

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.5393 of 2018

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M/s Aditya Multicom Private Limited Son of Shri Surendra Singh Resident of
D/139, Keshari Nagar, P.O. Rajeev Nagar, P.S. Rajeev Nagar, District- Patna.

... .. Petitioner/s

Versus

1. The State of Bihar through the Commissioner -cum- Principal Secretary,
Department of Mines and Geology, Vikas Bhawan, Bailey Road, Patna-
800001.
2. The Joint Secretary-Cum-Director, Directorate of Mines and Geology, Bihar,
Vikas Bhawan, Bailey Road
3. The District Magistrate-cum-Collector, Aurangabad.
4. The District Magistrate-cum-Collector, Rohtas, Sasaram.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. S.B. Upadhyay, Sr. Adv. Mr. Suraj Samdarshi, Adv.
For the Mines Deptt.	:	Mr. Naresh Dikshit, Spl. P.P. Ms. Kalpana, Adv.
For the Respondent/s	:	Mr.G.P. Ojha, GA-7 Mr. Abhishek Singh, AC to GA-7

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CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH
ORAL JUDGMENT

Date : 01-10-2020

Heard Mr. S.B. Upadhyay, learned Senior counsel
assisted by Mr. Suraj Samdarshi on behalf of the petitioner, Mr.



Naresh Dixit, learned Special P.P. assisted by Ms. Kalpana, appearing for the Mines Department and Mr. G.P. Ojha, learned G.A. 7 assisted by Mr. Abhishek Singh, learned counsels appearing for the State.

The petitioner, which is a private limited company having its registered office within the territorial jurisdiction of this Court, has invoked the writ jurisdiction of this Court under Article 226 of the Constitution of India, inter alia, for the following reliefs:

“(i) For issuance of a Writ in the nature of Mandamus directing the respondent authorities not to levy export premium charges upon inter-State sale of sand.

(ii) For issuance of a Writ in the nature of Mandamus directing the respondent authorities to issue transit pass/challan for inter-State sale without levy of export premium, as the same is without authority of law.

(iii) For a direction to the respondent authorities to adjust the amount of export premium already paid by the petitioner from the settlement amount, which the petitioner has to pay in terms of the agreement entered into by the petitioner.

(iv) For a direction to the respondent authorities not to create any impediment for non-payment



of export premium; and for such relief(s) to which the petitioner is found entitled in the facts and circumstances of the case.”

I.A. No. 2395 of 2018 was filed with a prayer for amendment of relief made in the main writ application to the extent of restoration of issuance of e-Challan which was stopped with effect from 24.3.2018 on the ground of non-payment of export premium charges after filing of the present writ application. The prayer in the I.A. as stipulated in paragraph 1 reads as follows:

“That the present Interlocutory Application has been filed for a direction to the respondent authorities for restoration of E-Challan which has been stopped with effect from the evening of 24.03.2018 after filing of the writ application, without any intimation and only on the ground that export premium is not being paid by the petitioner.”

Mr. Naresh Dikshit, learned Special P.P. did not oppose the prayer for the aforesaid amendment. Accordingly I.A. No. 2395 of 2018 was allowed and thus the relief sought for by the petitioner stood amended vide order dated 28.3.2018. While allowing the amendment petition, this Court passed following



interim order:-

“Considering the fact that export premium is being charged contrary to the terms of settlement, particularly at the present stand of the petitioner to deposit the raised demand within a period of one week, the concerned respondent authority is directed to restore the issuance of e-Challan in terms of settlement.”

I.A. No. 2651 of 2018 was filed on behalf of the respondent no. 1, the Commissioner-cum-Principal Secretary, Department of Mines and Geology, Government of Bihar and respondent no. 2, the Joint Secretary-cum-Director of Mines and Geology, Government of Bihar for modification of the order dated 28.3.2018 whereby this Court permitted the petitioner to deposit the demand raised with regard to the export premium charges including the commission of Bihar State Mining Corporation within a period of one week and to modify the finding incorporated in the said order to the extent that the export charges were being charged contrary to the terms of settlement. The prayer stipulated in paragraph 1 of the I.A. No. 2651 of 2018 reads as follows:



“That the instant Interlocutory Application is being filed for modification of order dated 28.3.2018 passed in CWJC No. 5393 of 2018 by Hon’ble Mr. Justice Dinesh Kumar Singh whereby and whereunder this Hon’ble Court has, inter alia, directed the petitioner to deposit the demand raised under letter no. 52 dated 12.3.2018 for export premium charges including the Commission of Bihar State Mining Corporation, within a period of one week as well as to modify the finding incorporated in the said order that export premium is being charged contrary to the terms of settlement.”

After hearing learned counsels for the parties, I.A. No. 2651 of 2018 was dismissed vide order dated 12.4.2018 treating it as misconceived since the Court was, prima facie, of the view that the levy of export premium charges was contrary to the terms of settlement. The operative portion of the order dated 12.4.2018 reads as follows:

“In view of the discussions made above, this Court finds that I.A. No.2651 of 2018 is absolutely misconceived in view of the fact that export premium charges have been accepted not only within a period of one week as permitted vide order dated 28.3.2018, but also thereafter, without any such permissibility. Moreover, this is not in



dispute that there is no stipulation with regard to levying export premium charges in the Agreement of settlement, as contained in Annexure 1 to I.A. No. 2395 of 2018.”

I.A. No. 3368 of 2018 was preferred on behalf of the petitioner with a prayer for further amendment of the prayer to the extent of quashing the demand notice issued vide letter no. 52 dated 12.3.2018 whereby the export premium charges to the tune of Rs.10,32,11,715/- were demanded. Further prayer was made for quashing the letter no. 178 dated 17.1.2018 issued by the General Manager, (Finance and Operation, Bihar State Mining Department (as contained in Annexure-2 to I.A. No. 3368 of 2018), whereby a decision was taken that for exporting the mines and minerals outside the State, 100% export premium charges and for bringing the mines and minerals from outside State 5% import premium charges will be levied and further for quashing Memo No. 189 dated 23.3.2018, as contained in Annexure 3 to I.A. No. 3368 of 2018, whereby the Bihar State Mining Corporation Limited (hereinafter referred to as BSMC) demanded export premium and commission failing which legal action was directed to be taken. The relief stipulated in paragraph 10 of the I.A. No. 3368 of 2018 reads as follows:

“That in view of the aforesaid facts and the



demand raised it has become necessary to challenge the same and thus, besides the reliefs sought for in the main writ application, the petitioner seeks for the following relief from this Hon'ble Court:-

“1(v). For issuance of a Writ in the nature of Certiorari for quashing the demand issued vide letter no. 52 dated 12.3.2018, by which the respondents have raised demand against export premium to the extent of Rs.10,32,11,715/-.

