Orient Papers and Industries Ltd. and Another

Vs

Tahsildar-Cum-Irrigation Officer and Others

Civil Appeals No. 1798 of 1986 with No. 1822 of 1992

(Dr. A. S. Anand, S. Rajendra Babu JJ)

07.09.1998

JUDGMENT

RAJENDRA BABU, J.

1. The appellant before us is the owner of two factories, one situate at Brajrajnagar in the State of Orissa and the other at Amlai in the State of Madhya Pradesh. The mill at Brajrajnagar was installed by the appellant which is engaged in the manufacture of paper and board since 1939. A compact block of land measuring 889 acres is in the possession of the appellant and abutting the bank of River Ib east to west. The lands on which the said kill is situated was used for the purpose of cultivation earlier and is situated about 400 yards away from the river bank. Water is required for the purpose of manufacture of paper and board and for domestic purposes for the use of the workers and staff residing in the colonies attached to the mill. The appellant has been drawing water from the year 1939 from the flowing stream of the said River Ib. Water so drawn from the said river is purified before use for manufacturing paper and for supply for domestic purposes. The water after it is used is discharged into the river after purification in the filter and water recovery plant and sedimentation lagoons. During the lean period which is about four months in a year from January to June, when the flow of water in the river is less. The appellant constructs sand bundhs across the river at different place for impounding the water. Without construction of such bundhs, it would not be possible to get water in sufficient depth from the pumps.

2. Hirakud Dam was constructed in the year 1956. The maximum level of the reservoir of the said dam is stated to be 630 R.L. The Orissa Irrigation Act, 1959 (hereinafter referred to as "the Act") which came into force from 1-6-1961 was enacted to consolidate and amend the laws relating to the irrigation, assessment and levy of water rate and cess in force in different parts of the State of Orissa. In March 1969, the Collector of Sambalpur addressed a letter to the Secretary of Revenue Divisional Commissioner, Northern Division, Orissa regarding the construction of the cross-bundhs by the appellant on the River Ib and drawing of water from the said river for its use at its mill. In the course of his letter, he adverted to the permission to put up sand bundhs and also regarding payment of water rate. He suggested that the construction of the bundhs benefited the villagers in various ways and accumulated water was also utilised in some places for growing crops. He further suggested that the mill should pay salami at the rate of Rs. 1000 per bundh per year and thereby the proposal made to initiate action for encroachment appears to have been dropped. In the year 1967-68, permission was also granted to the appellant for construction of the sand bundhs on payment of royalty of Rs. 1000 per year. This arrangement continued till 1975-76 when royalty was enhanced to Rs. 3000 per bundh per year from the year 1976-77. The Collector stated in his letter that the Revenue Divisional Commissioner had suggested that the appellant should pay a lump sum of Rs. 1000 per year towards water rate and the amount so paid was to be adjusted against the water rate

fixed under law. It is also indicated that on the construction of Hirakud Dam in the year 1956, the appellant was using natural flow of the water for a part of the year where the level of the reservoir was below that level at which the pumping station was situated and when the level of the reservoir rose above that level during the months of September to December, the appellant utilised the water of the reservoir. During the period from September to December, the appellant draws water from the artificial reservoir created by putting cross-bundhs at their own cost and they are liable to pay water rate only for that period of the year. Taking average period during which the water rate was payable by the appellant to be four months and assuming that about six lakh gallons was to be used per hour, the water rate was roughly worked out at Rs. 12 per hour or Rs. 280 per day or Rs. 8500 per month. It is suggested that the mill may have to pay about Rs. 34,000 to Rs. 40,000 for four months depending upon the actual quantity of water used during a particular year. However, it was made clear that after coming into force of the Act from the year 1961-62, the appellant became legally liable to pay water rate so long as it draws water from the reservoir. The stand taken by the appellant in reply to the communication sent by the Collector on the lines as stated above is that even when the level of water rises above the level of the pump, it uses the flowing water of the said River Ib. Therefore, it is not liable to pay any levy under the Act. Thereafter proceedings were initiated in Irrigation Case No. 1 (IRR) of 1972 by the Irrigation Officer. A show-case notice was issued as to why water tax should not be charged. The appellant replied that the Act and the Rules framed thereunder did not apply to the case as the appellant was drawing water from the flowing stream of the River Ib and not from any irrigation work as defined under the statute and since it has been drawing water from the natural flow of River Ib since 1939, it had acquired rights to enjoy free flow of water from the river and the said right cannot be abridged under the law. By an order made on 27-4-1974, the Irrigation Officer imposed water rate for the years 1961-62 to 1973-74 amounting to Rs. 19,13,184 and for the year 1974-75 Rs. 1,47,168 on the basis that the Act and the Rules were applicable to the appellant as it was drawing water from the Hirakud Reservoir. Water tax was calculated on the basis of consumption at 6 lakh gallons per hour.

