M/S. KABINI MINERALS PVT. LTD. AND ANR. A

v.

STATE OF ORISSA AND ORS.

NOVEMBER 18, 2005

[ARIJIT PASAYAT AND R.V. RAVEENDRAN, JJ.] B

Mines and Minerals:

Orissa Minor Mineral Concession Rules, 1990—Rule 6 (6-a)(i)—Quarry lease for Decorative stones—Preference given to second applicant for grant over the first applicant—Validity of—Held, valid as the second applicant had already set up an industry for processing of minor mineral—Question of giving preference to be adjudged only at the time of considering application and not at the time of making of application—Non-recording of reasons by the authorities while giving preference to second applicant—Not necessary since it has already set up similar industry which itself is a reason for giving preference under sub-rule (6-a). C D

Words & Phrases—'Setting up'—Meaning of.

Appellant no. 1 had applied for quarry lease to the Government of Orissa Steel and Mines Department for 'decorative stones' for a period of 10 years. For setting up of the unit, appellant no. 1 had entered into an agreement to purchase land and had also ordered for machineries. Subsequently, respondent no. 4 also applied for the quarry lease. Thereafter, respondent no. 4 wrote letter to the Government informing that it had purchased a sick unit "Valley Granites Pvt. Ltd." which was engaged in the processing of the concerned minor mineral and requested for consideration of its application for quarry lease. The lease was granted to respondent no. 4. Appellant challenged the same by way of Writ Petition. High Court dismissed the same holding that the case of respondent no. 4 was covered by Rule 6(6-a)(i) of the Orissa Minor Mineral Concession Rules, 1990 and it had priority over appellant No. 1. Hence the present appeal. E F G

Dismissing the appeal, the Court

HELD:1.1. On a reading of the language of Rule 6 of Orissa Minor

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A Mineral Concession Rules, 1990, it is clear that three types of precedence/ priority are embodied in the provision. First is a normal case where the application which has been received earlier is given precedence over the latter application. An exception is carved out in sub-rule (5-a) to the effect that if the State Government is of the opinion that in the interest of mineral department it is necessary to do so it may for reasons to be recorded in B writing, grant quarry lease in preference to the applications made earlier. [347-A, B]

1.2. Sub-rule (6-a) carves out a category of applicants who have applied for minor minerals of the enumerated categories i.e. all types of C rocks used for decorative, industrial or export purpose including dimension stones. The present case relates to priority as provided in the said Sub-rule. It provides for priority to a person who has already set up an industry for processing of such minor minerals. From the documents placed on record, it is clear that M/s Valley Granites (P) Ltd. was operating a running unit and that possession of the same was handed over to D respondent No.4, and it is being run by the said Company. [347-B, C, D]

2.1. Appellant No.1 had merely entered into an agreement for purchasing the land and placed orders for the machineries and had not set up an industry. [347-F]

E 2.2. The expression "setting up" means, as is defined in the Oxford English Dictionary, 'to place on foot' or 'to establish', and is contradistinction to 'commence'. The distinction is this that when a business is established and is ready to commence business, and then it can be said of that business that it is set up. But before it is ready to commence business it is not set up. [347-G]

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Commissioner of Wealth Tax, Madras v. *Ramaraju Surgical Cotton Mills Ltd.*, [1967] 1 SCR 761, relied on.

3. The question of priority is to be adjudged only at the time of consideration of the applications. Undisputedly, respondent No.4 had taken G over the unit on the date the applications were considered. Therefore, the stand of the appellants that at the time the applications were made by respondent No.4 it had not set up an industry is really without substance. [348-B]

Indian Metals & Ferro Alloys Ltd. v. *Union of India and Ors.* AIR H (1991) SC 818, referred to.

4. In a case covered by sub-rule (5-a) the State Government has to objectively assess as to whether in the interest of mineral development preference is given to a person though he made the application later. In such a case there is necessity to record reasons. So far as Sub-rule (6-a) is concerned, there is no requirement indicated to record reasons. The fact that priority is given to a person who has already set up an industry is itself the reason for giving priority. Therefore, the enumeration of the order of priority is itself the reason inbuilt in the process of consideration of the applications. That itself is the foundation and forms the rationale for the priority given. It is not the case of the appellant that the order of priority is irrational. That being so, stand of the appellants that reasons were not recorded and, therefore, the action is vitiated is really of no consequence. [348-E, F, G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8078 of 2004.

From the Judgment and Order dated 10.2.2004 of the Orissa High Court in C.W.P. No. 5994 of 2003.

K. Swami and Mrs. Prabha Swami for the Appellants.

Mrs. Kirti Mishra for the Respondent Nos. 1-3.

Jayant Das, Ajit Pudussery, K. Vijayann and Aditya Narayan Das for the Respondent No.4.