1(vi) For issuance of a Writ in the nature of Certiorari for quashing of the letter bearing no. BSMCL 3/BID-17/17178(A)M dated 17.1.2018 as being wholly without authority of law and contrary to Article 304 of the Constitution of India, apart from being in conflict with the order passed by this Hon'ble Court on 27.11.2017 in C.W.J.C. No. 15965 of 2017.

1(vii) For issuance of a Writ in the nature of Certiorari for quashing the memo no. 189 dated 23.3.2018, by which the Department of Mines & Geology through BSMC has demanded export premium and BSMC commission failing which legal action against the petitioner has been stipulated.”



The factual matrix, forming the bedrock facts of the present case, is to the effect that pursuant to an advertisement with regard to the settlement by auction of sand ghats in the district of Aurangabad for the period 2015-19, the petitioner responded to the tender process and was declared as the highest bidder. The tender process fructified in favour of the petitioner, agreement was executed and the work order was, accordingly, issued vide letter no. 44 dated 23.1.2015, as contained in Annexure 1 to the writ application.

The NIT was floated by the respondent on 08.01.2015 for obtaining the lease of Sand Ghats for the entire District of Aurangabad and Rohtas for the period between 2015 and 2019. The terms and conditions of the NIT did not provide that the Government shall subsequently charge an export premium from the lessee.

The petitioner, being the highest bidder, was declared successful and accordingly work orders vide letter no.44 dtd 23.01.2015 and letter no.28 dtd 23.01.2015 were issued by the respondent for the District of Aurangabad and Rohtas, respectively.

The agreement was executed between the petitioner and the State wherein the 'settlement amount' for the period of



5 years was clearly mentioned. The agreement nowhere provided for levy of an additional Export Premium charges for the sale or export of sand outside the State of Bihar.

In terms of Rule 4 of the Bihar Minerals (Prevention of Illegal Mining, Transportation and Storage) Rules, 2003 the State of Bihar began issuing transit pass/challan for sale of the mineral extracted by the petitioner at the rates agreed between the parties. Thereafter, the manual challans were issued online and converted to E-challans, however, the rate of sand remained the same.

The respondent authority called for a meeting of the lease/petitioner on 12.01.2018 and directed the petitioner to agree to pay an additional export premium charges on selling the sand outside the State of Bihar. It has to be taken note of that such stipulation is neither a part of settlement deed, nor is the requirement of Rule 26 of Bihar Minor Mineral Concession Rules, 1972 which provides for payment only, or dead rent as per Schedule-1, Royalty as per Schedule- 2 and Surface rent, as specified by the Collector from time to time.”

Subsequently, an order was issued under the signature of General Manager, Finance and Operation, BSMC whereby 100% export premium charges and 5% import premium



charges were directed to be levied. This order issued vide letter No. 178(A) dated 17.01.2018 came to be challenged vide I.A. No. 3368 of 2018, and was Annexure-2 to the I.A., which reads as under;

“बिहार राज्य खनन निगम

(राज्य सरकार का उपक्रम)

आदेश

बिहार राज्यान्तर्गत उपलब्ध लघु खनिज बालू, पत्थर दूसरे राज्यों को भेजा जा रहा है, एवं अन्य निकटवर्ती राज्यों से बिहार राज्य में उपयोग हेतु लाये भी जा रहे हैं, जिसका उपयोग विभिन्न संवेदकों/कार्य विभागों द्वारा निर्माण कार्यों में किया जा रहा है। वर्तमान में इन खनिजों के अन्य राज्यों से आयात/निर्यात पर कोई शुल्क देय नहीं है। वर्तमान परिपेक्ष्य में यह आवश्यक हो जाता है कि खनिजों के आयात/निर्यात प्रणाली पर भी नियमित अनुश्रवण हो एवं राज्य को इससे वांछित राजस्व की भी प्राप्ति हो।

उपरोक्त के आलोक में सम्यक विचारोन्त यह निर्णय लिया जाता है कि बिहार राज्य से अन्य राज्यों को प्रेषित किये जाने वाले लघु खनिजों पर लघु खनिजों के दर का 100 प्रतिशत Export Premium देय होगा। साथ ही अन्य राज्यों से बिहार राज्य में प्राप्त/उपयोग में लाये जाने वाले लघु खनिजों पर 5 प्रतिशत की दर से Import Premium देय होगा।

उपरोक्त प्रीमियम का भुगतान निर्यातकर्ता/आयातकर्ता द्वारा बिहार राज्य खनन निगम के पक्ष में किया जायेगा।

विश्वासभाजन,

ह0/—

(राजेश कुमार)

महाप्रबंधक (वित्त एवं ऑपरेशन)

पत्रांक—बी0एस0एम0सी0एल0—03/विविध—17/17178(A)एम0 पटना दिनांक 17.01.2018

प्रतिलिपि :- प्रधान सचिव के आप्त सचिव/महाप्रबंधक (F&O)/महाप्रबंधक (HR & A) को सूचनार्थ प्रेषित।

ह0/—

महाप्रबंधक (वित्त एवं ऑपरेशन)



पत्रांक-बी0एस0एम0सी0एल0-03/विविध-17/17178(A)एम0 पटना दिनांक 17.

01.2018

प्रतिलिपि :- सभी समाहर्ता/सभी उप निदेशक/सभी सहायक निदेशक/सभी खनिज विकास पदाधिकारी/सभी खान निरीक्षक को सूचनार्थ प्रेषित।

ह0/-

महाप्रबंधक (वित्त एवं ऑपरेशन)

पत्रांक-बी0एस0एम0सी0एल0-03/विविध-17/17178(A)एम0 पटना दिनांक 17.

