1988 SCC OnLine Gau 16 : (1989) 1 Gau LR 1 : AIR 1989 Gau 90

In the High Court of Gauhati
(BEFORE A. RAGHUVIR, C.J. AND B.L. HANSARIA AND J. SANGMA, JJ.)

Baghmari Tea Company Limited ... Petitioner;
Versus
The Divisional Forest Officer, Darrang Division, Tezpur and Two Others ... Respondents.

Civil Rule No. 238 of 1981
Decided on September 9, 1988

Constitution of India, Article 226 — Writ jurisdiction of the High Court — Scope of power of the High Court — Whether the question of liability or non-liability of the owner of a tea garden to pay royalty on trees growing or grown on NLR Grant (New Lease Rules grant) can be decided in a Writ Petition Held: Yes.

Per A. Raghuvir, C.J.—This assertion of the estate to have planted trees cut by them is not specifically traversed in the counter filed by the State. However, there is a bare denial of the fact alleged. Based on such a denial it is argued on behalf of the State their denial raises a complicated question of fact the estate therefore should seek relief elsewhere. We hold the plea of the State is a mere ruse and in law cannot be countenanced. We unhesitatingly rule it out and reject the contention.

(Para 19)

Per B.L. Hansaria, J.—A Writ court would not be the proper forum to be approached when complicated questions of facts are involved or where the writ petitioner tries to enforce a contractual, as distinguished from a statutory, obligation.

(Para 34)

On facts of the case, the writ petition was held to be maintainable.

Royalty — Whether the owner of a tea garden is liable to pay royalty on trees growing or grovra on N.L.R. Grant (New Lease Rules Grant) land taken on lease for special cultivation when those are felled to be utilised for the development of the garden — Held: No.

Per A. Raghuvir, C.J.—In the instant case Baghmari Tea Company Ltd. is entitled to use the timber of 152 trees for construction of buildings, bridges and tenaments of workers of the estate without paying royalty.

(Para 22)

Per B.L. Hansaria, J. (concurring).— In my view a tea garden is not liable to pay royalty on trees grown by it on the land taken on lease for special cultivation when those trees are felled to be utilised for development of the garden.

(Para 32)

Words & Phrases — Royalty — Meaning of—

(Paras 25 to 28)

Advocates who appeared in this case:
Mr. G.K. Talukdar & Mr. S.N. Sarma, for the Petitioner.
Mr. D.P. Chaliha, for the Respondents.

Cases referred: Chronological:

District Council of Jowai Autonomous District v. *Dwet Singh*, (1986) 4 SCC 38 : AIR 1986 SC 1930

Bajrgang Tea Company Limited v. *State of Assam*, (1984) 1 GLR (NOC) 17

The Judgment of the Court was delivered by

A. RAGHUVIR, C.J.:— This writ petition is by a Tea Company called Baghmari Tea Company Ltd. The company cultivates and vends tea in the District of Darrang. The Estate obtained a lease of 592.12 acres of land under the New Lease Grant No. 738 from the then Secretary of State of India in Council on May 2, 1919. The indenture of lease was registered on June 19, of the same year per order in Mutation Case No. 9 of 1918–1919. The Estate is in possession of the demised land and is cultivating tea on the land.

2. The land is divided in sections and trees are planted. The estate whenever in the past cut trees, are informed the Divisional Forest Officer, Darrang Division, Tezpur for embossing marks before the timber was transported. This practice is recounted to show the estate planted trees and removed them and used the timber without paying royalty to the State Government.

3. In sections 5 and 26 of the leased land standing trees were cut and bushes were cleared to make the land fit for fresh cultivation. The timber of the felled trees 86 in Section 5 and 66 in Section 26 is intended to be used for construction of building, building bridges and for building of tenaments for the residence of workers of the estate.

4. Before timber (of 152 trees) was transported to the situs of a Saw Mill, the Range Officer, Eastern Range, Borgang was invited for embossing hammer marks. The two sections were inspected on April 9, 1980. The estate was informed on June 2, again, on June 12 and finally on August 1, 1980 by three letters to pay Rs. 4,295.00 as Royalty inclusive of Rs. 500.00 as sales tax.