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. Appellants call in question legality of the judgment rendered by a Division Bench of the Orissa High Court dismissing their challenge to the decision of the State of Orissa in the Department of Steel and Mines, granting lease over an area of 6.90 acres in the villages Bada Dalma and Jangia in Mayurbhanj District in favour of respondent No.4 and consequentially rejecting appellant's No.1 application dated 7th October, 2002.

Factual position in a nutshell is as follows:

Appellant No.1 applied for quarry lease to the Secretary, Government of Orissa Steel and Mines Department, in Form A of the Orissa Minor Mineral Concession Rules, 1990 (in short the 'Rules') for "decorative stone" for a period of 10 years. On 25.10.2002, the Managing Director of the appellant

A No.1-Company entered into an agreement with one R. Narayan Swami for purchase of land measuring 1.134 acres in village Ambagan in the District of Ganjam to set up a cutting and polishing unit for decorative stones. On 26.10.2002 the Mining Officer, Baripada Circle, Baripada issued Form B to appellant No.1 and confirmed the receipt of its quarry lease application dated 7.10.2002. On 2.12.2002 appellant No.1 placed orders with Metcons B Engineering Pvt. Ltd. for supply of machineries for setting up the cutting and polishing unit for decorative stones. On 5.12.2002 respondent No.4 applied for a quarry lease in Form A for decorative stones for a period of 10 years over an area of 6.90 acres. On 28.1.2003 respondent NO.4 wrote a letter to the Director of Mines regarding purchase of sick unit i.e. M/s. Valley Granites C (P) Ltd. from the Orissa State Financial Corporation (in short the 'Corporation') and requested consideration of its quarry lease application dated 5.12.2002. On 7.2.2003 appellant No.1 vide its letter of even date wrote to the Principal Secretary to the Government, Department of Steel and Mines informing him regarding the agreement to purchase land and placement of orders for machineries of proposed unit. On 4.6.2003 the State Government took a D decision to grant the quarry lease in question in favour of respondent No.4. Writ Petition No.5994 of 2003 was filed by the appellants before the Orissa High Court questioning the decision of the Government to grant quarry lease in favour of respondent No.4. By the impugned judgment dated 10.2.2004 the writ petition was dismissed. The High Court held that the case of respondent E No.4 was covered by Rule 6(6-a)(i) of the Rules and it had priority over the appellant No.1. Said judgment as noted above is the subject matter of challenge in this appeal.

According to learned counsel for the appellant, the view of the High Court is clearly erroneous. Undisputedly, the appellant No.1 had filed the F application for the quarry lease earlier and his case was to have precedence over that of respondent No.4. Merely because the respondent No.4 had purchased a sick unit which was not functional, priority under Rule 6 (6-a)(i) was not available to it. It was submitted that no reasons were indicated as to why and under what circumstances respondent No.4 could have priority *vis-a-vis* appellant No.1.

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In response, learned counsel for the State and respondent No.4 submitted that the crucial expression in sub-rule (6-a)(i) of Rule 6 is "who has already set up an industry". Undisputedly, the unit which was taken over by respondent No.4 was engaged in the processing of the concerned minor mineral. Therefore, H rightly the Government decided to give priority to respondent No.4. It was

further submitted that appellant No.1 has not even established that it was covered by Rule 6(6-a)(ii) and, therefore, was considered to be a person who belonged to the residual category i.e. Rule 6 (6-a)(iv).

In order to resolve the controversy it would be appropriate to take note of Rule 6 of the Rules which reads as follows:

"6. *Disposal of the application-* (1) All applications received by the competent authority shall be entered in the Register of Applications for quarry leases which shall be maintained in Form 'C' appended to these rules;

(2) As soon as an application is received, it shall be acknowledged to the applicant in Form 'B'. If the application is refused, an intimation which would contain the reasons for refusal, shall be sent to the applicant;

(3) x x x x ....

(4) No application shall be granted unless the applicant submits the income-tax and Sales Tax clearance certificates in original or non-assessment certificates in original;

(5) Subject to the provisions of sub-rules (6) and (6-a), where two or more persons have applied for a quarry lease in respect of same land or area, the applicant whose application was received earlier shall take precedence in consideration for the grant over an applicant whose application was received later.

(5-a) Notwithstanding anything contained in sub-rule (5), if the State Government is of the opinion that in the interest of mineral development, it is necessary to do so, it may for the reasons to be recorded in writing grant quarry lease in preference to the applications made earlier.

(6) Priority shall be given to the applicants in the following order, namely:

(i) co-operatives of artisans using the minor mineral as raw material;

(ii) a person who has been operating an industry based on the minor mineral applied for or, having completed all other

formalities, would be able to operate it if the lease is granted;

(iii) a person who is the raiyat of the land;

(iv) any other category.