01.2018

प्रतिलिपि :- सभी बंदोबस्तधारी, बालू/पत्थर को सूचनार्थ प्रेषित।

ह0/-

महाप्रबंधक (वित्त एवं ऑपरेशन)"

Initially 100% export premium charges were levied, thereafter it was enhanced to 125% and ultimately it was increased to 200% , which led to filing of the present writ application.

Initially the export premium charges were incorporated in e-Challan as Item no. 16, but subsequently, by virtue of the above mentioned order the demand notice was issued which also was under challenge in the present writ application.

For better appreciation of the issues involved in the present writ application, it is also necessary to trace the legislative history of Bihar Minor Mineral Rules.

Section 15 of the Mines and Minerals (Development & Regulation) Act, 1957 (hereinafter referred to as the Act, 1957) empowers the State government to make rules in respect of minor minerals by notification in official gazette regulating



the grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals and for the purposes connected therewith prescribing the procedure for making settlement or lease for mining. In pursuance thereof, vide notification no. B/N/109/72-4275M dated 22nd June, 1972, in exercise of the powers conferred by Section 15 of the Act, 1957, the Governor of Bihar was pleased to make Bihar Minor Mineral Concession Rules, 1972 (hereinafter referred to as the Rules, 1972).

Rule 11 of the Rules, 1972 stipulates regarding the disposal of application for mining lease. Rule 11 A to 11 D thereof was substituted vide Notification no. 3085 dated 11.8.2014 vide Amendment Rules, 2014 whereby the mode of settlement of sand as minor mineral by public auction-cum-tender in favour of the highest bidder by the Collector or any officer so authorized by the State Government was prescribed. Each river as a whole situated in each district was to be considered as a single stretch, the minimum area of which was not less than 5 hectares in any case. Rule 11A of the Rules, 1972 reads as follows:

“11A. Mode of Settlement -(1) The settlement of sand as minor mineral shall be done by public auction-



cum-tender in favour of the highest bidder by the Collector/any officer so authorised by the State Government in the underlined manner;-

(a) Each river as a whole situated in each district shall be considered as a single stretch, the minimum area of which shall not be less than 5 hectares in any case.

(b) Likewise, all rivers in a district shall be treated as individual stretches and all such stretches in one district shall be combined into one single unit for the purpose of settlement.

(c) The highest bidder shall deposit 25% of the auction amount immediately after the auction, following which an in-principle sanction order shall be issued in his favour by the Collector/any officer so authorized by the State Government.

(d) The highest bidder shall submit the required documents (approved mining plan, environmental clearance, bank draft of the due installment of auction amount and other taxes within the prescribed time limit as referred to in the prevailing notification issued by the State Government in this regard, following which the work order shall be issued in his favour by the Collector/any Officer so authorised by the State Government.

(e) The successful bidder shall submit a mining plan prepared for the respective sandghat unit and duly approved by the State Government or by the Officer/Committee so authorised in this regard.



(f) The successful bidder shall obtain environmental clearance from the competent authority as per the prevailing Environmental impact Assessment notification of the Ministry of Environment and Forest, Government of India and as per the provisions of the Environment Protection Act.

Provided that the State Government may direct for the combined settlement of two or more districts as one single unit keeping in view specific geographical disposition, practical difficulties in district-wise demarcation of river bad and sand mining areas located therein, law and order situation, interest of revenue, checking of illegal mining and other relevant factors into consideration.

Provided further that in case of non settlement of anyone or more units, the Mines Commissioner may decide collection of royalty through any public sector undertaking or zila parishad or gram panchayat on recommendation of the Collector.

Provided further that such sand deposits in isolated and far flung areas, which reasonably and conveniently could not be settled by auction shall be identified by the Collector and on approval of the same by the Mines Commissioner, the competent officer (as defined in the rules) may issue permits for extraction of sand from such areas, period for which will not exceed one year.....”



Section 11A(c) of the Rules, 1972 prescribes that the highest bidder shall deposit 25% of the auction amount immediately after the auction, following which an in-principle sanction order shall be issued in his favour by the Collector or the officer so authorised by the State Government. In 2013, the State Government came up with a decision stipulating that for mining of sand by settlement entire river bed is one unit in each district. Hence, by substitution of Rule 11 A in 2014 the mining of sand was permitted through settlement by public auction.

In exercise of power conferred under Section 15 of the Act, 1957 read with Section 23C and 26 of the Act, 1957, the Governor of Bihar was pleased to notify vide Notification no.3018/M dated 10.10.2017, the Bihar Minor Mineral Rules, 2017 (hereinafter referred to as Rules 2017).

Rule 67 in Chapter X of Rules, 2017 was introduced with regard to powers to impose fee on import, export, transport and excavation and is being reproduced hereinunder:

“67. Power to impose fee on import, export, transport and excavation. -(1) Any fee or surcharge, as the case may be, at such rate or rates as the State Government may direct, may be imposed, either generally or for any specified local area on -



- (a) any Minor minerals imported, or
 - (b) any Minor minerals exported, or
 - (c) any Minor minerals transported, or
 - (d) any Minor minerals excavated under any mining lease issued or renewed under this Act, or
 - (e) any Minor minerals excavated or produced in any Mine or crusher.
- (2) A duty, at such rate or rates as the State Government may direct, may be imposed, either generally or for any specified local area, on any Minor Minerals under the provisions of these rules.”

Rule 145 of Rules, 2017 stipulated repeal and savings clause whereby the Rules, 1972 was amended time to time and the Bihar Minerals (Prevention of Illegal Mining, Transportation and Storage) Rules, 2003 and the Sand Policy, 2013 were repealed. Rule 145 of the Rules, 2017 reads as follows:

“145. Repeal and Savings. - (1) The Bihar Minor Mineral Concession Rules, 1972 (as amended from time to time), the Bihar Minerals (Prevention of Illegal Mining, Transportation and Storage) Rules, 2003 and the Sand Policy, 2013 are hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said rules and Policy shall be deemed to have been done or taken under the corresponding provisions of the Act and these rules.

