Supreme Court upholds the levy of transit fee on forest produce under Indian forest act, 1927- minerals also

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On 15 September 2017, the Hon'ble Supreme Court of India (Supreme Court) delivered a judgment in the matter of State of Uttarakhand v Kumaon Stone Crusher***[1]*** deciding the issue of levy of transit fee on forest produce arising out of the States of Uttar Pradesh, Uttarakhand and Madhya Pradesh. The State Governments levied transit fees on forest produce under the Indian Forests Act, 1927 (1927 Act) which was challenged by the assessees in the respective three High Courts which delivered different verdicts. The Supreme Court, however, held the levying of fee on transit of forest produce by the State Governments to be constitutionally valid.

The broad issues to be decided by the Supreme Court were as follows:

1. In view of the Mines and Minerals (Development & Regulation) Act, 1957 (MMDR Act, 1957) enacted by the Parliament, whether the State Government has the power to regulate and levy fees on transit of coal and other minerals under the 1927 Act?
2. Whether the MMDR Act, 1957 impliedly repealed the 1927 Act as per Article 372 of the Constitution of India (Constitution)?
3. Whether 'coal' is covered within the definition of 'forest produce' under the 1927 Act?
4. Whether the words 'brought from' used in section 2(4)(b) of the 1927 Act would cover such items which though did not have origin in the forest but are transported through a forest?
5. Whether Transit Fee on forest produce (a regulatory charge provided for under Section 41 of the 1927 Act) (Transit Fee) can still be charged when the forest produce has undergone a manufacturing process to become a commercial commodity?
6. Whether there is a broad correlation between increase in transit fee and expenses incurred in regulation of forest produce, although the State is not liable to prove any *quid pro quo*?
7. Whether the State has satisfactorily justified the increase in Transit Fee by the 4th & 5th amendment to the Uttar Pradesh Transit of Timber and other Forest Produce Rules, 1978 (1978 Rules) by producing relevant material?
8. Whether by adoption of ad valorem basis by the 5th amendment to the 1978 Rules, the Transit Fee no longer remains a fee and has changed into the character of a tax?

Arguments on behalf of the Assessees

The broad arguments on behalf of the assessees to answer the above questions were:

- The regulation of coal is outside the 1927 Act and is regulated by the MMDR Act, 1957 and Coal Bearing Areas (Acquisition & Development) Act, 1957.

- The 1957 Act was enacted by the Parliament under Entry 54 of List I of VII Schedule of the Constitution which relates to regulation of mines and the development of minerals. The legislative competency of the State regarding mines and minerals development is contained in Entry 23 of List II which is subject to provisions of List I. In so far as transit fee on minerals is concerned, the entire field is covered by the 1957 Act and the State is denuded of any jurisdiction to legislate.
- The 1957 Act is a special enactment which shall override the 1927 Act which is a general enactment.
- The provisions of the 1978 Rules under which the State of UP levied the transit fee along with Section 41 of the 1927 Act, are repugnant to the provisions of the 1957 Act and stand overridden in terms of Article 372 of the Constitution.
- The transit and transportation of minerals is an integral part of regulation and development of minerals and the law enacted by the Parliament is to occupy the entire field regarding the transit and transportation of minerals and development of mines. No other law can overreach upon the occupied field.
- The assessees of MP argued that they did not mine coal but purchased it from Northern Coal Fields Ltd. or from other coal fields. The royalty and other charges on the coal purchased from different coal fields was also paid by the assessees in terms of the provisions of the 1957 Act.
- Coal cannot be brought within the definition of ‘forest produce’ under the 1927 Act since it is obtained from collieries which are not situated in forests.
- The word 'forest' as used in 1927 Act as well as in the 1978 Rules must be read as 'forest' as enumerated in the 1927 Act, i.e., a reserved forest, a village forest and a protected forest. Transit Fee can be charged only when forest produce transits through a reserved forest, a village forest or a protected forest.
- Since the Third Amendment Rules were substituted by the Fourth & Fifth Amendment Rules and the Fourth & Fifth Amendment Rules were struck down by the Allahabad High Court on 11 November 2011[2], the Third Amendment Rules shall not revive and the State of UP cannot charge fee on that basis.
- The transit fee levied by the State of UP is excessive in nature and the State has not produced data for justifying the increase in the transit fee. Further, exorbitant increase by way of the Fourth and the Fifth Amendments has robbed the regulatory character of the Transit Fee which has now become confiscatory and has partaken character of tax.

