefit of all these extension of settlements in its favour. Further, by another

notification dated 31.03.2021 another extension was granted from 01.04.2021 to 30.09.2021. The work order was issued to the petitioner vide letter

dated 31.03.2021 issued by the Assistant Director, District Mining Office. The petitioner accepted the said extension and deposited first installment of

a sum of Rs. 27,35,37,240/-. On 26.04.2020, the petitioner communicated to the Assistant Director, District Mining Office, Bhojpur, intimating that

because of rampant illegal sand mining and non-cooperation of the State Government machinery, it was not possible for the company to pay the next

installment of royalty and, therefore, it had decided to surrender the settlement of sand mining for Bhojpur, Patna and Saran districts with effect from

01.05.2021. Responding to the said letter dated 26.04.2021, the Collector, Bhojpur, informed the petitioner rejection of the application for surrender, referring to Rule 50 (1) of 2019 Rules, as the petitioner had not complied with the requirements under the said Rule. The Collector also directed the petitioner to deposit the second installment, which was payable prior to 30.04.2021, within time, else action under Rule 47 of 2019 Rules would be taken. Subsequently, the petitioner received impugned letter on 07.07.2021 issued by the Collector, Bhojpur, requiring the petitioner to deposit the said amount of Rs. 1,39,50,39,924/- along with 24 per cent interest, as the second, third and fourth installments of the royalty for the extended period of settlement, failure of which to entail consequences of institution of certificate proceeding.

6. It is the petitioner's case, as pleaded in the writ application, that it had to suffer a huge loss during the months of January, February and March, 2021 because the State Government had come out with a resolution dated 16.12.2020, whereby use of trucks with 14 or more wheels was prohibited for transportation of sand and stone chips, since large percentage of sand is transported using such trucks. Considering this and also the rampant illegal mining operations prevailing in the district of Bhojpur, the petitioner was reluctant to accept the settlement. However, under pressure from the department, the petitioner had accepted the settlement. The petitioner has alleged that it had earlier approached this Court in 2019 giving rise to CWJC No. 6890 of 2019 for a direction upon the authorities to prevent illegal mining and transportation of sand, which was disposed of on 09.08.2019, wherein the Court had issued certain directions. Nonetheless, the petitioner asserts, the menace of illegal mining continued to thrive. It is the petitioner's case that since it had not extracted any sand from 01.05.2021, the respondents cannot compel it to pay royalty for second, third and fourth installments.

7. Counter affidavits have been filed on behalf of the respondents. It has been stated in the counter affidavits that the petitioner is a habitual defaulter and has itself indulged in illegal mining which was detected by the Department in such area, which was not allotted to it, in breach of the Rules.

Further, it has fraudulently removed/stocked sand without e-challans worth Rs. 15.84 crores.

8. It has also been stated that the State Government of Bihar has taken strict measures against illegal mining and transportation of sand. In support of the statement that the petitioner itself was indulged in illegal mining and was caught by the department violating the Rules, reference has been made to the F.I.Rs. registered as Chandi P.S .Case No. 30 of 2021 and Sahar P.S. Case No. 37 of 2021 registered on 04.02.2021 and 08.02.2021 respectively.

9. It has also been stated that the petitioner itself has violated environmental norms, and, on several occasions, it has been punished. In relation to this

Court's order passed in a writ petition filed by the petitioner earlier, i.e. CWJC No. 6890 of 2019, reported in 2019(4) PLJR 246 (M/s. Aditya

Multicom Private Limited vs The State of Bihar and others and other analogous matters), it has been stated that petitioner's interest was never

jeopardized in any manner and the petitioner has been able to do mining activities to its full capacity. It is their specific case that the exit option under

Rule 50 of 2019 Rules can be exercised on six months' prior notice. Further, said option is not available to a concession holder, who has not paid

its bidding amount or settlement amount or violated any conditions of the settlement. In the aforesaid background, the petitioner's application to

exit was rejected and communicated to it by letter dated 28.04.2021.

10. It has also been stated that once the petitioner had agreed to pay and accepted the terms and conditions of extended period of agreement, it was

impermissible for him to surrender the settlement.

