**FINAL ORDER NO. 36/2015**

**DATE: 25 .3.2015**

**(In Revision Application file No.22(38)/2012-RC-I**

M/s. Ramesh Prasad Sao Revisionist

Vs.

State Government of Odisha Respondent

**O R D E R**

**(Under Section 30 of the Mines and Minerals (Development and Regulation) Act, 1957 and Rule 55 of the Mineral Concession Rules, 1960 (MCRs).**

This RA has been filed challenging the State Government of Odisha's Order/Notification No. 5915/SM dated 7.9.2010 and Order/Notification No.2654 dated 9.4.2012 and Demand Note No.

3705 dated 15.5.2012 .Vide the impugned order, the State Government has instructed the field officers to raise the demand for royalty for the fines dispatched at the rate of lumps on ad-valorem basis. The State Government has also raised a demand of Rs.5,24,71,016 (Rupees Five crores twenty four lakhs seventy one thousand sixteen only) to be paid by the Revisionist on the basis of above mentioned orders. In this case an interim order was passed on 30.8.2012 after hearing both the sides staying the impugned order and the State Government was directed not to take any coercive action for recovery of demand and to stop mining operations/denial of transit permits provided all necessary clearances are taken by the Revisionist

2. The case was heard on 12.9.2014. The Revisionist was represented by Shri Manas Mohopatra, Senior Advocate, Shri Shiv Mangal Sharma, Advocate and Sri Shrey Kapoor, Advocate. The State Government was represented by Ms. Kirti Mishra, Advocate.

3. In his RA the Revisionist has submitted as follows:

i) That the Revisionist got the lease on transfer vide lease deed No.3547 dated 15.11.1986 and started mining operations. He also submitted an application for renewal of the ML under Rule 24A(1) of MC Rules, 1960 which is still pending. However, the Revisionist is continuing mining operations under Rule 24A(6) of the MC Rules, as "Deemed Lessee"

ii) The Revisionist used to pay royalty as payable under Rule 64 of the MC Rules.

iii) The Revisionist received a Demand Note from the DDM, Joda asking him to pay "differential royalty" which was raised on the basis of Audit objections. The demand raised by the DDM was paid under protest.

iv) However, the Government of Odisha issued a letter dated 7.9.2010 instructing that the royalty shall be assessed on iron ore lumps mined or on the processed form i.e. fines and CLOs whichever is higher with effect from August, 2009. Accordingly, the DDM has started raising the demand of Royalty and charging the same rate of royalty on CLO as well as on Fines. The Revisionist has made a representation before the DDM objecting to the charging of royalty in this manner and requested the DDM to keep the demand in abeyance.

v) Subsequently vide Notification No.2654 dated 9.4.2012 the State Government again directed the authorities to charge royalty on the basis of their earlier instructions dated 7.9.2010 and accordingly the impugned demand letter (Annexure 10) was issued demanding a sum of Rs.5,24,71,016 from the Revisionist.

vi) The Revisionist has further submitted that raising of the aforesaid demand is illegal and violative of Rule 64 B of the MC Rules as the State Government is not the competent authority in this case to issue such a directive. The aforesaid

demand has been raised overlooking the mining plan approved by the IBM wherein the Revisionist are required to feed ROM to the crusher unit situated within the lease hold area. The State Government has raised the demand merely on the basis of dictate of auditors completely overlooking the approved mining plan and the relevant legal provisions.

4. The State Government in their reply submitted on 26.11.2013 has stated that the State Government is entitled to get royalty in respect of any mineral removed or mined by the lessee or by his agent, manager, employee etc. and even mere raising or consumption within the leasehold area also obliges the lessee to pay the royalty to the State. The State Government has contended that it is a settled principle of law that the provisions of legislation enacted by the Parliament over-ride the provisions of any rule and as such the rules are to be construed in a harmonious manner ensuring that the purpose of the statutory provision is not whittled down by the Rules. The rules are only to facilitate the achievement of the objectives of the Act. Accordingly, Rule 64B, 64C and 64D of the MC Rules are to be read and given effect to in such a manner that helps realize the policy embodied under Sec.9 of the MMDR Act. The State Government has contended that Rule 64B of the MC Rules provides that in case of process of ROM within the leasehold area, the royalty shall be chargeable on the processed mineral removed from the leasehold area and ROM comprise lumps, fines and waste material. The sale prices of lumps is much more than the sale price of fines and as per the notification of IBM published from time to time, the royalty on iron ore lumps is much higher than iron ore fines. Due to crushing of iron ore into fines by the Revisionist there was loss to the State Government exchequer and therefore the decision was taken by the State Government to calculate royalty on lumps. As the rate of CLO is yet to be published, the lessee has to pay the royalty for the lumps ore which he would have paid had he not processed the lumps in the crushing plant inside the leasehold area for value addition.