(3) All references in any provisions of the rules so repealed shall be construed as references to the corresponding provisions of these rules.

(4) All proceedings (including proceedings by way of investigations) pending before any Officer, Authority or Court, immediately before the commencement of these rules shall, on such commencement, be deemed to be proceedings pending before it as



per these rules and shall continue to be dealt with accordingly.”

Sub-rule(2) of Rule 145 of Rules, 2017 clearly stipulates that notwithstanding such repeal, anything done or any action taken under the said rules and Policy shall be deemed to have been done or taken under the corresponding provisions of the Act and these rules.

Rules, 2017 came to be challenged in CWJC No. 15965 of 2017 and other analogous cases. After hearing learned counsels for the parties, a Division Bench of this Court came to a prima facie satisfaction that Rules, 2017 violated various provision of the M.M.R.D. Act and directed that the doctrine of severity may not apply in the facts and circumstances of the case. As a result, the writ applications were admitted and Rules, 2017 in its totality was stayed until further orders vide order dated 27.11.2017. The operative portion of the order reads as follows:

“That being the position, we deem it appropriate to hear the parties at length on various issues involved in the matter and, prima facie, being satisfied that the Rule in question violates various provisions of the M.M.R.D. Act and even the doctrine of severity may not apply in the facts and circumstances of the case.



We admit this appeal and direct for stay of the new Bihar Minor Mineral Rules, 2017 in its totality until further orders.

Immediately after pleadings are completed, learned Counsel for the parties are granted liberty to mention the matter and we shall take up the case for final hearing out of turn.

In view of the stay of the New Rules, i.e. Bihar Minor Mineral Rules, 2017, the other existing Rules will come into force for the time being.”

The above quoted interim order dated 27.11.2017 came to be challenged in SLP No. 33129 of 2017 before the Hon’ble Supreme Court. The SLP aforesaid was disposed of by the Apex Court vide order dated 15.12.2017 since by virtue of stay, Rules, 1972 came into operation and the parties came to an agreement that until High Court decides the issue, the claim of the parties will be decided as per Rules, 1972. Relevant portion of the order of the Apex Court reads as follows:

“Both the parties have also agreed that without prejudice to their rights and contentions, the Bihar Minor Mineral Concession Rules, 1972 [hereinafter referred to ‘the 1972 Rules’] would be applicable until the decision of the petitions



pending before the High Court along with lease conditions.

Learned counsel for the petitioners says that in the implementation of the 1972 Rules, contempt petitions have been taken out against some officers of the petitioners. Since the 1972 Rules have now been made operational, the contempt proceedings, in our opinion, will not lie but they will be subject to the orders passed by the High Court in the case of M/s Mahadev v. State of Bihar (Civil Writ Jurisdiction Case No.9908/2016 with regard to maximum price fixation.

The special leave petition is disposed of.”

In spite of the fact that the operation of Rules, 2017 was stayed in totality including the operation of Rule 67 of Rules, 2017 which stipulated charging of export premium charges and there was no such stipulation in Rules, 1972 which was revived by virtue of order dated 27.11.2017 passed in CWJC No. 15965 of 2017, the department of Mines took a short circuit route by levying export premium charges from 100% to 200% by including the same as Entry No. 16 in e-Challan and subsequently by virtue of the order of General Manager (Finance and Operation), BMSC dated 17.1.2018, as quoted above, started issuing demand notice for realization of export



premium charges, which came to be challenged in the present writ application.

Subsequent to the disposal of S.L.P. (Civil) No.33129 of 2017 filed on behalf of the respondent state, they changed their stand and filed I.A. No. 5 of 2019 in the pending writ application CWJC No. 15965 of 2017 (Puspa Singh and Ors. Vs. The State of Bihar and Anr.) and other analogous cases with a prayer that the government has deliberated upon Rules, 2017 and after scrutiny, the government proposed to frame a Rule to regulate the mines and minerals in the State of Bihar in terms of MMDR Act.

The said I.A. No.5 of 2019 was disposed of vide order dated 9.09.2019 by a Division Bench of this Court to the effect that the State Government has not to take a permission from the Court or bringing any Rule in existence. Order dated 09.09.2019, reads as follows :-

“During the pendency of this application, present interlocutory application has been filed wherein it has been stated that the provisions of Bihar Minor and Mineral Rules, 2017 was scrutinized and deliberated at the Government Level, finally Government proposes to frame a new Rule to regulate the mines and minerals in this State in terms of MMDR Act. In consequence, it



has been felt necessary to withdraw the Bihar Minor Mineral Rules, 2017. In the light of decision taken by the State Government, it was thought proper to bring to the notice of this Court the decision of the State Government to frame a fresh Rule and at the same time intends to withdraw the Bihar Minor Mineral Rules, 2017.

Basically, the aforesaid interlocutory application has been filed by the State to inform this Court that they are going to bring a new Rule and simultaneously intending to withdraw the impugned Rules, 2017. The framing of new Rule and withdrawing the old Rule under the statutory provision is an act of subordinate legislation, which falls within the power and domain of the State Government. It is for the State Government to decide in what manner the State would act in the matter of withdrawing the 2017 Rules and simultaneously bringing the new Rule, which does not require any prescription and approval of this Court. It is under their wisdom in what manner they want to act and the same is completely within the prerogative of the State Government. With this observations, this interlocutory application stands disposed of.”

However, in exercise of power under Section 15 of the Act, 1957 read with Section 23C and 26 thereof, the Governor of Bihar was pleased to enact Bihar Minerals



(Concession, Prevention of illegal mining, Transportation and Storage) Rules, 2019 (hereinafter referred to as Rules, 2019) vide Notification No. 4/V.Mu-20-93/18-3174/M which was notified with effect from 17th of September, 2019. However, in Rules, 2019 there was no provision for imposing fees on import, export and excavation and in a way provision under Rule 67 of Rules, 2017 was given an complete go-bye. Hence, at present, there is no such provision for charging export premium charges.

Repeal and savings clause of the said Rules, 2019 is incorporated in Rule 88 thereof, which reads as follows:

“88. Repeal and Savings.-

(1) The Bihar Minor Mineral Concession Rules, 1972 (as amended from time to time), the Bihar Minerals (Prevention of Illegal Mining, Transportation and Storage) Rules, 2003 and Bihar Minor Mineral Rules, 2017 are hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said rules shall be deemed to have been done or taken under the corresponding provisions of the Act and these rules.