11. It is noted, at this juncture, that no rejoinder has been filed on behalf of the petitioner to the counter affidavits filed on behalf of the respondents

and, thus, the statements made in the counter affidavits have remained uncontroverted.

12. Mr. S.B. Upadhyay, learned Senior Counsel appearing on behalf of the petitioner had made two fold submissions to assail the impugned action of

the respondents. He has firstly submitted that because of the circumstances prevailing in the State arising out of unhampered and uncontrolled illegal

mining activities in the State of Bihar and absence of desired co-operation from the State authorities, it had become impossible for the petitioner to

continue with the settlement.

13. Further, a subsequent policy decision of the State Government to prohibit use of trucks with 14 wheels had added to the perilous situation in which

the petitioner was placed. In such circumstances, it was an impossibility for the petitioner to continue with the sand mining activity. Relying on Section

56 of the Contract Act, 1872, he has submitted that since performance of the sand mining activities by the petitioner had become impossible, the

contract of settlement had become void. He has relied on a Supreme Court's decision in case of Delhi Development Authority v. Kenneth

Builders and Developers Private Limited and Others, reported in (2016) 13 SCC 561, to contend that the word "impossible", used in Section 56

of the Act, does not connote only physical or literal impossibility, rather it ought to be interpreted as impracticable and useless from the point of view of

the object and purpose that the parties had in view when they entered into the contract. He has submitted that because of intervening circumstances,

as narrated in the writ application, the element of impracticability/uselessness in continuing with the settlement in question had arisen and, therefore,

the petitioner had rightly surrendered his settlement with immediate effect. The Collector, without examining the petitioner's plight, as disclosed in

his application for surrender, casually rejected it by referring merely to Rule 50 (1) of 2019 Rules.

14. He has secondly submitted that Rule 50 (1) of 2019 Rules has no application in respect of the settlements granted in exercise of power vested in

Rule 77 (2) of the said Rules. According to him, Rule 77 (2), being a non obstante clause, is an independent provision having overriding effect over all

other provisions under the Rules. He has accordingly submitted that reference by the Collector to Rule 50 of 2019 Rules for rejecting the

petitioner's application for surrender of settlement is wholly misconceived and rejection of petitioner's application on that ground is not

sustainable in the eyes of law. He has relied on a Supreme Court's decision in case of Union of India and Another Vs. G.M. Kokil and Others

reported in 1984 Supp SCC 196, to contend that the non obstante clause is a legislative device which is employed to give overriding effect to provisions

over some contrary provisions that may be found either in the same enactment or some other enactment. He has submitted that the expression

“notwithstanding anything contained in these Rules” must mean notwithstanding anything to the contrary contained in the Rules. He has

submitted that a settlement granted under Rule 77 (2) of the Rules is not controlled by any other provision under the Rules. He has further submitted

that since the settlement in question itself was for a period less than six months, question of application of Rule 50 (1) of 2019 Rules cannot arise. He

has accordingly submitted that the impugned action of the Collector, rejecting the petitioner’s application to surrender the settlement and raising a

demand to the tune of Rs. 1,39,50,39,924/-, is wholly arbitrary, illegal, irrational and beyond jurisdiction.

15. Mr. Naresh Dixit, learned counsel appearing on behalf of the Mines Department, on the other hand, has submitted that the petitioner is playing hot

and cold at the same time. On the one hand, there is no denial of the allegations made in counter affidavits filed on behalf of the respondents regarding

petitioner’s indulgence in activities of illegal mining of sand and violation of environmental laws inviting penal actions, on the other hand, it is trying

to make out a case that it was difficult for the petitioner to continue with the settlement for mining of sand because of rampant illegal mining activities

in the State of Bihar.

16. He has secondly submitted that Rule 77 of the Rules falls under Chapter XIII, which provides for exemptions and relaxations, which can be

granted by the State Government. He has submitted that notwithstanding clause in Sub Rule (2) of Rule 77 of the Rules permits the State Government

to grant a mining lease/mining settlement and authorizes grant of quarrying permit or movement permit to any person on terms and conditions other

than those prescribed in the Rules. He has submitted that the expression “notwithstanding anything contained in these Rules” is referable to,

(i) Grant of a mining lease/mining settlement to any person,

(ii) Grant of acquiring permit or movement permit to any person, and

(iii) Terms and conditions other than those prescribed in these Rules.

