T.R. Chemicals Ltd. (Unit-II) and Another Vs State of Orissa and Another

Court: Orissa High Court

Date of Decision: April 11, 2008

Acts Referred: Constitution of India, 1950 â€" Article 245, 246

Citation: AIR 2008 Ori 126 : (2008) 106 CLT 26 : (2008) 1 OLR 967 Supp

Hon'ble Judges: A.K. Ganguly, C.J; Indrajit Mahanty, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Indrajit Mahanty, J.
The Petitioner-M/s. T.R. Chemicals Limited (Unit-II) in this writ application seeks to challenge the Order Dated

25.5.2007 (Annexure-4) directing suspension of its licence for storage and transportation of minerals u/s 6 of the Orissa Minerals (Prevention of

Theft, Smuggling and Other Unlawful Activities) Act, 1989 (in short ""Orissa Act, 1989"") apart from the challenge to the Order Dated 18.06.2007

(Annexure-6) directing cancellation of the Petitioner''s licence in purported exercise of power u/s 7 of the Orissa Act, 1989. The Petitioner also

further seeks to challenge the direction made in the said order directing the Petitioner to deposit a sum of Rs. 4,00,675.00 as cost of price of the

Iron Ores under the provisions of the Orissa Act, 1989, inter alia, on the ground that the action of the Deputy Director of Mines in passing the

impugned order was without jurisdiction and therefore, illegal.

2. From the averments made in the writ application, it appears that the Petitioner applied and was issued with a Licence for storage and

transportation of minerals by making an application in Form-D under the provisions of Section 6 of the Orissa Act, 1989 and Rule-6 of the Orissa

Minerals (Prevention of Theft, Smuggling and Other Unlawful Activities) Rules, 1990 (in short ""1990 Rules""). On 22.12.2006, a show cause

notice for cancellation of licence was issued to the Petitioner by the Dy. Director of Mines on 11.5.2007, purportedly on the basis of verification of

report dated 10.5.2007 and by further Notice dated 25.5.2007, the licence granted to the Petitioner-company was suspended and the Petitioner

was directed to deposit a sum of Rs. 4,00,675.00 under Annexure-4 to, the writ application.

3. The Petitioner submitted its show cause reply vide its letter dated 31.5.2007 (Annexure-7) and further made a representation to the Dy.

Director of Mines on 12.6.2007 (Ahnexure-5) requesting him to recall the order of suspension dated 25.5.2007. As a result of the aforesaid series

of communications, by an Order Dated 18.6.2007 (Annexure-6), the licence which was issued in favour of the Petitioner-company was cancelled,

leading to filing of the present writ application seeking quashing the orders of suspension, demand of cost as well as cancellation of licence under

Annexures-4 and 6 respectively.

4. Mr. Sanjit Mohanty, Senior Advocate appearing for the Petitioner, inter alia, contended that the action of the Deputy Director of Mines

impugned herein was completely without jurisdiction and the source of such authority i.e. the Orissa Act, 1989 and the Rules framed thereunder,

were superseded and were inoperative with effect from 20.12.1999. The Petitioner contended that the Orissa Act, 1989 was enacted by the State

Legislature by virtue of legislative power conferred by Article 245 read with Clause-3 of Article 246 and Entry 23 of List-II of the Seventh

Schedule of the Constitution of India. This enactment governed the requirement of licence for the purpose of possession, storage, sell, trade,

transportation and removal of minerals from a mine and the said Act came into operation on and from 20.5.1990. It was further submitted that

Entry 23 of List-II of the Seventh Schedule of the Constitution covers the ""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"" whereas Entry 54 of List-I of the Constitution provides as

follows:

Regulation of mines and mineral development 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.

5. Mr. Mohanty submitted that whereas the Petitioner does not question the legislative competence to legislate the Orissa Act, 1989 at the time of

its legislation, yet, after promulgation of the Mines and Minerals (Regulation and Development) Amendment Act, 1999 (Act 38 of 1999) by the

Union Legislature with effect from 20.12.1999, all aspects of storage, transportation etc. of minerals came to be governed under Sections 4(1A),

23C(1) and 23C(2)g of the M.M. (D & R) Act, 1957. He further asserted that the aforesaid amendment read with the declaration made u/s 2 of

the Central Act, 1957 runs as follows:

It is hereby declared that it is expedient in the public interest that the Union should take under its control the regulation of mines and the

development of minerals to the extent hereinafter provided.