5. The estate thereupon reminded the forest authorities that in the past whenever trees were cut and removed the estate did not pay royalty therefore the estate maintained in law on royalty is payable by them. Finally the instant writ petition is filed and in that the above issue is raised.

6. The Divisional Forest Officer, Darrang Division the Range Forest Officer and the State of Assam are impleaded in the case and all the three resist the writ petition. Their case in defence is the Government of Assam on April 11, 1973 decided in a Circular to realise royalty on timbers grown on N.L.R.F.S. and special lands. In the cricular the definitions of timber in Settlement Rules and in Assam Land and Revenue Regulation, 1886 were considered. As per the circular Tea gardens are not entitled to the usufruct of trees without payment of royalty and as per the circular the impugned demand is raised against the estate which is legal and justified.

7. This writ petition was heard by a Division Bench of this Court by one of us (Hansaria, J.) and Saikia, J. as he then was on December 14, 1985. The Division Bench formulated

the following two questions—(1) whether the owner of a tea garden is liable to pay royalty on trees growing or grown on N.L.R. Grant (New Lease Rules Grant) land taken on lease for special cultivation when those are felled to be utilised for the development of the garden; (2) when such royalty is demanded whether the question of the owner's liability or non-liability to pay royalty under the lease can be decided in a writ petition? Saikia J. ordered the writ petition be placed before a larger Bench for deciding the two questions whereas Hansaria J. two questions set out be considered by a larger Beach. We understand the order on December 14, 1986 to mean the entire writ petition is placed before a Bench of three Judges for decision.

8. The second question was formulated in the back-ground of a case (1981) 3 SCC 238 : AIR 1981 SC 1353 (*Divisional Forest Officer* v. *Bishwanath Tea Co. Ltd.*). We will advert to that case first. The issue in that case was — whether the estate can seek relief in a petition under Art. 226 of the Constitution. The facts in the case show—Bishwanath Tea Co. Ltd. obtained a lease on September 27, 1932 from the Secretary of State for India. The leased land was demarcated N.C. Tengalbasti village in Sootea Mouza in the Tezpur Sadar Sub-Division of Darrang District Block. The land measured 1107.26 acres which was compendiously known as Tezalpatti and the area in that patti covered fields No. 2 and 3. Clause 2 of the Indenture imposed a liability to pay royalty if timber was used unconnected “with exploitation of the grant during the period of lease or renewed lease”. If the timber was used for the leased tea garden that is for Tezalpatti—as Royalty was payable. The precise issue therefore was whether user of timber by the estate in that case was connected with Tezalpatti.

9. The Supreme Court analysed the issue in five parts (I) The area covered by the grant, (ii) Felling of the trees from the area covered by the grant, (iii) Use to which the felled timber was to be put to, (iv) Such use will have to be one connected, with the exploitation of the grant, (v) what is meant by the exploitation of the grant. The facts showed as per the decision of the Supreme Court timber of Tezalpatti was to be used for the construction work at Pratapghur in Dekorai Division. The State of Assam contended Clause 2 of the Indenture enabled the

estate to use timber for Tezalpatti only and not for Pratapghur garden therefore Royalty was payable by Bishwanath Tea Co.

10. This Court in the writ petition filed by Bishwanath Tea Co. held no question of fact was disputed. The Supreme Court overturned that decision and held facts were disputed. The Supreme Court in the case decided the disputed facts and held “upon a true construction of Clause 2, Part IV of indenture of lease, the respondent Company was not entitled to remove timber without payment of royalty”. The dispute and the decision of the Supreme Court is emphasized in the instant case and it is on this plank -objection is raised that facts are disputed like in *Bishwanath Tea Co. case*. Therefore the estate in the instant case is not entitled to relief in a petition under Article 226 of the constitution.