(3) All references in any provisions of the rules so repealed shall be construed as references to the corresponding provisions of these



rules.

(4) All proceedings (including proceedings by way of investigations) pending before any Officer, Authority or Court, immediately before the commencement of these rules shall, on such commencement, be deemed to be proceedings pending before it as per these rules and shall continue to be dealt with accordingly.”

It is the specific case of the Department of Mines that after passing of the interim order dated 28.3.2018 when it was prima facie noticed by this Court that realization of export premium charges is contrary to the provisions of the Act and Rules, the Department of Mines have not raised any demand. This writ application has thus virtually become infructuous and insignificant and the issue involved has become academic only.

Mr. S. B. Upadhyay, learned Senior Counsel appearing on behalf of the petitioner submits that there is no provision for levy of export premium charges in Rules, 1972.

Rule 11A of the Rules, 1972 prescribes the mode of settlement. Rule 11B(2) of the Rules, 1972 prescribes the execution of settlement deed, which further mandates that it has to be executed in Form ‘O’. Rule 11B has been substituted vide Notification No.3085 dated 11.08.2014 whereas the agreement of settlement between the petitioner and the Department of



Mines was executed on 24.7.2015 as contained in Annexure 1 to the I.A. No. 2395 of 2018 in Form 'O'. Hence, the contention of the respondents that the provision of Part VII(1) of Form D of Rules, 1972 empowers the BMSC to levy export premium, does not apply to the present case. A bare reading of the condition contained in Part VII(1) of Form D begins with the word 'lessee to pay rent/royalty/taxes etc.' The case of the petitioner is of settlement under Rule 11A(1) of the Rules, 1972. The rent is by virtue of agreement. Royalty and taxes is by virtue of statutes. The meaning of word 'etc.' is ascertained by the company it keeps and this is the law of interpretation under ejusdem generis. Reliance has been placed on the Supreme Court's decision in Subramaniam Swamy Vs. Union of India and others, (2016) 7 SCC 221.

The cause of action as per the pleadings and submissions made by learned counsel for the petitioner, accrued when the respondents started levying and collecting the export premium for the inter State sale of the sand.

Mr. Upadhyay, learned Senior counsel for the petitioner submits that this exaction in the form of export premium was neither contemplated under the agreement nor under the sand policy under which the notice inviting tenders



were floated.

It is the further contention of learned Senior counsel Sri Upadhyay that levying and collection of the export premium on the inter State trade of sand does not have any sanction of law and is in derogation of the constitutional inhibition enshrined under Article 265 of the Constitution of India, according to which, no tax can be levied and collected, save and except by the authority of law. Learned Senior counsel thus, submits that in absence of any legislative sanction for such exaction followed by levying and collection of export premium in the inter State trade and commerce of sand is contrary to the provisions of Article 265 of the Constitution and furthermore, in effect, violates the right to trade under Article 19(1)(g) of the Constitution of India. Besides, it is the further case of the petitioner that imposition of such premium charges is also violative of the very trade and commerce as stipulated under Article 301 to 304 of the Constitution. Besides the aforesaid, other constitutional issues regarding the pre-requisites of imposition of any tax were argued by the learned senior counsel. Reliance has been placed on the Supreme Court decision in Om Prakash Agarwal and Ors. Vs. Giri Rajashori and Ors., (1986) 1 SCC 722.



It is further submitted that export premium charges cannot be treated as a public demands since the 'Public Demand' is defined under sub-section (6) of Section 3 of Bihar and Orissa Public Demands Recovery Act, 1914 (hereinafter referred to as the Act), which stipulates any arrear or money mentioned or referred to in Schedule I. Moreover, Schedule I of the Act does not stipulate any such charges like export premium charges as public demand, hence, even as per Form - D of Rules, 1972 the export premium charge cannot be realized by way of public demands. Learned Senior Counsel has relied upon a Full Court judgment of this Court in the case of Ram Chandra Singh Vs. The State of Bihar and Ors. reported in 1987 PLJR 47.

It is further submitted that the restriction on the export of minor mineral is further arbitrary, unreasonably restrictive and is violative of Articles 14 and 19(1)(g) of the Constitution of India and is not saved by Article 19(6) of the Constitution. Once the mineral has been mined and extracted and royalty stands paid, the State is divested of its ownership over the sand and it vests in the petitioner or the mine owner/lease holder. Reliance has been placed by learned counsel to the case of State of Tamil Nadu Vs. M.P.P. Kavery Chetty,



reported in (1995) 2 SCC 402, wherein it has been held that there is no power conferred upon the State Government under the Act to exercise control over minor mineral after they have been excavated as per the settlement.

The consent of the petitioner to pay the export premium charge and consequential part payment does not apply as estoppel against the petitioner to challenge the levy in exercise of its constitutional right under Article 14, 19(1)(g) read with Article 226 of the Constitution because such imposition is fundamentally illegal and unauthorized besides having been extracted under coercion.

Invoking the mandate of Section 72 of the Indian Contract Act, 1872, Sri Upadhyay further submits that the collection of such export premium would amount to unjust enrichment by the Mines Department and corresponding unjust loss to the petitioner. It is lastly submitted by learned Senior counsel that the parties were not *ad idem* to the imposition of such premium charges and if at all some payment has been made under the impugned imposition, it has been done on account of unequal bargaining power qua the Mines Department.

Mr. Upadhyay lastly submitted that the Department



of Mines what could not have done directly, has sought to do indirectly in violation of the interim order dated 27.11.2017 passed by the Division Bench of this Court which was not even interfered by the Supreme Court in S.L.P.

However, learned senior counsel for the petitioner agrees not to press for the refund amount already deposited but submits that the aforesaid concession does not mean that the petitioner concedes such realization to be just and proper.