6. Mr. Mohanty, submitted that the aforesaid declaration read with the amendment referred to above, effectively denuded the State Legislature to

legislate on the said subject with effect from 20.12.1999. Mr. Mohanty placed reliance upon a Judgment in the case of State of Orissa Vs. M.A.

Tulloch and Co., wherein their Lordships of the Apex Court came to hold as follows:

Paragraph-5:

...It does not need much argument to realize that to the extent to which the Union Government had taken under "its" control" "the regulation and

development of minerals" so much was withdrawn from the ambit of the power of the State Legislature under Entry 23 and legislation of the State

which had rested on the existence of power under that entry would to the extent of that "control" be superseded or be rendered ineffective, for

here we have a case not of mere repugnancy between the provisions, of the two enactments but of a denudation or deprivation of State legislative

power by the declaration which Parliament is empowered to make and has made.

Paragraph-12:

...The effect of reading the two Entries together is clear. The jurisdiction of the State Legislature under Entry 23 is subject to the limitation imposed

by the latter part of the said Entry. If Parliament by its law has declared that regulation and development of mines should in public interest be under

the control of the Union, to the extent of such declaration the jurisdiction of the State Legislature is excluded. In other words, if a Central Act has

been passed which contains a declaration by Parliament as required by Entry 54, and if the said declaration covers the field occupied by the

impugned Act the impugned Act would be ultra vires, not because of any repugnance between the two statutes but because the State Legislature

had no jurisdiction to pass the law. The limitation imposed by the latter part of Entry 23 is a limitation on the legislative competence of the State

Legislature itself. This position is not in dispute.

Paragraph-15:

...The test of two legislations containing contradictory provisions is not, however, the only criterion of repugnancy, for, if a competent legislature

with a superior efficacy expressly or impliedly evinces by its legislation an intention to cover the whole field, the enactments of the other legislature

whether passed before or after would be overborne on the ground of repugnance. Where such is the position, the inconsistency is demonstrated

not by a detailed comparison of provisions of the two statutes but by the mere existence of the two pieces of legislation....

7. In the case of Baijnath Kadio Vs. State of Bihar and Others, , the Apex Court taking note of the case of M.A. Tulloch & Co. (supra), in

paragph-16 of the Judgment held as follows:

where a superior legislature evinced an intention to cover the whole field, the enactments of the other legislature whether passed before or after

must be held to be overborne. It was laid down that inconsistency could be proved not by a detailed comparison of the provisions of the conflicting

Acts but by the mere existence of two pieces of legislation.

8. Apart from the above, Mr. Mohanty also placed reliance upon a Judgment of this Court in the case of Jai Durga Iron Pvt. v. Superintendent of

Police, Sundergarh and Anr. (2006) 34 OCR 655 and in particular, paragraphs-12 and 13 thereof which are quoted herein below:

12. From the above, it is clear that the State Act legislated by the State Legislature being in relation to Entry 23 of List-II in the 7th Schedule of the

Constitution, which is with regard to Regulation of Mines and Minerals Development, the same is subject to the provisions of List-I with respect to

Regulation and Development under the control of the Union. Thus, the above State Act was in force as no similar provisions were included in the

M.M.(D&R) Act which is a central legislation under Entry 54 of List-I of the 7th Schedule. In view of the declaration made in Section 2 of the

M.M.(D&R) Act, the moment similar provisions as contemplated in the State Act were provided for in the M.M.(D&R) Act by way of

amendment with effect from 18.12.1999, the said provisions in the State Act became inoperative being occupied by the central legislation.

13. In view of the above amendment brought to the M.M.(D&R) Act by the central legislation with effect from 18. 12. 1999, in our considered

view, the provisions of Section 12 of the M.M.(D&R) Act with regard to penalty which can be imposed on a person who fails to comply with or

contravene any of the provisions of the State Act and the provisions of Section 16 of the State Act with regard to seizure of property liable to be

confiscated and prosecution for such offences u/s 12 of the State Act can no longer be made applicable to minerals which are covered in the M.M.

(D&R) Act.

9. Relying on the aforesaid assertions and the case laws, Learned Counsel for the Petitioners submitted that the Orissa Act, 1989 should be held to

be non-existent with effect from 20.12.1999 for every purpose on the ground that beyond the said date the aforesaid Legislature was itself

denuded or deprived of its power for legislation and any legislation done prior thereto must be held to be in-operative having been occupied by the

Central legislation of 1999.