3. Aggrieved by the aforesaid order an appeal was preferred before the Sub-Divisional Officer, Sadar, Sambalpur top set aside the order made by the Irrigation Officer and to remand the matter for fresh disposal as in his view a proper inquiry had not been made to come to the conclusion whether the lifting of water was done within the point of Hirakud Reservoir. The matter was reconsidered by the appellate authority and when the appellant examined three witnesses and the Department examined one witness, certain documents were also produced. By an order made on 10-8-1976, the appellate authority held that the appellant was liable to pay a sum of Rs. 1,89,21,600 for the years 1961-62 to 1975-76 and a further sum of Rs. 12,61,440 for the year 1976-77, thus amounting to a total sum of Rs. 2,01,83,040. The finding recorded by the appellate authority on remand is that the appellant was drawing water from the reservoir area and, therefore, it was liable to pay for the unauthorised use of water and further that the water discharged by the appellant was not purified before being discharged in the river. The assessment of the levy was made at the maximum rate applicable for unauthorised use of the water.

4. The appellant preferred an appeal against the order. The appeal was disposed of by the appellate authority upholding the findings of the Irrigation Officer. The appellate authority modified the calculations of the amount due from the appellant by deleting charges for the period prior to coming into force of the Act. Being dissatisfied by the order made by the appellate authority, the appellant preferred a revision petition under Section 48 of the Act before the Divisional Commissioner, Northern Division, Sambalpur who rejected the same with a modification to the extent that the rate of tax for the unauthorised use of water was reduced to four times the bulk rate instead of 6 times as imposed by the lower authorities. The revisional authority formulated nine questions for its

consideration and they are as follows :

> "(i) Whether in the second enquiry the Tahsildar could go into the question of fresh assessment of water rate instead of restricting his finding out if the intake point is within the Hirakud Reservoir ?
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> (ii) Whether the intake point of the mill is below 630 R.L. ?
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> (iii) If so, whether this point is within the reservoir of Hirakud project ?
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> (iv) Whether the definition of reservoir to include the bed of River Ib is valid ?
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> (v) Whether the drawal of water is from an irrigation work as defined under the Act ?
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> (vi) Whether drawal of water can be treated as supply on which water rate is payable ?
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> (vii) Whether drawal of water can be held as unauthorised ?
>
> (viii) Whether water discharged is polluted ?; and
>
> (ix) Whether any levy is possible for unauthorised use under Rule 47(2) within the framework of the Orissa Irrigation Act ?"

5. All the questions were answered in the affirmative and against the appellant. The matter was, therefore, carried in a writ petition before the High Court. Before the High Court, the contentions put forth by the appellants pertain to -

> (1) The appellant does not use the water from River Ib for the purpose of irrigation or domestic purpose and, therefore, the Act and the Rules do not apply.
>
> (2) The water is drawn by the appellants at a point which is within the Hirakud Reservoir area and as such the appellant does not draw water for any irrigation work as defined under Section 4(9) of the Act.
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> (3) Even assuming that the appellant is liable to pay water rate for the use of water for its mill or supply of water to the residential colonies, levy at penal rates was uncalled for.

6. A Division Bench of the High Court considered the matter and held that the contentions raised in the matter the covered by a decision of the High Court in Titaghur Paper Mills Co. Ltd. v. State of Orissa (ILR 1975 Cut 1095). The Court rejected the contention that the appellant had any riparian right to use water from the river and such user of the water was available free of charge. They also held that under Section 21(2) of the Act supply of water for purpose other than irrigation is also covered and, therefore, the contention that they draw water for the purpose other than irrigation and, therefore, the statute has no application was held to be untenable. As long as the source of water from which supply is made is for irrigation as defined under Section 4(9) of the Act, the authorities under the Act were empowered to levy the water rate for cess. On the principal question as to whether the appellant draws water from the point which lies within the Hirakud Reservoir, the matter was enquired into by the Irrigation Officer. He had held that the point was within the

reservoir area. The appellate authority as well as the revisional authority had affirmed this view and, therefore, the High Court held that these aspects were questions of fact and cannot be re-examined by the High Court.

7. The High Court took the view that the appellants were using the water from the River Ib since 1939 and during lean months, i.e., from January to June, they were using the water by constructing sand bundhs on the river. There was a serious controversy between the parties that whether the point at which the appellant had drawn water lies within the area of Hirakud Reservoir and, therefore, penal rates could not have been levied and thereby held that the appellant would be liable to pay water rate at the usual rate which is Rs. 10 per lakhs gallons and directed the Irrigation Officer to revise the demand accordingly. It is against this order that this appeal has been preferred.

8. Shri Shanti Bhushan, learned Senior Advocate appearing for the appellant, submitted that the Irrigation Officer could not go into the question of fresh assessment of water rate and ought to have confined his findings only to the question of restricting it to the point whether it is within the Hirakud Reservoir or not. On this aspect of the matter, we may advert to the order made by the appellate authority dated 23-12-1975. The concluding portion of the order reads as follows :

> "The main point is whether lifting of water from River Ib is being done from a point which is within the reservoir. This is a question of fact and, as admitted by the Government Pleader, proper enquiry to come to a finding that lifting is being done from a point within the reservoir has not been conducted. The case is, therefore, remanded to the learned Irrigation Officer-cum-Tahsildar, Jharsuguda for re-enquiry and disposal."