The respondents filed their counter affidavit and resisted the reliefs as claimed in the writ application. Mr. Naresh Dixit, learned counsel for the Mines Department appeared and vehemently opposed the prayer in the writ application on diverse grounds. It is the stand of the respondents in the counter affidavit as also in the course of submission that the levying of export premium at the rate of 200% was in the interest of public revenue and also justified as in the neighbouring State like U.P., the rate of sand is quite higher than that in the State of Bihar and if such export premium is not imposed upon the settlee, then such settlee would export the entire sand to the nearby States, instead of selling the same in the market of the State of Bihar.

It is further submitted that the excessive mining would adversely affect the environment. As per the respondents the



export of sand by the petitioner would fetch the firm handsome profit and on that ground also the imposition of such export premium charges is sought to be justified. It is the further stand of Mines Department that a joint meeting of the authorities and the lease holders and other stake holders was convened on 12.1.2018, in which meeting the petitioner also participated and consented to abide by whatever terms which would be imposed upon him.

The plea of the petitioner having consented to such exaction, is pressed hard by the Mines Department. The respondents further seek to justify the imposition of the export premium charges for the reason that the petitioner is earning heavy profit by exporting the sand to the neighbouring districts. A very feeble argument was made with regard to the omission on the part of the petitioner to raise grievances before the authorities and by-passing the alternative administrative remedy, and as such, as per the respondents, the writ petition should not have been maintained directly before this Court. It is lastly submitted relying upon letter no. 178 dated 17.1.2018, as contained in Annexure A to the counter affidavit, which has been issued by the General Manager (Finance and Operation), which is the genesis for imposition of impugned export



premium charges.

Mr. Naresh Dikshit submits that the total amount deposited in the head of export premium charges is subject to calculation but roughly it is around twenty crores. However, the Department of Mines have not issued any demand notice after passing of the interim order dated 28.3.2018 and they are not realizing any such export premium at present.

In view of the submissions advanced and taking into consideration the legislative history, current legislation and various orders passed by the different Benches of this Court, it would be apt to formulate the issues for adjudication in the instant writ application, which in the considered opinion of this Court, are as follows:

- I. Whether any compulsory exaction of the export premium charges amounts to levying and collection of tax under Article 265 of the Constitution of India ?
- II. Whether the taxes can be levied and collected on the basis of exaction orders without any legislation ?
- III. Whether a consent by a settlee would confer



jurisdiction upon the Mines Department to levy tax de hors the provisions of Constitution and the Rules, 1972 ?

- IV. Whether any action of the public authority for howsoever laudable purpose it may be, can be ratified in the absence of any legal sanction or if such action is challenged as being without authority of law ?
- V. Whether the proceeds of collection of tax which has been declared to be unconstitutional can be allowed to be retained with the authorities or they can be allowed to be benefitted by unjust enrichment ?
- VI. Whether the entries in the relevant form prescribed for collection of taxes etc. under the relevant Rules, 1972 can be considered to ascertain the intention and purpose of the imposition of any charge ?
- VII. Whether in view of the subsequent development, like, discontinuation of the collection of the impugned export premium charges and coming into force of 2019 Rules, which does not



contemplate any levy of such nature, this writ petition is rendered academic only after deliberation by this Court ?

VIII. Whether the plea of availability of an alternate remedy would bar the invocation of writ jurisdiction under Article 226 of the Constitution where the nature of challenge is on the ground of absolute lack of jurisdiction and violation of fundamental rights ?

Issue Nos. I and II are contingent upon each other and in the opinion of this Court, can be decided simultaneously.

The levy and collection of any duty/tax has been provided under Article 265 placed in Chapter XII of the Constitution which reads thus:

“ 265.Taxes not to be imposed save by authority of law.- No tax shall be levied or collected except by authority of law.”

It has been the consistent stand of the petitioner that the imposition of the impugned export premium charges does not conform to the constitutional requirement as contemplated under Article 265 of the Constitution of India in as much as the exaction is being effected without any authority of law.



The imposition of export premium charges being compulsory exaction of money by public authority is in the nature of tax and there is no statutory sanction for imposition of export premium charges, hence, in view of this Court, such imposition is violative of Article 265 of the Constitution of India as has been held in the case of Om Prakash Agrawal and Ors. Vs. Giri Raj Kishori and Ors., reported in (1986) 1 SCC 722.

Article 265 of the Constitution of India declares that no tax shall be levied or collected except by the authority of law. The term 'tax' has been defined by the Hon'ble Supreme Court in the case of Jindal Stainless Ltd. And Ors. Vs. State of Haryana, reported in (2017) 12 SCC 1. Paragraph 312 of the judgment reads as follows:

“312. Power to tax is a sovereign power and is legislative in character and it has to be exercised within the constitutional limitation. In State of W.B. v. Kesoram Industries Ltd. [State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201 : AIR 2005 SC 1646] , it was held as under: (SCC p. 312, para 109)

“109. The primary purpose of taxation is to collect revenue. Power to tax may be exercised for the purpose of regulating an industry, commerce or any other activity; the purpose of levying such tax, an impost to be more correct, is the exercise of



sovereign power for the purpose of effectuating regulation though incidentally the levy may contribute to the revenue.”

Power of taxation has been regarded as an inherent attribute of sovereignty emanating from necessity. Same view was reiterated in *Yadlapati Venkateswarlu v. State of A.P.* [*Yadlapati Venkateswarlu v. State of A.P.*, 1992 Supp (1) SCC 74] , SCC para 9, *State of U.P. v. Synthetics and Chemicals Ltd.* [*State of U.P. v. Synthetics and Chemicals Ltd.*, (1991) 4 SCC 139] , SCC para 44, *Amrit Banaspati Co. Ltd.v.State of Punjab* [*Amrit Banaspati Co. Ltd.v.State of Punjab*, (1992) 2 SCC 411] , SCC para 10, *Dena Bank v. Bhikhabhai Prabhudas Parekh & Co.* [*Dena Bank v. Bhikhabhai Prabhudas Parekh & Co.*, (2000) 5 SCC 694] , SCC para 8.”