10. Mr. Mohanty further contended that after the amendment was brought into the Mines and Minerals (Development and Regulation), Act, 1957

in 1999, the State Legislature in terms thereof, enacted the Orissa Rules, 2007 with effect from 16.7.2007 and the same was framed in exercise of

power conferred u/s 23C of the M.M.(D&R) Act, 1957. It was submitted that the power of the State Government and its authorities on and from

the said date i.e. 16.7.2007 came to be vested to enforce the provisions of the Orissa Rules, 2007. Therefore, between the period 20.12.1999

(the date of amendment of the Central Act, 1957) and 16.7.2007 (date of framing of Orissa Rules, 2007), the State Government and its authorities

did not possess any statutory competence to enforce the provisions of the Orissa Act, 1989 and therefore, it was submitted that the impugned

orders under Annexuros-4 and suffer from statutory incompetence and ought to be quashed.

11. Apart from the aforesaid argument on the question of competence and/or jurisdiction of statutory authority, Learned Counsel for the Petitioners

further raised the question of violation of the principles of natural justice and essentially advanced the contention that since no opportunity of

hearing was given to the Petitioner either before issue of the order of suspension of licence vide Order Dated 25.5.2007 (Annexure-4) and further,

since no opportunity was given to the Petitioner as provided u/s 7 of the Orissa Act, 1989 before cancellation of licence under Annexure-6, the

impugned orders having been passed in violation of the principles of natural justice, ought to be declared unlawful and in-operative. Learned

Counsel further contended that demand of Rs. 4,00,675.00 as cost is obviously in the nature of penalty. It was asserted that since Section 12 of

the Orissa Act, 1989 has already been declared inoperative and is no more available to be exercised in view of the Judgment of this Court in the

case of Jai Durga Iron Pvt. Ltd. (supra), no prosecution can be initiated u/s 12 of the Orissa Act, 1989 for violation of the provisions of the said

Act and consequently no demand/levy of penalty is permissible.

12. Learned Counsel for the Petitioner further contended that by framing the Orissa Rules, 2007 on 16.7.2007, in essence, the State Government

has admitted that the provisions of the Orissa Act, 1989 and 1990 Rules framed thereunder, were no longer valid since they have been effectively

rendered invalid with effect from 20.12.1999, i.e. the date on which amendment was carried out to the M.M.(D & R) Act, 1957 and therefore, it

was submitted that between the period 20.12.1999 and 16.7.2007, neither the State of Orissa nor the statutory authority had any power to

enforce the provisions of the Orissa Act, 1989 and 1990 Rules.

13. Mr. J.M. Mohanty, Learned Government Advocate on behalf of the State, on the other hand, submitted that the Dy. Director of Mines had

issued show cause notice dated 11.5.2007 to the Petitioner for illegal storing of excess quantity of iron ore at the stock point violating the

conditions enumerated in the licence and in response thereto, Petitioner No. 1 has submitted its show cause reply beyond the stipulated period.

Therefore, the order of suspension of licence was passed and whereafter, necessary order of cancellation of the licence was passed with a

direction to Petitioner No. 1 to deposit a sum of Rs. 4,00,675.00 towards the cost of 66.75 MT of iron ore. While the Learned Govt. Advocate

denied the allegations made in the Writ Petition and submitted that the impugned orders have been passed in accordance with the provisions of law

and the Dy. Director had acted consonance with the provisions of the Act and the Rules framed thereunder and the same should not be interfered

with since the Petitioner-company has violated the conditions stipulated in the licence in procuring excess quantity of iron ore and therefore, it is

liable to pay the cost.

14. It was further submitted that since the Petitioner did not responds to the show cause notice dated 11.5.2007, Opp. Party No. 2 had no option

other than directing suspension of licence and deposit cost of the excess iron ore procured. Learned Government Advocate submitted that

although the Petitioner did file its reply to the show cause notice on 31.5.2007, the same was beyond the time stipulated in the notice for which the

same was not taken into consideration. Further, since the Petitioner did not deposit the demanded amount, the Dy. Director was compelled to

direct cancellation of the licence granted to the Petitioner by issuing the impugned order under Annexure-6.

15. Learned Government Advocate advanced a further contention that the orders impugned are appealable in terms of Section 10(1) of the Orissa

Act, 1989 and therefore, the Petitioners having alternative remedy, ought not to have approached this Court in Writ Petition for which this Writ

Petition should be held to be not maintainable.