17. According to him, the said provision cannot be read in a manner as to render all the other provisions under the Rules otiose. The said clause is

confined to the purposes mentioned thereunder and not for any other purpose. He has submitted that the provision under Rule 50 of the Rules cannot be said to be excluded for settlements granted by invoking Clause 77 (2) of 2019 Rules. He would contend that the petitioner has not paid the entire settlement amount and has thus violated conditions of settlement. According to him, the exit option under Rule 50 (1) of 2019 Rules is not available to such settlees who have not paid the amount of settlement.

18. Mr. S.B. Upadhyay, learned Senior Counsel appearing on behalf of the petitioner, in response to said submission of Mr. Dixit, has relied on the Supreme Court's decision in case of Mohinder Singh Gill and Another vs. Chief Election Commissioner, New Delhi and Others (AIR 1978 SC 851), to contend that validity of an order is to be tested on the basis of what is mentioned therein and not on the basis of facts asserted in affidavits.

He has contended that the only reason for rejecting the petitioner's application for surrender of settlement given in the impugned order dated 28.04.2021 is that the exit option has not been exercised, six months in advance.

19. Mr. Gyan Prakash Ojha, learned G.P-7 appearing on behalf of the State of Bihar has argued that it is impermissible for the petitioner to approbate and reprobate at the same time. He has submitted that it was upon the petitioner not to have accepted the settlement for the period in question. Once he accepted the settlement, he is estopped from taking a plea that because of the circumstances, which were already existing and in respect of which he had made complaints, it had become impossible for him to continue with the mining activities in terms of settlement. He has argued that the petitioner's claim is not bona fide and this application deserves to be dismissed.

20. I have perused the pleadings and the documents brought on record and have given my anxious consideration to the rival submissions made on behalf of the parties. In view of the rival submissions advanced on behalf of the parties, it would be beneficial to notice first, the impugned order dated 28.04.2021, which has been brought on record by way of Annexure-11 to the writ application. In the impugned order, the Collector has quoted Rule 50 (1) of 2019 Rules for rejecting the petitioner's application to surrender the settlement. On a plain reading of the said communication dated

28.04.2021, it can easily be discerned that requirement of six months' prior notice cannot be said to be the sole reason for rejecting the petitioner's application.

21. Rule 50 (1) of 2019 Rules which reads as under has been quoted in the impugned communication,

“50(1) Any Mineral Concession Holder, at any point of the Mineral Concession period, may opt to exit the business upon giving Six months' notice

to the Collector. However, this option is not available to Mineral Concession Holder who have not paid their bidding amount or settlement amount or

have violated any condition of settlement.”

22. After quoting the said provision, it has been mentioned that the petitioner has not complied with the requirements under Rule 50 (1) of 2019 Rules

while making an application for surrender of settlement. Admittedly, exit option is not available for such mineral concession holder who has either not

paid any amount of settlement or has flouted any condition of the settlement agreement.

23. In such view of the matter, submission made on behalf of the petitioner that absence of six months' prior notice was the only reason for

rejecting the petitioner's surrender application, is untenable and is accordingly rejected.

24. Coming to the next question, which the Court is required to consider in this case is the effect of non obstante clause in the nature of Rule 77 (2) of

2019 Rules. The Supreme Court in case of Union of India and Another Vs. G.M. Kokil and Others (supra), heavy reliance on which has been placed

by Mr. S.B. Upadhaya, learned senior counsel, has held in paragraph 11 that a non obstante clause is a legislative device which is usually employed to

give overriding effect over some “contrary provisions”. In the said case, provision under Section 70 of the Bombay Shops and Establishment

Act, 1948, had fallen for consideration which read as “nothing in this Act shall be deemed to apply in a factory and provisions of the Factories Act

shall notwithstanding anything contained in that Act, apply to all persons employed in and in connection with a factory”. Interpreting the said

provision, the Supreme Court held in case of G.M. Kokil (supra) that the non obstante clause must mean notwithstanding to the contrary contained in

that Act and as such it must refer to the exempting provisions, which would be contrary to the general applicability of the Act. The Supreme Court clarified that in other words, all the relevant provisions are made applicable to a factory, notwithstanding anything to the contrary contained in it, it must have the effect of excluding the operation of exemption provisions.