11. From the pleadings in the instant case we see lease was obtained on June 19 of 1919. It is seen in the lease in original that clause (f) of Article 3 is omitted. The estate pointed cut to the omission of clause (f) and alleged Royalty for the trees then in existence was paid. The State avers there is no proof of payment offered by the estate therefore, what is urged by estate is disputed and for that reason relief should not be accorded to the estate in a writ petition.

12. The issue in the instant case is not regarding tries existed on May 2, 1919 when

lease was obtained by the estate. Those trees are not relevant in the instant case; Since a great part of the debate covered on this question we hold payments made or not made under clause (f) of Article 3 is not relevant to the question at issue in the instant writ petition. The question at issue is whether Royalty and sales tax of Rs. 4295.40 is liable to be paid by the Estate for using timber of 152 trees of sections 5 and 26 of the demised land.

13. Before the issue is answered we may clear out one more case in which the Supreme Court pointed out the incidents of Royalty when it was imposed by a District Council in one of the North Eastern Regions. The case is AIR 1936 SC 1930 (*District Council of Jowai Autonomous District* v. *Dvet Singh*). We may look into the facts of the case.

14. The Secretary of the Executive Committee of the District Council of the Jowai Autonomous District in North Eastern Region by a notification on April 20, 1968 ordered royalty be paid for red pine and whits pine timber “that comes from private forests” and for the squared log pine timber sent out “from the private forests”. The exigibility of royalty under the above notification was assailed in a writ petition successfully in this Court. On appeal by the District Council the Supreme Court confirmed the decision. In that case the meaning of Royalty, the formation of the District Councils, and the powers enjoyed by that local authority under the Sixth Schedule of the Constitution all the three aspects were considered.

15. The District Council did not possess it was held plenary powers enjoyed by a legislature for imposing taxes. Paragraphs 3 and 8 of the Sixth Schedule to the Constitution, were delineated. It was held the District Council could levy fees under paragraph 3 though there were no express words used in paragraph 3 to that effect. This Court in the writ petition held even fee could not be imposed by the District Council. The District Council in no case could impose taxes was specially decided. Further as the notification of April 20 of 1968 did not refer land on which trees were grown therefore it was held Royalty was not a tax on land and for the same reason it was added the District Council vested no power to tax the forest produce.

16. Now in the background of the decision in the District Council case we see the Assam Land and Revenue Regulation. In Rule 1(2)(h) defines timber as trees fallen or felled, and all wood whether cut up or fashioned or hollowed out for any purpose and includes, palms, bamboos, stumps, brush-wood and canes. Rule 2 recites lease for ordinary cultivation are covered by clauses (a) to (f) of that Rule 21 and the heading is Royalty on timber Clause (a) recites—“No royalty shall be payable on any forest produce except timber sold, bartered, mortgaged, given or otherwise transferred or removed for transfer. The timber sold, bartered, mortgaged, given or otherwise transferred or removed for transfer shall be liable to the full royalty under the rules relating to unclassed State Forests.” Clause

(b) recites “Before a lease is accorded the leasee may clear his liability for royalty by the pre-payment of a sum representing the full royalty on all trees which are found in the lease area. The pre-payment can be paid in instalment.” Clause (c) recites—“at

any time during the pendency of a lease the lessee may in the manner set forth in cl. (b) clear his liability in respect of all trees still standing on the land." Here we skip and see Clause (f) recites—"subject to the payment of such royalty, if any, as is due under cls. (a), (b) or (c) of this rule, the holder of a periodic or annual patta shall be entitled to cut down or sell any tree standing on the land covered by his lease: provided that the holder of an annual patta shall not be entitled to cut down or lop branches from trees of classes and within such areas as may be notified in this behalf by the State Government.

17. Clause (d) which is important and to the point for the decision of the case recites "(d) Notwithstanding anything contained in the preceding clauses, trees which were planted or began to grow, on the land during the pendency of a lease shall be exempted from all payment of royalty even if sold, bartered, mortgaged, given or otherwise transferred or removed for transfer When land has been settled continuously for twenty years, all trees standing thereon shall be presumed to have been planted, or to have begun to grow, during the pendency of the lease."