9. Though the various points on which the order made by the Irrigation Officer were challenged in the appeal on the basis of non-consideration of the question whether the point at which the water was lifted by the appellant was within the reservoir, entire order made by the Irrigation Officer was set aside and there was an open remand. When the scope of enquiry after remand was not restricted by the appellate authority, it was certainly permissible by the Irrigation Officer to examine all questions arising thereto. Therefore, we find absolutely no merit in the first contention urged on behalf of the appellant and it is accordingly rejected.

10. A more important point raised by Mr. Shanti Bhushan is that the irrigation work as defined under Section 4(9) would not cover the area in which the reservoir lies, but only a reservoir, tank, anicuts, dams, weirs, canals, barrages, channels, pipes, wells, tubewells and artesian wells constructed, maintained or controlled by the State or a local authority. In order to appreciate this contention, it is necessary to refer to the view taken by the authority. After examining certain documents produced by the authorities, it was held that the point from which the water is lifted by the appellant from River Ib is below 630 R.L. in the bed of River Ib and it was stated that it cannot be construed that such a point would not lie within the area of the irrigation work. He held as follows :

> "True it is that River Ib has not been constructed or maintained by the Government. But it does not necessarily mean that every inch of earth has to be touched by shovel or spade and dredger or bulldozer to be constructed as a part of the reservoir. But the lands within the contours of 630 R.L. in contiguity and the water of which is compounded by artificial dam is a reservoir, i.e., an irrigation work."

11. He further held that after the construction of Hirakud Reservoir, it could not be said any more that the appellants are lifting water from the flowing stream of River Ib because the place from which water is lifted is part of the reservoir itself. Flow of water is not only limited to River Ib but is extends to the entire reservoir including central areas covering the contours of lower level. The water which flows or remains stagnant in areas covered within 630 R.L. in continuity (sic contiguity) is nothing but the water of the reservoir and, thus, he ultimately held that the appellants are lifting water from the reservoir itself. Hence they are liable to pay water rate after commencement of the Orissa Irrigation Act.

12. The appellate authority affirmed the finding recorded by the irrigation Officer. It held as follows :

> "For a considerable part of the year, the water level of the reservoir extends beyond the intake point and during this period the appellant, without any additional effort, is lifting water directly from the reservoir area. Only because during a part of the year the stagnant water level recedes beyond the lifting point, it cannot be said that the lifting point ceases to be a part of the reservoir."

And it further concluded as follows :

> "Once it is concluded that the intake point is within 630 R.L., it will not cease to be a part of the reservoir only because the water level recedes beyond this point for a particular period of the year. The reservoir limits are fixed and have nothing to do with the water-spread area at different points of time. The reservoir extends up to the limits to which the water spreads at the maximum water level and hence all areas in continuity within 630 R.L. are included in the reservoir."

13. Ultimately he observed that the intake point is within 630 R.L. and hence it is a part of the reservoir and any water lifted from the point whether apparently stagnant, flowing or artificially stored would be water coming from an irrigation work under the definition of the Act and would be liable to payment of water rate and other consequences prescribed under the Act. The revisional authority also took the view that was taken by the lower authorities. Therefore, the consistent view taken by all the authorities on a question of fact is that the point at which the water is drawn by the appellant lies within the reservoir area and is conclusive.

14. Irrigation work is defined under Section 4(d) of the Act as to include all land occupied by the Government for the purpose of reservoir, tanks, etc., and other structures occupied by or on behalf of the State Government on such land. A reservoir cannot be understood merely to be a means to hold water in a stream. It is only by controlling the flowing stream in an area that water can be stored in a reservoir. Viewed thus, irrigation work would include land used for such purpose. In this case the finding recorded by the authorities is in accord with this view. "Reservoir" may not necessarily mean only the constructed part of the land but includes the area where the water is held by a dam constructed by the Government; then if from such a point falling within that area water is drawn it must be held that the appellant is liable to pay the water rate. Therefore, there is no substance in the contention urged on behalf of the appellant that the point at which the water is drawn by the appellant does not lie within the reservoir area or water is not drawn from a government source or a waterwork. Under Section 28 of the Act, the Irrigation Officer is empowered to fix the compulsory basic water rate for supply of water from a government source as distinguished from a private source.

15. In the result, we find no merit in this appeal which is accordingly dismissed. Bearing in mind the circumstances in which this matter has been brought before, us, we direct the parties to bear their own costs.

Civil Appeal No. 1822 of 1992

16. This appeal arises out of the order made on 3-4-1986 by the High Court of Orissa on an application for review of its order made on 15-1-1986 in OJCs Nos. 609 and 1144 of 1980. Against the order in OJCs Nos. 609 and 1144 of 1980 a separate appeal by special leave has been preferred before this Court in CA No. 1798 of 1986. That appeal has been disposed of by us dismissing the same. Hence this appeal does not survive for consideration and is dismissed.