25. In my opinion, Rule 77 (2) of the Rules cannot be read independent of all other provisions under the Rules. Chapter-XIII of the Rules confers

power on the State Government to exempt minor minerals from the provisions of these Rules. Rules 77, on the other hand, confers upon the State

Government power to relax the operation of any provisions of these Rules. In exercise of Sub-Rule (1) of Rule 77, the State Government may relax

operation of one or more provisions of these Rules, if in the opinion of the Government, such relaxation is necessary in public interest. Sub-Rule (1) of

Rule 77 is of general nature. Rule 77 (2) authorizes the State Government to,

(i) Grant a mining lease/mining settlement,

(ii) Authorize the grant of quarrying permit or movement permit, to any person, and

(iii) Put such terms and conditions other than those prescribed in these Rules for the reasons to be recorded in writing.

26. The unambiguous language of Sub-Rule (2) of Rule 77 leaves no room of doubt that the expression “notwithstanding anything contained in these

Rules” is referable to such things only, which relate to grant of mining lease/mining settlement and authorization of grant of quarrying permit or

movement permit. The said clause cannot be read to be a separate provision altogether, from all other provisions under the Rules.

27. Mr. Naresh Dixit, learned counsel for the Mines Department appears to be correct in his submission that procedure for grant of mining lease

except sand is laid down under Chapter-IV of 2019 Rules, whereas Chapter-V lays down, inter alia, the procedure of settlement of sand. Chapter-VI

of the Rules contains the provisions relating to activities by the Bihar State Mining Corporation. Chapter-VII of the Rules deals with the procedure for

grant of quarrying permit. In the Court’s opinion, the non obstante, clause in Sub-Rule (2) of Rule 77 overrides only such provision, which lay

down the procedure for grant of mining lease/mining settlement/quarrying permit/movement permit. In exercise of such power, the Government may

grant mining lease/mining settlement to any person, notwithstanding anything contained in the Rules, in public interest, on such terms and conditions

other than those as prescribed in the Rules, for the reasons to be recorded in writing.

28. It would lead to an anomalous situation if the submission advanced by Mr. Upadhayay to the effect that no provision under 2019 Rules shall have

application in respect of the settlements granted by the State Government in exercise of power under Rule 77 (2) of 2019 Rules. By way of

illustration, if the said submission is accepted, no provision under Chapter-XII of the Rules shall apply to a settlement allowed in exercise of power

under Rule 77 (2) of the Rules. Chapter-XII deals with cancellation of mineral concession, which includes power to suspend or cancel mineral

concession, power of the Collector to take over the management in case mineral concession holder contravenes any provisions of the Act or any

Rules made thereunder, power of Collector to requisition of minor minerals etc. Rule 77 (2) of 2019 Rules further authorizes the State Government to

put such terms and conditions for grant of lease/settlement/permit on such terms and conditions, which are not prescribed in the Rules.

29. Unfortunately, the petitioner had not brought on record the terms and conditions for settlement of sand ghats, though the same has been brought on record by way of annexure to the counter affidavit.

30. There is yet another aspect of the matter. If petitioner's contention that Rule 50 (1) of 2019 Rules have no application in respect of settlement

allowed in exercise of power under Rule 77 (2) of the Rules is accepted, the same shall be self-defeating for the reason that in such circumstance a

settlee will have no exit option.

31. I have refrained myself from making any comments on the uncontroverted averments made in the counter affidavit in relation to the irregularities

committed by the petitioner, which can be a subject matter of any other proceeding before appropriate forum under law.

32. In view of the discussions, as above, in my opinion, this writ application has no merit and is accordingly dismissed.

33. There shall, however, be no order as to costs.