18. The Estate points out of clause (d) and alleged to have planted 152 trees in sections 5 and 26 when they have had cut the trees they are not liable to pay royalty under clause (d) of Regulation 21.

19. This assertion of the estate to have planted trees cut by them is not specifically traversed in the counter filed by the State. However, there is a bare denial of the fact alleged. Based on such a denial it is argued on behalf of the estate their denial raises a complicated question of fact the estate therefore should seek relief elsewhere as held in Bishwanath Tea Co. case. We hold the plea of the State is a mere ruse and in law cannot be countenanced. We unhesitatingly rule it out and reject the contention.

20. It is next argued on behalf of the State as per circular on April 11, 1973, the estate has to pay the royalty. The circular does not purport nor can it have the effect of repealing, of Rule 21(d). therefore the basis of the Circular of April 11, 1973 cannot sustain the levy of Royalty in the instant case. Similar was the decision by a Divisional Bench of this Court consisting of Hansaria and Dr. Singh, JJ. in Civil Rule No. 556/74 of August 24, 1983. In that case rule 37 and the circular were considered at the instance of the State to sustain the levy of Royalty.

21. The question arose when timber was seized from a tea garden for not paying royalty. In that case also land was granted on lease for cultivation of tea. The timber seized was grown on the leased land. The timber was to be used for garden purposes like building of labour quarters or bridges in the garden. In that case Rules 7 and 37 were considered. Rule 7 related to "Unclassed State Forests" in the plains District of Assam and North Cachar Hills. The expression "Unclassed State Forest" meant "lands at the disposal of the State and not included in a reserved or village forest". The land on which trees were grown was not the land at the disposal of the State. It was held the land was not included in a reserved or village forest. Therefore imposition of royalty was held not justified. Having regard to the Transit Rules this Court clarified the estate in that case "would be required to obtain a Certificate of Origin before it can remove the forest produce". The obtaining of a certificate was peculiar to the facts of the case. We are not concerned of a Certificate in the instant case. We are in agreement with the reasoning and conclusions reached by that Divisional Bench to hold the circular of April 11, 1973 of the State of Assam did not support the imposition

of Royalty.

22. For all the aforesaid reasons we declare in the instant case Baghmari Tea Company Ltd. is entitled to use the timber of 152 trees for construction of buildings, bridges and tenaments of workers of the estate without paying royalty.

The writ petition is allowed. No costs.

B.L. HANSARIA, J.:— I am in respectful agreement with My Lord the Chief Justice whose judgment I have perused with profit. I would however, like to add a few words of my own.

24. I would formulate the two questions which we are required to answer as below:

(1) Whether the owner of a tea garden is liable to pay royalty on trees grown by him on the land taken on lease for special cultivation when those are felled to be utilised for the development of the garden?

(2) When such royalty is demanded whether the question of owner's liability or non-liability to pay royalty can be decided in a writ petition?

25. Let us first see what is meant by “royalty”. This word is of varying meanings. Defined generally, it means “a share of the product or profit reserved by the owner for permitting another to use the property”, as stated in *Corpus Juris Secondum*, Vol. 77 page 542. This is also one of the definitions given in *Words and Phrases* (Permanent Edition) Vol. 37A page, 597. In *Black's Law Dictionary*, 5th Edn. the word “royalty” has been defined to mean “Compensation for use of the property, usually copyrighted material or natural resources expressed as a percentage of receipts from using the property or as an account per unit produced……In its broadest aspect, it is share of profit reserved by owner for permitting another the use of property.” (See page 1195). In *Jowitt's ‘The Dictionary of English Law’* it has been defined to mean “a payment reserved by the grantor of a patent, lease of a mine or similar right, and payable proportionately to the use made of the right by the grantee.”