- It is true that *quid pro quo* is not to be proved for regulatory fee but the State was obliged to prove a broad correlation between the levy of Transit Fee and the expenditure incurred by the State on the transit of forest produce.

-The State has not provided any details of the expenditure which it has incurred in regulation of transit of the forest produce but has given figures of expenditure of the entire forest department which could have no correlation with the collection of Transit Fee. The entire expenditure of the forest department could not be met by collection of Transit Fee.

- Fixation of fee on Transit Pass qua tonnage is a colourable piece of exercise of power

- The words 'brought from forest', means that the forest produce originated from the forest. This implies that for any produce to be ‘forest-produce’ under Section 2(iv)(b) of the 1927 Act, the forest has to be the starting point of transit and not in transit. The Division Bench of the Allahabad High Court in its judgment dated 27 April 2005 in Kumar Stone Works & Others v State of UP & Others [3] erred in equating the words ‘brought from forest’ as ‘brought through forest’.
- In Section 2(4)(b) of the 1927 Act the words 'found in' and 'brought from' are qualified by word 'when', which denotes the time factor. The word 'when' signifies that the item while leaving the forest is in continuous

process of transit from the point where it is said to be found in. But once, the continuous transit of forest produce terminates at any point of place which is not a forest item included in Clause B(4)(2), it shall cease to be 'forest produce' and further transit of such material being material not brought from forest shall not attract tax under Section 41 of the 1927 Act.

Arguments on behalf of the State

- It was argued that the subject matter and objects of the 1927 Act and the 1957 Act are distinct and different. The provisions of the 1927 Act relating to transport of forest produce are only incidental and ancillary in nature. Further, the 1957 Act does not impliedly overrule the 1927 Act, both the legislations being under different subjects. The machinery for enforcement, the officers and consequences of breach are different for the 1927 Act and the 1957 Act and the provisions of both the Acts operate in different fields.
- The provisions of the 1927 Act in so far as Section 41 and Rules of 1978 are concerned, shall not stand impliedly overruled by Parliamentary enactment of the 1957 Act in terms of Article 372 of the Constitution. In the 1927 Act, the provision relating to transport of forest produce is only incidental and ancillary in nature. The 1927 Act comprehensively deals with forest and forest wealth whereas the 1957 Act deals with mines and minerals wealth.
- The word 'forest' has to be understood broadly. The definition of forest as given by the Supreme Court in TN Godavarman Thirumulkpad v Union of India and others[4] , is to be followed. The High Court has rightly understood 'forest' to be a large track of land covered with trees and undergrowth usually of considerable extent, on the principles of sound ecological and scientific basis reflecting sociological concerns.
- Transit Fee is regulatory in nature and for regulatory fee, *quid pro quo* is not necessary.
- The increase in Transit Fee vide the Fourth and Fifth Amendments to the Rules was justified. The method chosen by the State Government to levy the fee based on quantity of minerals would not change the nature and character of the levy.
- The State of MP argued that the fee for issuance of transit passes has been charged under Notification dated 28 May 2001 issued in exercise of power under Rule 5 of the Rules of 2000. The Rules were framed under Section 41 of the 1927 Act and there is no encroachment on the provisions of the 1957 Act. The power of regulation and control under 1957 Act is totally different from the imposition of fee on Forest Produce by the State. Further, the regulatory fee is not charged on extraction of minerals but only on the transportation of minerals.