5. The State Government has also argued that Sec.9(2) of the MMDR Act obliges the holder of a ML to pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area at the rate for the time

being specified in respect of that mineral. The State Government has also submitted that it is obliged to ensure prudent exploitation of minerals so as to achieve greater common good and Sec.9 of the MMDR Act leaves the option to the State Government to charge royalty on minerals removed or consumed from the leasehold area. The lumps or fines in the ROM used in the crusher are nothing but consumption of mineral within the leasehold area by the lessee. The State Government has not charged royalty on minerals removed from the leasehold area and hence the question of application of Rule 64B does not arise in so far as this case is concerned. A question of charging royalty on processed mineral would arise only once the IBM starts notifying the sale price of the process mineral viz price for the various size of Calibrated Lump Ore (CLO). The State Government has also contended that since the ad valorem rate of royalty on iron ore has been introduced since August 2009, royalty from this period onwards has to be calculated on iron ore lumps, fines or on the processed form i.e. fines and CLOs whichever is higher. The State Government has argued that the Revisionist has misconstrued the provisions of the Act and that the impugned order passed by the State Government and the demand raised against the Revisionist is in accordance with law and hence recoverable from the Revisionist.

6. The Revisionist in the written submissions has submitted that the Revisionist Company has been calculating the royalty after processing of ROM carried out in the crusher unit, within its leasehold area and paid the royalty to the State Government who were also accepting the same on the basis of Rule 64B (1) of the MC Rules. The Revisionist also referred to and relied upon circular issued by the Government of India, Ministry of Mines bearing reference No.3/2/2012-M.IV dated 23.7.2012 wherein it has been clearly stated that the State Government circular No.5905/SM-AUD-SM-17/2010 dated 7.9.2010 on the basis of which the impugned order has been passed is not consistent with Rule 64B of the MC Rules and should be immediately withdrawn by the State Government to avoid litigation. The Revisionist has further pointed out that these instructions have been issued by Government of India after consulting IBM on this point.

7. The Revisionist has also contended that the royalty in respect of mining leases which provides for collection of royalty at the rate for the time being specified in respect of that mineral. The present demand raised by the state Government is not in conformity with the rates specified in the Second Schedule. The Revisionist has further stated that as per Section 13 of the MMDR Act, it is only the Central Government which is empowered to make rules in respect of minerals and the State Government does not have any jurisdiction to take its own interpretation under the MMDR Act in so far as charging of royalty is concerned. The impugned order is therefore an abuse of power at the hands of State authorities. The Revisionist has also contended that the impugned order raising the demand of royalty with retrospective effect i.e. August, 2009 to March 2011 while accepting a report of the auditors is against the well settled principle of law.

8. I have carefully examined the documents on record and the submissions made by the learned counsels appearing on behalf of the Revisionist and the State Government. The main issue in this case relates to assessment of royalty on mineral produced in the leasehold area. Under the provisions of Section 9 of the MMDR Act, the holder of a ML shall pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, etc. from the leased area. On the other hand Rule 64B of the MC Rules provide that in case processing of ROM is carried out within the leased area then the royalty shall be chargeable on the processed mineral removed from the lease area. Rule 64B(2) further provides that in case of ROM, mineral is removed from the leased area to a processing plant which is located outside the lease-held area, then the royalty shall be chargeable on the unprocessed Run of Mines (ROM) and not on the processed product.

9. It would therefore be appropriate to reproduce the provisions of Section 9 of the MMDR Act and Rule 64B of the MC Rules. Section 9 of the MMDR Act reads as under:

> ***"Royalties in respect of mining leases.***
>
> *9(1) The holder of a mining lease granted before the commencement of this Act shall, notwithstanding anything contained in the instrument of lease or in any law in force at such commencement, pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or*

*sub-lessee from the leased area after such commencement, at the rate for the time being specified in the Second Schedule in respect of that mineral.*

*(2) The holder of a mining lease granted on or after the commencement of this Act shall pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area at the rate for the time being specified in the Second Schedule in respect of that mineral.*

*(2A) The holder of a mining lease, whether granted before or after the commencement of Mines and Minerals (Regulation and Development) Amendment Act, 1972, shall not be liable to pay any royalty in respect of any coal consumed by a workman engaged in a colliery provided that such consumption by the workman does not exceed one-third of a tonne per months.*

*(3) The Central Government may, by notification in the Official Gazette, amend the Second Schedule so as to enhance or reduce the rate at which royalty shall be payable in respect of any mineral with effect from such date as may be specified in the notification:*

*Provided that the Central Government shall not enhance the rate of royalty in respect of any mineral more than once during any period of three years.*

Rules 64B of the Mineral Concession Rules, 1960 reads as under:-

***"[64B. Charging of royalty in case of minerals subjected to processing –***

*(1) In case processing of run-of-mine is carried out within the leased area, then, royalty shall be chargeable on the processed mineral removed from the leased area.*