26. The Supreme Court had occasion to note the meaning and nature of royalty in District Council of *Jowai Autonomous District* v. *Dwet Singh*, (1986) 4 SCC 38 : AIR 1986 SC 1930, wherein royalty was damanded for timber grown on, and felled from, private forests. In para 16 of this judgment, it was stated after noting the definition given in *Jowitt's Dictionary* that in the true sense what is sought to be recovered is not royalty since the forest does not belong to the District Council. It then stated that “(t)he amount claimed by way of royalty under the Notification is a compulsory exaction of money by a public authority for public purpose enforceable by law and is not a payment for services rendered. It is truly in the nature of a tax.”

27. One thing which follows from the aforesaid definition of royalty is that conceptually no royalty can be realised unless one be the owner or lessor of the property in question. If the person concerned be neither owner of the property nor lessor or grantor of the same it is apparent that no royalty cm be demanded by him. In the context of the present case it may be stated that royalty cannot be realised by

the State on trees unless the State be owner of the same. It, therefore, follows that if the trees in the growth of which no part has been played by the State cannot be made subject of royalty.

28. If royalty be regarded as akin to tax, as observed in *Dwet Singh* (supra), it is apparent that it cannot be levied or collected except by authority of law, vide Article 265 of the Constitution. No authority of law to levy royalty in a case of the present nature has however been brought to our notice. Government circular dated April 11, 1973, bearing No. FRS 56/72 has admittedly no authority of law. There are, however two provisions in the Settlement Rules framed under the Assam Land & Revenue Regulation, 1886, which do speak of royalty on timber. The first is Rule 21 which has dealt with the subject of royalty on timber relating to lease for ordinary cultivation. Sub-rule (d) of this Rule is important which has stated:

> "(d) Notwithstanding anything contained in the preceding clauses, trees which were planted or began to grow, on the land during the pendency of a lease shall be exempted from payment of royalty if sold, bartered, mortgaged, given or otherwise trasferred or removed for transfer. When land has been settled continuosly for twenty years, all trees standing thereon shall be presumed to have begun to grow, during the pendency of the lease."

This rule is important for our purpose inasmuch as it has clearly recognised that royalty shall not be payable on trees which were grown or planted during the pendency of the lease. The deeming provision of the Rule that when land has been settled for 20 years, all trees standing thereon shall be presumed to have been planted during the pendency of the lease

should, in my opinion, also apply to leases given for special cultivation whose period is more than 20 years.

29. In so far as lease for special cultivation is concerned, the subject matter has been dealt with by Rule 38 of the settlement Rules which reads as below:—

> "38. Royalty on timber in respect of leases for special cultivation.—Notwithstanding anything contained in Rule 37, the lease may be issued to the applicant before the value of the timber has been ascertained. When the Deputy Commissioner has adopted this procedure, he shall add the following clause to the lease:
>
> > "You shall pay value of the timber on the land as ascertained in conformity with Rule 37 of Section—II of the Settlement Rules, within three months from the date of receiving notice of the valuation which has been assessed.
> >
> > In special case, the payment of value of timber on the land may be postponed for such a term and under such conditions as State Government may decide".

It may be stated that Rule 38 finds place in Section—II of the Settlement Rules which deals with "Special provisions relating to applications for special cultivation". Rule 37 finding place in this Section deals with the valuation of timber. We are not much concerned with this Rule, as it is related to the question of valuation. Rule 38 has, however, stated that for demanding royalty the timber must be on the land. This would clearly show that trees must be found on the land before royalty for the same can be demanded. If the trees were not there when the lease was granted but had been grown subsequently, it is apparent that no royalty for the same can be demanded. It may be added here that as per the proviso to Rule 37 which had stood deleted with effect from 18.5.87, a lessee of land meant for special cultivation could

have exercised an option not to pay full royalty valuation at the time of taking lease but could opt for paying a reduced valuation representing only the profit which he was likely to derive from the use of the timber for proposes connected with special

cultivation. The proviso had stated that in case the lessee exercised such an option "he shall be liable to pay royalty at full rates on all timbers sold, bartered, mortgaged, given or otherwise transferred or removed for transfer and on timbers removed for use unconnected with the exploitation of the garden during the period of lease or renewed lease." I have mentioned about this proviso because in answering the second question this provision would be found to have some relevance.