The provision of Part-VII(1) of Form D of Rules, 1972 prescribes the model for mining on lease for minor minerals as incorporated under Rule, 21 of the Rules, 1972. Present is not the case of lease. It is a case of settlement of sandghats (mining) for which Form O is prescribed and that Form is under Rule 11B (2) of Rules, 1972 which has been substituted by Notification no. 3085 dated 11.08.2014, whereas the agreement of settlement was executed between the petitioner



and the Department of Mines on 24.07.2015 and obviously it is in Form O. The word Form has been defined in Rule 2(vii) of the Rules, 1972 which means a form set out in Schedule III appended to these Rules. Form O is in Schedule III which suggests that it is in relation to Rule 11 B (2) and for the agreement, not for the lease. This is not in dispute that no lease has been executed in favour of the petitioner. Hence, the claim of Department of Mines of having valid export premium charges in pursuance to part VII (1) of Form D is absolutely misconceived.

Moreover, the respondent's claim that they derived their power to collect export premium charges in prescribed Form D is absolutely misconceived as the power flows from the provision of the Rules, that is Rules 11A and 11B of Rules 1972 which, neither talks about lease nor talks about realization of export premium.

Rule 26 of the Rules, 1972 defines rent, royalty and assessment. Rule 26(1) of the Rules, 1972 suggests that when a lease is granted or renewed, dead rent shall be charged at the rate specified in Schedule I, royalty shall be charged at the rate specified in Schedule II and surface rent shall be charged at the rate specified by the Collector from time to time for the area



occupied or used by the lessee. Rule 26 of Rules, 1972 reads as follows:

[26. Rent/royalty and assessment. - (1) When a lease is granted or renewed:-

- (a) Dead rent shall be charged at the rates specified in Schedule I;
- (b) Royalty shall be charged at the rates specified in Schedule II; and
- (c) Surface rent shall be charged at the rate specified by the Collector from time to time for the area occupied or used by the lessee.]

(2) On and from the date of commencement of these rules, the provisions of sub-rule (1) shall also apply to the leases granted or renewed prior to the date of such commencement and subsisting on such date.

(3) If the lease permits the working of more than one mineral in the same area, the Collector may charge separate dead rent in respect of each mineral:

Provided that the lessee shall be liable to pay the dead rent or royalty in respect of each mineral, whichever be higher in amount.

[(4) Notwithstanding any thing contained in any instrument of lease the lessee shall pay rent/royalty in respect of any minor mineral own, extracted and removed at the rate specified from time to time in Schedules I and II.]

(5) The State Government may, by notification in the Official Gazette, amend the first and second Schedules so as to enhance or reduce the rate at which rents/ royalties shall be payable in respect of any minor mineral with effect from the date of publication of the notification in the Official



Gazette.

(6) The[Competent Officer], after such enquiry and verification as he may deem necessary of the monthly returns furnished by the lessee in Form "H" shall assess the amount of rent/royalty payable by the lessee at the end of the prescribed period.

Rule 26 of Rules, 1972 does not stipulate realization of export premium charges.

A bare reading of the condition contained in Part VII(1) of Form D shows that it begins with the word 'lessee to pay rent/royalty/taxes etc.' The word 'etc.' has to be understood in terms of earlier connotation used ejusdem generis, like, rent/royalty/tax. Meaning thereby, any imposition like export premium charges cannot be read with the words used in Rule 26 of Rules, 1972, like, dead rent, royalty and surface rent as has been held in the case of Subramanian Swamy Vs. Union of India, Ministry of Law and Ors., reported in (2016) 7 SCC 221. Paragraph 74 of the judgment reads as follows:

“74. At this juncture, we may note that in Ahmedabad (P) Primary Teachers' Assn. v. Administrative Officer [Ahmedabad (P) Primary Teachers' Assn. v. Administrative Officer, (2004) 1 SCC 755 : 2004 SCC (L&S) 306] , it has been stated that noscitur a sociis is a legitimate rule



of construction to construe the words in an Act of Parliament with reference to the words found in immediate connection with them. In this regard, we may refer to a passage from Justice G.P. Singh, Principles of Statutory Interpretation [(13th Edn., 2012) 509.] where the learned author has referred to the lucid explanation given by Gajendragadkar, J. We think it appropriate to reproduce the passage:

“It is a rule wider than the rule of ejusdem generis; rather the latter rule is only an application of the former. The rule has been lucidly explained by Gajendragadkar, J. in the following words:

‘This rule, according to Maxwell [Maxwell, Interpretation of Statutes (11th Edn., 1962) 321.] , means that when two or more words which are susceptible of analogous meaning are coupled together, they are understood to be used in their cognate sense. They take as it were their colour from each other, that is, the more general is restricted to a sense analogous to a less general.’”

The learned author on further discussion has expressed the view that meaning of a word is to be judged from the company it keeps i.e. reference to words found in immediate connection with them. It applies when two or more words are susceptible of analogous meanings are coupled together, to be



read and understood in their cognate sense. [Principles of Statutory Interpretation by G.P. Singh (8th Edn.) 379.] Noscitur a sociis is merely a rule of construction and cannot prevail where it is clear that wider and diverse etymology is intentionally and deliberately used in the provision. It is only when and where the intention of the legislature in associating wider words with words of narrowest significance is doubtful or otherwise not clear, that the rule of noscitur a sociis is useful.”

The word ‘settlement’ has been defined under Rule 2(xviii) of the Rules, 1972, which reads as follows:

“2 (xviii) **Settlement** means a mining right given on behalf of the Government to quarry, win, work and carry away sand and other minor mineral(s) specified therein through a competitive bidding process as notified by the State Government.”

Rule 11A of the Rules, 1972 prescribes the mode of settlement. Rule 11-B(2) of the Rules, 1972 prescribes the execution of settlement deed, which mandates that it has to be executed in Form O.

Moreover, the word ‘tax’ used in Form D shall have



to be realized as public demand. The work 'public demand' is defined under Section 3(6) read with Schedule I of Bihar and Orissa Public Demand Recovery Act, 1914. A perusal of Article no. 1 to Article no. 15, it appears that they are those items which have been provided under some law, making them enforceable. Articles 1 to 14 do not include export premium charges. Article 7 of Schedule I of Bihar and Orissa Public Demand Recovery Act, 1914 refers to demand payable to Collector by a person holding any interest in land by virtue of settlement or lease or by law. Since the condition laid down in Form D Part VII does not refer to payment of an export premium charges, it cannot fall within the scope of public demand.

