

GAHC010179172015



**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

Case No. : WP(C)/6526/2015

SANJIB KRISHNADEVA GOSWAMI
S/O LT. JIBA KRISHNADEVA MAHANTA, R/O SUDHALATA APARTMENT,
SIXMILE, FIRM GATE, G.S. ROAD, P.S. DISPUR, GUWAHATI-22, DIST.
KAMRUP METRO, ASSAM.

VERSUS

THE STATE OF ASSAM AND 4 ORS
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM,
PUBLIC WORKS DEPARTMENT ROADS DISPUR, GUWAHATI-6.

2:COMMISSIONER and SPECIAL SECRETARY TO THE
GOVT. OF ASSAM
PUBLIC WORKS DEPARTMENT ROADS DISPUR
GUWHATI-6.

3:THE CHIEF ENGINEER
PUBLIC WORKS DEPARTMENT ROADS
and PMGSY WORKS ASSAM
CHANDMARI
GUWAHATI-3
DIST. KAMRUP METRO
ASSAM.

4:SUPERINTENDING ENGINEER
PUBLIC WORKS DEPARTMENT
JORHAT ROAD CIRCLE
JORHAT
DIST. JORHAT
ASSAM.

5:THE EXECUTIVE ENGINEER

PWD
GOLAGHAT RURAL ROAD DIVISION
DIST. GOLAGHAT
ASSAM

Advocate for the Petitioner : MR.P SARMAH

Advocate for the Respondent : MR.H BURAGOHAIN

Linked Case : WP(C)/6533/2015

SANJIB KRISHNADEVA GOSWAMI
S/O LT. JIBA KRISHNADEVA MAHANTA
R/O SUDHALATA APARTMENT
SIXMILE
FIRM GATE
G.S. ROAD
P.S. DISPUR
GUWAHATI- 22
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5:THE EXECUTIVE ENGINEER

PWD GOLAGHAT
RUAL ROAD DIVISION
DIST. GOLAGHAT
ASSAM.

Advocate for : MS.S PHUKAN
Advocate for : SC
PWD ROADS appearing for THE STATE OF ASSAM AND 4 ORS

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

ORDER

13-02-2024

Heard Mr. P. Sarmah, learned counsel for the petitioner. Also heard Mr. P. Nayak, learned Standing Counsel, PWD.

- 2.** Both the writ petitions are taken up together for disposal by taking into account the similarity of the issues involved and the fact that another writ petition have already been dealt with by this Court by a judgment and order dated 24.11.2023 in WP(C) No. 5305/2022 (**Muslim Ali Vs State of Assam & Ors**).
- 3.** The petitioner who is the same in both the writ petitions is aggrieved by the deduction of an amount of Rs.5,60,521/- and Rs.10,29,387/- towards forest royalty by the Public Works Department and therefore have sought for a direction upon the PWD for refund of the said amounts along with the interest.
- 4.** The same issue which are involved in both the writ petitions has been dealt with by this Court in the case of ***Muslim Ali*** (supra).
- 5.** Paragraphs 15 to 21 of the said judgment is reproduced hereinunder:-