30. The above shows that royalty can be imposed on leases given for special cultivation only when timber was there on the land. In this connection, Shri Bhattacharjee has referred to *Dwet Singh* (supra) wherein it was held that the District Council had no authority in law to impose royalty. This view was, however, taken in *Dwet Singh*, because it was first stated that the powers enjoyed by the District Council created in accordance with the provisions finding place in the Sixth Schedule to the Constitution cannot be equated to the plenary powers enjoyed by a legislature. This was the view first expressed in para 14 of *District Council* v. *Sitimon*, (1971) 3 SCC 708 : AIR 1972 SC 787. After noting the limited legislative power of a District Council, the question of imposing royalty by the District Council was examined in the light of para 3 of the Sixth Schedule which has dealt with the power of the District Council to make laws. Reference was also made to para 8 of the Sixth Schedule which has dealt with the powers to assess and collect land revenue and to impose taxes. As none of the provisions finding place in these two paragraphs allowed levy of royalty (which was taken in *Dwet Singh* as akin to tax, though it may not be always so), and as it was pointed out that the royalty sought to be realised could not be regarded as tax on land, it was held that the same could not be imposed by a District Council. The ratio of this decision would not apply to the present case inasmuch as the legislative power of a State is wider than that of the District Council. This apart, provisions do exist under the Settlement Rules which are statutory in nature to impose royalty.

31. The question whether royalty could be levied or collected in a case of the present nature had come up for decision by this Court in *Bargang Tea Company Limited* v. *State*

of Assam (Civil Rule 556-74 disposed of on 24.8.83)* and it was held in that decision that royalty could not be levied or collected by the State merely on the strength of the aforesaid letter No. FRS. 56/72 dated 11.4.73 issued by the Forest Department of the Government of Assam. The decision rendered in *Birgang* (supra) was accepted by the State inasmuch as it is an admitted position that no appeal was preferred against that judgment to the Supreme Court.

32. In view of all that has been stated above, I would answer the first question in negative, that is, in my view a tea garden is not liable to pay royalty on trees grown by it on the land taken on lease for special cultivation when those trees are felled to be utilised for development of the garden.

33. In so far as the second question is concerned, our attention has been invited by

Shri Choudhury to D.F.O. v. *Bishwanath Tea Company Ltd.*, (1981) 3 SCC 238 : AIR 1981 SC 1368. In that case, the respondent (who was the petitioner before this Court) had come up by way of a petition under Article 226 of the Constitution seeking refund of the royalty which had been paid by it. In support of its case, it was urged on behalf of the petitioner that as the timber had been used for a purpose connected with the exploitation of the grant, that is, timber was not removed for use "unconnected with the exploitation of the grant" of which reference was made in the proviso to Rule 37 of the Rules, demand of royalty was hit by the aforesaid part of the proviso to Rule 37 of the Rules. The Supreme Court observed that the proviso was merely an enabling provision and what the petitioner was trying to enforce was a term of the above nature contained in Clause (2) of Part—IV of its deed of lease. Being of this view, it was stated that there was a complaint regarding breach of contract, and the petitioner should have ordinarily sued for specific performance of the contract, or for damages if the contract was not capable of being specifically performed. It was then pointed out that such a suit would ordinarily be cognizable by civil court for which approach to the High Court was not visualised. This was regarded as a well-settled proposition in law. It was then observed in para 10 that the petition under Article 226 of that case being in

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substance "a suit for refund of a royalty alleged to be unauthorisedly recovered and that could hardly be entertained in exercise of writ jurisdiction of a High Court." It was then found in that case that very many questions of facts arose of which reference was made in para 12. As there were many facts to be traversed, it was asked whether the High Court was justified in observing that it was not called upon to decide complicated questions of facts. Some factual averments made in the petitions were also disputed.

34. From what has been stated above, I would answer the second of the aforesaid questions by saying that a writ court would not be the proper forum to be approached when complicated questions of facts are involved or where the writ petitioner tries to enforce a contractual, as distinguished from a statutory obligation.

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* (1984) 1 GLR (NOC) 17.