Moreover, a Full Bench of this Court in the case of Ramchandra Singh Vs. State of Bihar and Ors., reported in 1987(1) BLJR 178, has held that all the arrears of revenue, money or payable demand which the legislature chooses to incorporate in Schedule I, becomes public demand by virtue of definition.

The respondents, in support of the exaction have brought on record the order of the General Manager (Finance and Operation) of the Bihar State Mining Corporation to contend that on the basis of such order, the export premium is



being levied and collected. Besides the said order no other instrument has been brought on record either through pleadings or in the course of submission so as to justify such levying and collection. I am afraid that such an order passed by the General Manager and that too without any authority of government can be treated as imposition by an authority of law. It is a settled principle of construction of administrative orders that the contents of the order are to be interpreted in light of the averment in the same, without importing anything from outside. There is not even a single averment as to on whose instruction or direction and under what provision of law, rule or regulation, the same has been issued. A specific query was made as to under what authority such order has been issued, which has an implication of levying or collecting fresh tax, it has been submitted that the General Manager of the Corporation has issued it in the public interest. What is palpable from the perusal of this order dated 17.1.2018 is that, it is purely an administrative order issued by the General Manager of the Corporation without referring to any provision either of the Rules, 1972, order or notification and furthermore, no source or authority to justify the issuance of such order has been mentioned.



The charging of export premium charges first by making entry into e-Challan as item no. 16 and secondly by issuing an administrative order by General Manager (Finance and Operation), BSMC dated 17.01.2018 is nothing but circumventing the order of the Division Bench dated 27.11.2017 whereby the operation of Rules, 2017 was stayed in its entirety and Rules, 1972 was allowed to be revived and the said interim order was not interfered by the Supreme Court in S.L.P. preferred by the government. To frustrate such kind of collection either through entry into e-Challan or through administrative order. The respondent had to resort to the provisions under Rules, 1972 which does not contain any provision warranting such an action. Hence, such an action or realizing export premium charges was nothing but to give effect to the provisions under Rule 67 of Rules, 2017 which was stayed, which is case of judicial overreach and it is settled law that a thing which cannot be done directly is not permitted to be done indirectly. A purposeful reference may be made to the case of Sant Lal Gupta and Ors. Vs. Modern Cooperative Group Housing Society Limited and Ors. reported in (2010) 13 SCC 336. Paragraph 21 of the judgement reads as under :-

“It is a settled proposition of law that what cannot be done directly, is not permissible to be done



obliquely, meaning thereby, whatever is prohibited by law to be done, cannot legally be effected by an indirect and circuitous contrivance on the principle of "quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud." An authority cannot be permitted to evade a law by "shift or contrivance". (See: Jagir Singh v. Ranbir Singh & Anr., AIR 1979 SC 381; and M.C. Mehta v. Kamal Nath & Ors., AIR 2000 SC 1997). “

Imposition of export premium is hit by Articles 265, 302 and 304 (b) of the Constitution of India. In inter State trade and commerce, it is only the Parliament which may impose any restriction on the freedom of trade and commerce under Article 304 which provides for restrictions on trade and commerce amongst the States which starts with a non-obstante clause. However, it is subject to Article 302 of the Constitution of India. The legislature of the State has the power to make law and impose reasonable restrictions in freedom of trade and commerce amongst the States with previous sanction of the President. But the administrative circular by which the export premium charges have been made is not a law made by the State, hence, the levy of export charges for sale of sand or transportation of sand to other State through executive order or direction is absolutely impermissible under law.



There is yet another facet to the impugned order in as much as, the administrative power of the executive is co-existent with the legislative power under Article 162 of the Constitution of India. Executive can take decision only on those issues on which it has the competence to pass legislation. As per Schedule-VII Entry No.42 appended to the Constitution, Inter State trade and commerce is the Union subject. Therefore, for the said reasons also the State respondent could not have issued any administrative order affecting the Inter State trade and commerce in as much as they lack any legislative competence.

For the reasons aforesaid, there cannot be any doubt that this is an administrative order and on the basis of such order, taking into consideration the constitutional inhibition under Article 265 of the Constitution of India, any kind of tax or levy cannot be collected. Therefore, the two issues framed for adjudication are answered in negative and it is held that by the said order dated 17.01.2018, such exaction could not have been levied and collected.

The objection of Mr. Naresh Dikshit that the petitioner should avail alternative remedy under the Act, will not apply to the facts of the present case, because realization of



export premium charges has been made invalidly and in an illegal manner, without any legislative backing, but only on the basis of an administrative order and the impugned order of the General Manager has been issued without authority of law. In such circumstances, the Supreme Court has held in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Ors., reported in (1998) 8 Supreme Court Cases 1, to the effect that the writ application would be maintainable despite availability of alternative remedy, in three contingencies, which has been elaborated in paragraph 15 of the judgment. Paragraph 15 reads as follows:

“15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the Writ Petition has been filed for the enforcement of any of the Fundamental rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act



is challenged. There is a plethora of case law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.”

It is made clear that in the present writ application, no legislative Act is under challenge but only administrative order whereby initially the export premium charges were levied by making entry no. 16 in e-Challan and subsequently by virtue of execution order.

Accordingly, it is held that no rights, liabilities or any civil consequences could ensue out of such an order which is illegal and beyond jurisdiction.

Having given my anxious consideration to the peculiar facts and circumstances of the case, I deem it appropriate to order that:-

(i) the Principal Secretary of the Mines Department shall quantify the actual proceeds in the shape of export premium charges and any other consequential collection by the corporation.

(ii) the proceeds so quantified shall be spent for the purposes of: (a) development of sand ghats in the State of Bihar and also for augmenting the infrastructural facilities;



(b) organizing training programmes for the stakeholders to optimize the use of minerals and to create awareness for the optimal use of natural resources; and

(c) the decision taken pursuant to this direction shall be notified on the official website of the Mines Department in the end of the financial year and in case of omission by the corporation to adhere to the direction, it would be open for any public spirited person to bring the fact to the notice of this Court, for appropriate action.

The writ application is accordingly disposed of.

(Dinesh Kumar Singh, J)

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Transmission Date	