“15. This Court further finds it relevant to take note of the judgment of the Co-ordinate Bench in the case of M/S R.C.N. Constructions Pvt. Ltd. (supra) wherein amongst the various issues so framed, one of such issue was whether the State Authority i.e. the Public Works Department, Railways etc. can deduct forest royalty from the bills/security deposit of the contractors in absence of any stipulation in the contract agreement empowering the employer State to do so. The Co-ordinate Bench had also decided the issue as to whether the contractor executing works for Government and its Departments are bound to procure minor minerals/forest produce only through permit granted under Rule 5 of the Rules of 2013. The Co-ordinate Bench of this Court after taking note of various contentions opined that in absence of any contract condition, when a contractor is unable to produce a certificate showing the use of forest produce on which royalty has been collected, the recovery from the bills against the forest royalty cannot be made. It was also opined that those contracts where the Office Memorandum dated 17.06.2000 was a part of the contract and the same has been signed by the contractors and the employer, the contractors shall be bound by the Office Memorandum dated 17.06.2000 only when a specific clause was incorporated in the contract that the materials required should be collected either through permit etc. under the Rules of 2013 and/or through permit issued under the Assam Forest Regulation, 1891 and the Rules and Notifications issued thereunder. It is also seen from the judgment of the Co-ordinate Bench wherein it was opined that Rule 5 of the Rules of 2013 is only a mode of permit provided under the Rules of 2013 and it is not mandatory always for a contractor under the State Agencies to procure the minor minerals through the permit issued under Rule 5 of the Rules of 2013. It was observed that the contractors would be compelled to do so when the contract conditions stipulated that the minor minerals must be collected through the permit under Rule 5 of the Rules of 2013. It was further observed that Rule 5 was not mandatory in each and every contractual work inasmuch as the Rules of 2013 itself provided that mining lease/contract/query permits can be granted under Rule 8 or Rule 18 or Rule 23 of the Rules of 2013 and therefore, the contractors are within their liberty to purchase/procure the minor mineral from other agencies who are holding mining lease/contract/query permits until the same is barred under the conditions of

the contract.

16. This Court had also taken note of the judgment of the Division Bench in the case of N.C. Das - Allied Infra (JV) (*supra*) which was rendered in an appeal against the judgment passed by the Co-ordinate Bench of this Court in the case of M/S R.C.N. Construction Pvt. Ltd. (*supra*). In the said case, the challenge was made to the legality and validity of the notice dated 08.02.2021 issued by Northeast Frontier Railway requiring the Appellants therein to provide the Forest Royalty Clearance Certificate regarding 5 components of the work order in question i.e. (i) earth work, (ii) total sand, (iii) quarry dust, (iv) stone chips, and (v) boulder. The letter mentioned that the Forest Royalty Clearance Certificate of the quantities of the materials utilized by the Appellants would have to be submitted before clearing the next bill submitted towards the construction work awarded by the Northeast Frontier Railway to the Appellants viz. B.G. standing formation; minor bridges including retaining wall; side drains, catch water drains, ground improvement works and all other connected ancillary works in between km 44.13 (including Digaru Station yard) to km 98.00 in connection with Digaru-Hoijai Double Line project of N.F. Railway. The said communication was put to challenge by the Appellants in the case of N.C. Das - Allied Infra (JV) (*supra*) in WP(C) No.9227/2019. The Division Bench took into consideration the submission made by the Appellants therein to the effect that as in Condition 13.2 of the contract, ordinary earth was not covered, the employer Railways was not at liberty to demand the Forest Royalty Clearance Certificate from the Appellants regarding the said mineral used in the construction works. The Division Bench rejected the said contention opining that Clause 13.2 is not exhaustive in its operation because it only referred to sand, stone and timber in a generic sense as covered under forest produces. It was observed that the governing phrase of the said clause is forest produces and the examples in the form of sand, stone, timber are given but thereafter, the word "etc." being used means that whichever forest produce/mineral is used in the construction works, the contractor would have to furnish documentary proof that the requisite Royalty on such produces have been paid to the concerned Department. It is under such circumstances, the Division Bench found no infirmity with the judgment rendered by the Co-ordinate Bench in the Case of M/S R.C.N. Constructions Pvt. Ltd. (*supra*).

17. Before further proceeding, this Court finds it relevant to observe two vital aspects of the matter. First, neither the Forest Department nor the PWD have assailed the judgment rendered in M/S R.C.N. Constructions Pvt. Ltd. (*supra*) or for that matter apprised this Court that the said Departments have assailed and the issue is pending. Under such circumstances, the said judgment rendered by the Co-ordinate Bench in M/S R.C.N. Constructions Pvt. Ltd. (*supra*) is binding on this Court sans anything being shown that the said judgment is per incuriam. Secondly, the submission made by the Standing counsel for the Forest Department that the Division Bench in N.C. Das - Allied Infra (JV) (*supra*) mandated that the Forest Royalty Clearance Certificate is to be produced before the employer in all cases is totally misconceived inasmuch as in the said case, there was a term in the form of Clause 13.2 which is not there in the present case.