(6-a) Notwithstanding anything contained in sub-rule (6), in respect of all types of rocks used for decorative, industrial or export purpose including dimension stones the priority shall be in the following order, namely:

(i) a person who has already set up an industry for processing of such minor minerals in the State;

(ii) a person who has a definite plan for setting up of an industry in the State processing of such minor minerals if he has furnished a copy of his project report on the proposed processing industry and also a letter from the financing institution, issued by the Chief Executive of such institution to the effect that his project report is being appraised by such financing institution;

Provided that in case of an applicant under category (ii), the initial lease shall be granted up to fifty hectares and a letter of assurance can be issued for grant of lease beyond fifty hectares before commencement of production on confirmation received from the financing institution or the Deputy Director of Mines or the Mining Officer.

(iii) a person who is a raiyat of the land;

(iv) any other category;

Provided that in the case of an applicant under category (iii) or (iv) the lease may be granted by the competent authority on being satisfied that the applicant shall be able to invest or arrange sufficient funds to carry on his quarrying activity in a proper, skilful and workmen-like manner.

(7) No quarry lease/permit/auction for road metals including ballas and ordinary boulders shall be granted within the area for which a lease has been granted for quarrying rocks used for decorative, industrial and export purposes including dimension stones."

On a reading of the language of Rule 6 it is clear that three types of precedence/priority are embodied in the provision. First is a normal case where the application which has been received earlier is given precedence over the latter application. An exception is carved out in sub-rule (5-a) to the effect that if the State Government is of the opinion that in the interest of mineral department it is necessary to do so it may for reasons to be recorded in writing grant quarry lease in preference to the applications made earlier. Sub-rule (6) deals with another category of priority. In the present case Sub-rule (6) does not have much relevance. Sub-rule (6-a) carves out a category of applicants who have applied for minor minerals of the enumerated categories i.e. all types of rocks used for decorative, industrial or export purpose including dimension stones. The present case relates to priority as provided in the said Sub-rule. It provides for priority to a person who has already set up an industry for processing of such minor minerals. From the documents placed on record more particularly the letter of the Corporation dated 23.5.2003 it is clear that M/s. Valley Granites (P) Ltd. was operating a running unit. The letter in clear terms states that possession of the unit was handed over to respondent No.4 and the unit is being run by the said Company.

Learned counsel for appellant No.1 submitted that in fact the unit taken over by respondent No.4 was not functional and it had applied for permanent registration certificate which was under process as is evident from the letter of the District Industrial Centre, Mayurbhanj.

The question really is whether the unit had been set up and not whether it was running. Undisputedly, prior to its take over by respondent No.4 the industry had been set up and used for processing of decorative stones. Though, it was contended by learned counsel for appellants that by the time the applications were made the respondent No.4 had not taken over the unit yet that really is of consequence.

Appellant No.1 had also not set up an industry. It had merely entered into an agreement for purchasing the land and placed orders for the machineries. The expression 'set up' has a definite connotation of its own.

The expression "setting up" means, as is defined in the Oxford English Dictionary, 'to place on foot' or 'to establish', and is contradistinction to 'commence'. The distinction is this that when a business is established and is ready to commence business, and then it can be said of that business that it is set up. But before it is ready to commence business it is not set up. (See *Commissioner of Wealth Tax, Madras* v. *Ramaraju Surgical Cotton Mills*

A *Ltd.*, [1967] 1 SCR 761).

In the said case, it was further held that the word "set up" is equivalent to the word established but operations for establishment cannot be equated with the establishment of the unit itself of its setting up.

B The question of priority is to be adjudged only at the time of consideration of the applications. Undisputedly, respondent No.4 had taken over the unit on the date the applications were considered. Therefore, the stand of the appellants that at the time the applications were made by respondent No.4 it had not set up an industry is really without substance. As was observed by this Court in *Indian Metals & Ferro Alloys Ltd.* v. *Union* C *of India and Ors.*, AIR (1991) SC 818, since the applicant had already set up an industry for processing minor minerals on the date of consideration of the application its claim for priority was to be judged on the basis of the factual position on the date of consideration of the applications.

D It was submitted by learned counsel for the appellants that no reasons were indicated by the authorities as to why the respondent No.4 was to have priority over the appellants. Reference in this context is made to sub-rule (5-a) of Rule 6.

It is to be noted that in a case covered by sub-rule (5-a) the State E Government has to objectively assess as to whether in the interest of mineral development preference is given to a person though he made the application later. In such a case the Government's opinion that in the interest of mineral development it is necessary to do so obviously has an objective angle involved and, therefore, there is necessity to record reasons. So far as Sub-rule (6-a) is concerned, there is no requirement indicated to record reasons. The fact F that priority is given to a person who has already set up an industry is itself the reason for giving priority. Therefore, the enumeration of the order of priority is itself the reason inbuilt in the process of consideration of the applications. That itself is the foundation and forms the rational for the priority given. It is not the case of the appellant that the order of priority is irrational. G That being so, stand of learned counsel for the appellants that reasons were not recorded and, therefore, the action is vitiated is really of no consequence.

Looked at from any angle, the appellants have not made out any case for interference with the judgment of the High Court. The appeal fails and is dismissed. Costs made easy.

H D.G. Appeal dismissed.