Judgment of the Supreme Court

The Supreme Court decided the issues in the following manner-

- Coal is a 'forest produce' under Section 2 of the 1927 Act since it is formed from plant substances preserved from complete decay in a normal environment and later altered by various chemical and physical agencies. The formation of coal itself is due to large tracts of forest getting buried under the ground due to natural processes.
- The 1957 Act does not impliedly repeal the 1927 Act in so far as Section 41 and Rules of 1978 are concerned.
- A pre-constitutional statute which has been continued in force by virtue of Article 372 of the Constitution is to continue until altered or repealed or amended by a competent legislature. Initially, the subject 'forest' was in Entry 19 of List II of the Constitution. Thus, it was the State legislature which was competent to alter or repeal or amend the said law. Entry 19 was omitted from List II and transferred to List III as Entry 17A with the 44th Amendment to the Constitution which came into effect on 3 January 1977. Thus, with the 44th Amendment in

force, both the Parliament and the State legislature are competent legislatures within the meaning of Article 372. In the instant case, under the 1927 Act, 'transit of forest produce' itself is the subject of primary legislation as can be seen from the Preamble and the provisions of Section 41 & 42 of the 1927 Act. In contrast, the detailed provisions of the 1957 Act deal with regulation of mines and development of minerals (Section 4 to 17 and Section 18) as primary legislation. Provisions relating to transport or storage are only incidental and ancillary in nature. The question of repeal by implication arises when two statutes become inconsistent to the extent that competence of one is not possible without disobedience to other however, no such inverse relationship can be drawn in case of the 1957 Act and the 1927 Act. Both the legislations being on different subject matters, the provisions relating to transportation of minerals as contained in 1957 Act can at best be said to be incidentally affecting the 1927 Act. Further, incidental encroachment of one legislation with another is not forbidden in the constitutional scheme of distribution of legislative powers.

- Any produce moving within or from outside or outside the State which has originated in a forest requires a transit pass for transiting in the State of UP. Conversely, any goods which did not originate in forest whether situated in the State of UP or outside the State but is only passing through a forest area may not be forest produce answering the description of forest produce within the meaning of Section 2(iv)(b)
- The term 'found in' in Section 2 (iv)(b) of the 1927 Act refers to things growing in a forest like timber trees, fuel trees, fruits, flowers etc. or mineral deposits or stones existing in the forest. The expression 'brought from' also alludes to the source of the thing so brought being within the area of a forest.
- 'Forest' shall include all statutorily recognised forests, whether designated as reserve, protected or otherwise. The term 'forest land', occurring in Section 2 of the 1927 Act, will not only include 'forest' as understood in the dictionary sense, but also any area recorded as forest in the Government records irrespective of the ownership.
- If the processing of forest produce does not result in bringing out a new commodity but preserves the same and renders it fit for markets, it does not change its character hence, it remains forest produce.
- The Third Amendment dated 9 September 2004 to the 1978 Rules could have been resorted to for realising the Transit Fee even in the wake of the Fourth and the Fifth Amendment having been declared to be invalid by the High Court. In fact, the Supreme Court in the interim order dated 29 October 2013 had expressly directed that the State shall be free to recover Transit Fee for forest produce removed from within the State of UP at the rate stipulated in the Third Amendment to the 1978 Rules.
- The High Court was justified in striking down the Fourth and the Fifth Amendments to the 1978 Rules. The increase in transit fee was excessive and the character of the fee changed from simple regulatory fee to a fee which was for raising revenue. There was no maximum cap in the Fifth Amendment to the 1978 Rules although a minimum fee was prescribed.
- With respect to the State of MP, the High Court had taken an incorrect view of the matter by concluding that the Notification dated 28 May 2001 is beyond the power of the State under Rule 5 of the Rules of 2000. Rule 5 clearly empowers the State to fix the rate of fee and when the State is empowered to fix the rate, it has the latitude under the statute to adopt a basis for fixation of rates.

Comment

The judgment delivered by the Supreme Court contains a detailed analysis of the operation of pre-constitutional statutes after 1956 by virtue of Article 372 of the Constitution of India.

The judgment, although upholds the leviability of transit fee on forest produce including minerals, however, the excessive increase in regulatory fee has been stuck down.

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