18. Now, coming to the merits, it is seen that Rule 5(2) of the Rules of 2013 stipulates that the contractor engaged for works/projects of the Government Department/Agencies shall be granted mining permit for the required quantity as specified in the detailed project report for execution of the works/projects on making an application under Sub-Rule (1) of Rule 5 of the Rules of 2013. It is also relevant to take note of that upon being granted the mining lease, the contractor would step into the shoes of the lessee of a mining contract. Further to that, Rule 8 of the Rules of 2013 stipulates that it is the lessee who is responsible/statutorily obligated to pay the Royalty. Therefore unless and until the contract terms mandatorily obligates the contractor to obtain mining lease for use and consumption of minor minerals in the tendered works, the contractors merely by using the minor minerals does not become a lessee to be statutorily obligated to pay Royalty. Therefore, if the contractor is not required to pay Royalty, the question of deduction of Royalty from the dues of the contractor cannot be made by the Respondent PWD as done in the instant case.

19. This Court also finds it relevant to deal with the submissions made by Mr. P. Nayak, the learned Standing counsel for the PWD that the contract price being inclusive of all the dues includes the Royalty as stipulated in Clause 41.1 of the General Conditions of the Contract. It is well settled that the shifting of liability is permitted by mutual agreement. However, it cannot be lost sight of that the incidence for payment of Royalty would arise only if the mining lease is taken. Therefore, it is the opinion of this Court that Clause 41.1 of the General Conditions of the Contract cannot be invoked to include Royalty unless and until the mining lease is/are granted to the contractors or the contract forbids obtaining minor minerals from any other source other than mining lease. This Court further finds it appropriate to mention that in the contract in question there is no clause that the Forest Royalty Clearance Certificate was required to be submitted as per the Conditions of the Contract unlike in the case of N.C. Das - Allied Infra (JV) (*supra*). Therefore, the Respondent PWD cannot insist upon the Forest Royalty Clearance Certificate for releasing the amounts deducted as Forest Royalty.

20. Having analyzed the above and taking into account the terms and conditions of the contract in question, this Court therefore finds no reason to defer with the judgment of the Co-ordinate Bench in the case of M/S R.C.N. Constructions Pvt. Ltd. (*supra*). This Court is also of the opinion that sans any term in the agreement between the Petitioner and the Respondent PWD to the effect that the Petitioner can only use or consume minor minerals after obtaining the mining permit as stipulated in Rule 5 of the Rules of 2013, the Respondent PWD Authorities, in the opinion of this Court, had no authority to deduct any Forest Royalty from the bills of the Petitioner. Accordingly, the deduction so made of an amount of Rs.22,50,799/- towards Forest Royalty by the Respondent PWD authorities is declared as illegal and unauthorized.

21. Consequently, this Court directs the Respondent PWD authorities to release the amount of Rs.22,50,799/- to the Petitioner which have been deducted from the bills of the Petitioner on account of Forest Royalty within a period of 15 days from the date a certified copy of the instant judgment is served."

- 6.** Taking into account, the above settled position of law as held in ***Muslim Ali*** (supra), this Court directs the respondents PWD authorities to release the amount of Rs. Rs.5,60,521/- and Rs.10,29,387/- to the petitioner which have been deducted from the bills of the petitioner on account of forest royalty within a period of 3 (three) months from the date of the certified copy of the instant order is served upon the Chief Engineer, PWD (Roads) & PMGSY Works i.e. respondent no. 3 in both the writ petitions.
- 7.** With the above observations and directions, the writ petition stands disposed of.

JUDGE

Comparing Assistant