16. In so far as the earlier Judgment of this Court in the case of Jai Durga Iron Pvt. Ltd. (supra) is concerned, Learned Government Advocate

heavily placed reliance on the observations made by this Court in paragraph - 15 thereof which reads as follows:

No doubt, it is true that even though by the amended Section 23 "C" of the M.M.(D&R) Act, it has been provided that the State Government

may, by notification in the official gazette, make rules for preventing illegal mining, transportation and storage of minerals and for the purposes

connected therewith and such rules may, provide for all the matters as mentioned in Section 23C(2) but no such rules have yet been framed by the

State Government. Since we have concluded that no prosecution under the State Act can lie for the offences provided in the amended provisions

of the M.M.(D&R) Act, it is expedient in public interest for preventing commission of offences under the amended provisions of the M.M.(D&R)

Act, for the State to frame rules as provided in Section 23C(2) of the M.M.(D&R) Act, as early as possible for enabling the said amended

provisions of the M.M.(D&R) Act to be operational.

17. He further submitted that the State Legislature keeping in view the Judgment of this Court framed the Orissa Minerals (Prevention of Theft,

Smuggling & illegal Mining and Regulation of Possession, Storage and Transportations), Rules, 2007 (in short ""2007 Rules"") and the said Rule was

notified in the State Gazette and came into force with effect from 16.7.2007. It was asserted that the said Rule was framed by the State Legislature

not only in compliance with the direction of this Court, but also in terms of the provisions of Section 23-C of the Central Act, 1957 amended in

1999. u/s 23-C, the State Government is empowered to frame Rules for preventing illegal mining transportation and storage of minerals.

18. Placing reliance upon Rule 22, the saving clause, Learned Government Advocate submitted that any action taken against the Petitioner and the

order passed under the Orissa Act, 1989 and 1990 Rules are deemed to have been taken under 2007 Rule. He asserted that in the instant case

since action had been taken by the Dy. Director under the 1990 Rules, such action, in terms of the saving clause, is to be deemed to have been

taken under 2007 Rules. Therefore, the action of the Dy. Director in suspending and canceling the licence and making demand for payment of cost

imposed under Annexures-4 and 6 should be held within the scope and ambit pf the provisions of law.

19. In the light of the aforesaid contentions as recorded herein above, the essential question that arises for consideration in the present writ

application is, whether Rule 22 of 2007 Rules saves the impugned actions. In this respect, let us first begin with the passage relied upon by the

Learned Government Advocate in the case of Jai Durga Iron Pvt. Ltd. (supra) and in particular, paragraph-15 thereof. In the said Judgment and in

that very particular paragraph, this Court took note of the fact that whereas Section 23C had been incorporated In the Central Act, 1957 by

1999, the same had empowered the State Government to make rules for the purpose indicated therewith, yet, no such Rule had till the date of the

said Judgment been framed by the State Government and considering the said fact, this Court expressed its anxiety by stating that it was expedient

in public interest for preventing commission of offences under the amended provisions of the M.M. (D & R) Act, for the State to frame Rules as

provided u/s 23C as early as possible.

20. Therefore, the question now is the State Legislature having framed 2007 Rules and having provided Rule 22 thereof, to what extent the saving

clause would come to the aid of the State in defence of the impugned orders. This issue is no more res integra, inasmuch as, in the case of Jai

Durga Iron Pvt. Ltd. (supra), this Court already held that ""the moment similar provisions as contemplated in the State Act were provided for in the

M.M. (D & R) Act by way of amendment with effect from 18.12.1999, the said provisions in the State Act became inoperative being occupied by

the central legislation."" It is important to take note of the fact that Judgment of this Court was not challenged by the State and therefore, in view of

the above conclusive finding of this Court, since the MMDR Act was amended since 18.12.1999 and by the said amendment, similar provision as

contemplated in the State Act, 1989 and 1990 Rules, having been provided in the Central Act, 1957, this Court has clearly declared that the said

provision of the State Act became inoperative on and from the said date i.e. 18.12.1999.

21. The 2007 Rules were promulgated by the State Legislature and Gazetted on 16.7.2007. On a reading of the saving clause, a further problem

that arises to accept the argument advanced on behalf of the State is that the same would amount to holding that ""the saving clause"" is seeking to in

reality infuse life into an Act and Rule which had already been declared by this Court in Jai Durga Iron Pvt. Ltd. (supra) to have lost its force the

moment the amended central Act was enacted i.e. 18.12.1999. Therefore, once it is accepted that the State Act became inoperative being

occupied by the Central Legislation with effect from 18.12.1999, if the saving clause and the interpretation thereof as advanced by the Government

Advocate is accepted, it would tantamount to hold that irrespective of the earlier declaration by this Court that the State Act became inoperative,

yet, the State Act and the Rules framed thereunder will continue to govern and remain in force even beyond that period and that too until the 2007

Rule was promulgated.