*(2) In case run-of-mine mineral is removed from the leased area to a processing plant which is located outside the leased area, then, royalty shall be chargeable on the unprocessed run-of-mine mineral and not on the processed product.]"*

10. The State Government's argument is that even in case of a processing unit located within the leasehold area, the royalty shall be chargeable on the entire ROM as the ROM is deemed to be consumed by the lease holder in the processing plant. The learned counsels appearing on behalf of the Revisionist have submitted their counter arguments clarifying the two terms 'processing' and 'consumed'. According to them the word "Processing" is a flexible term and refers to either chemical or physical changes in the things so processed, but 'consumption' of a material indicates that the material in question is consumed and a new commercial material comes into existence. In support of their arguments they have also cited a few decisions of the Hon'ble Apex Court. In particular they have referred to the decision of Supreme Court in **Anwarkhan Mehboob Co. v. State of Bombay, (AIR 1961 SC 213) wherein it has been held that**

> *"we think it proper and reasonable to say that whenever a commodity is so dealt with as to change it into another commercial commodity there is consumption of the first commodity within the meaning of the Explanation to Article 286."*

Accordingly, the Court held that

> *"when tobacco was delivered in the State of Bombay for the purpose of changing it into a commercially different article viz. bidi patti the delivery was for the purpose of consumption. The purchases in this case therefore fall within the meaning of Explanation to Article 286(1)(a) and must be held to have taken place inside the State of Bombay".*

In this case the Hon'ble Court has cited with approval the decision in the State of Travancore-Cochin v. Shanmugha Vilas Cashew Nut Factory [(1954) SCR 53)] wherein it was held that

> *"The raw cashew nuts, after they reach the respondents, are put through a process and new articles of commerce, namely, cashew nut oil and edible cashew nut kernels, are obtained. It follows, therefore, that the raw cashew nuts consumed by the respondents xx xx xx."*

11. The learned counsels appearing on behalf of the Revisionist have also referred to Dy. Commissioner of Sales tax (law) v PIO Food Packers, (1980 Supp SCC 174) wherein the Hon'ble Apex Court held that where there is no essential difference in identity between the original commodity and the processed article, it is not possible to say that one commodity

has been consumed in the manufacture of another, although it has undergone a degree of processing it must be regarded as still retaining its original identity.

12. Although the references cited above relates to the determination of Excise duty, but nonetheless the rationale adopted by the Hon'ble Apex Court would equally be applicable in case of iron-ore lumps, fines and CLOs (Calibrated Lumps Ores). For the purposes of charging Royalty, it would be most pertinent to refer to entry 22 of the Second Schedule of the MMDR Act, 1957 as notified on 13.8.2009, which holds the field for purpose of this RA reads as under:

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|---|---|---|
| Iron ore: Lumps Fines and concentrates all grades. | - | Ten per cent of sale price on ad valorem basis. |

The Entry 22 of the Second Schedule as it then stood did not specifically mention CLO while classifying Iron-ore into Lumps and Fines and concentrates of all grades. It is an admitted fact that the Indian Bureau of Mines (IBM) published the *ad valorem* rates of lumps and fines. It is also a fact that IBM for the period when demands were raised did not publish rates of Calibrated Lumps Ores (CLO). In the letter of the Government of India No.3/2/2012- M.VI dated 17.5.2012, it has been clarified that CLO is nothing but processed form of lumps ore. Admittedly lumps and fines are different categories of ore for which different rates are published.

13. From the above it is apparent that the crushing plant set up by the Revisionist cannot be held to have consumed ROM while processing the mineral and as such the charging of royalty in this case must be on the mineral removed from the leasehold area as specified under Section 9 of the MMDR Act read with Rule 64B of the MC Rules. The contention of any alleged contradiction between Rule 64B and Section 9 of the Act as contended by the State Govt. appears to be misconceived and it is an argument which appears to be without basis and as such cannot be accepted. When the ROM/Ore is not "consumed" and the processing was within the lease area the State Government is bound to adhere to rates as prescribed under the Second Schedule of the Act and in the manner as prescribed by MC Rules, 1960. In fact the Union Government has also vide its circular dated 17.5.2012 come to the same conclusion and advised the state to withdraw the

impugned circular No.5905/AVD-SM-17/2010 dated 7.9.2010. This also appears to be quite logical and in conformity with the provisions of Section 9 of MMDR Act read with Rule 64B of the MC Rules, 1960

14. The RA accordingly stands allowed and the impugned orders raising the demand on the basis of circular No.5905/AVD-SM/17/2010 dated 7.9.2010 and 9.4.2012 issued by the State Government of Odisha are set aside and quashed along with the action taken in consequence of these circulars. The State Government should realize royalty as provided under Section 9 of MMDR Act, 1957 read with Rule 64B of the M.C. Rules, 1960, as per law.

(Arun Kumar)

Joint Secretary & Revi