22. We are unable to accept this contention advanced by the Learned Government Advocate in so far as his interpretation of Rule 22 of 2007

Rules is concerned the saving clause under Rule 22 stipulates that notwithstanding any thing to the contrary contained in 2007 Rules, things done,

actions taken, or orders passed under the 1990 Rules, shall be deemed to have been done, taken or passed under these rules. The saving clause

itself does not refer at all to the Orissa Act, 1989. Apart from this, saving clause can only come to save all actions taken by the authorities under

the Orissa Act, 1989 or 1990 Rules till 20.12.1999 i.e. the date on which amendment was carried out by the Union Legislature to the Central Act,

1957. On and from the date of incorporating Section 23C to the Central Act, 1957, the said provision has to be read along with the declaration

contained in Section 2 of the MMDR Act and the meaning of the said declaration having been made settled as early as in 1964 by the Supreme

Court in the case of M.A. Tulloch & Co. (supra), it has to be held that on and from the date of incorporation of Section 23C to the MMDR Act,

1957, the activities covered u/s 23C were taken under the control of the Union Government and on and from the said date, the State legislature

stood denuded or deprived of legislative power by the declaration which the parliament is empowered to make and has made.

23. The 1999 amendment to the MMDR Act has to be held to be a ""declaration"" by a superior legislature with the intention to cover the whole

field, especially covered u/s 23C and therefore, any enactment of the other legislature whether passed before or after must be held to be

inoperative. This Judgment of the Apex Court was relied upon by this Court in the case of Jai Durga Iron Pvt. Ltd. (supra) wherein this Court has

come to hold that the moment similar provisions as contemplated in the State Act were provided for in the MM (D & R) Act, by way of

amendment, with effect from-18.12.1999, the said provisions in the State Act became inoperative being occupied by the central legislation.

Therefore, after the amendment to the Central Act, 1957, neither the Orissa Act, 1989 nor 1990 Rules framed thereunder have any competence

nor were any longer enforceable.

24. It would at this juncture be relevant to take note of Section 15 of the M.M.(D & R) Act, 1957. Although this issue does not arise for

consideration, yet, the same, in our view, is extremely useful to understand the working of M.M.(D&R) Act. In Section 15, power has been vested

with the State Government to make rules in respect of minor minerals and in particular, various matters over which the State Government are

competent to make rules are enumerated under Sub-section (1A) of Section 15. In Sub-section (2) of Section 15, it is stipulated that until rules are

made under Sub-section (1), any rules made by a State Government regulating the grant of quarry leases, mining leases or other minerals

concessions in respect of minor minerals which are in force immediately before the commencement of this Act shall continue in force. From the

above, it is clear that until the State Government utilizes the power u/s 15 to frame rules pertaining to the matters covered thereunder, any rule

made by the State Government in connection with minor minerals and which are in operation immediately after commencement of the Act, shall

continue in force.

25. Making a comparison between Section 15 and Section 23C of the Act, it is clear that no similar provision as Sub-section (2) of Section 15

exists in Section 23C. Therefore, on promulgation of Section 23C on 20.12.1999 into the M.M.(D&R) Act, 1957, we are left with no other

alternative than to hold that the Orissa Act, 1989 and 1990 Rules framed thereunder, cannot be said to remain in force beyond 20.12.1999 and

Rule 22 of 2007 Rules, the saving clause does not and cannot justify the enforcement of 1989 Act and 1990 Rules beyond 20.12.1999.

26. The other plea of the State about the alternative remedy is not of much consequence since the issue raised in the present writ application relates

to the competence of the statutory authority and/or constitutional validity of an enactment, we do not find any merit in the contention advanced by

the State Counsel on the ground of alternative remedy.

27. In view of the conclusion arrived by us and the discussions made herein above, the writ application is allowed and Annexures 4 and 6 i.e. the

order of suspension and demand towards excess stock as well as cancellation of licence are held to be without jurisdiction and not binding in law

and therefore, are quashed. No costs.

A.K. Ganguly, C.J.

28. I agree.