Royalty collected under Agreement with Government is not unconscionable and distinguishable from Taxes

In ***M/s. INDSIL Hydro Power and Manganese Ltd. v. State of Kerala and Ors. [CIVIL APPEAL NOS.9845-9846 OF 2016 dated September 06, 2021]***, the current appeal has been filed against the judgment and *Order dated April 03, 2014* passed by the Kerala High Court allowing Writ Appeal Nos.1345 and 1355 of 2013 preferred by State of Kerala against M/s. INDSIL Hydro Power and Manganese Ltd **("the Appellant")**.

The Government of India on December 07, 1990 framed a *policy vide G.O.(MS)No.23/90/PD* **("the Policy")** allowing private agencies and public undertakings to set up hydel schemes for generation of electricity at their own cost. The Appellant in pursuance to the same established a 21 Mega Watts **("MW")** and 12 MW plant for exclusive use of Captive Generating Station **("CGS")** for its industrial units. Clause 14 of the Policy provided that royalty would be charged for controlled releasing of water used for generating electricity in the CGS. The Kerala Government and Kerala State Electricity Board **("KSEB")** directed the Appellant to pay royalty for use of water along with taxes and duties. An order dated July 03, 2004 was issued by the Government that in terms of Clause 19 of INDSIL Agreement, the Appellant would be liable to pay royalty and cost of controlled release of water.

The order was challenged in writ petitions vide *order dated February 15, 2013 and April 03, 201*3 which were held in favour of Appellant holding the action on part of the Government to be discriminatory. Thereafter, on writ appeal filed against those orders, *Order dated April 3, 2014* set aside the previous orders by directing the Government to levy royalty assessing the quantity of water used for generation of electricity and pass fresh orders accordingly. This *order dated April 03, 2014* has thereby been challenged by the Appellants in the current writ petition.

The Appellant placed reliance on the case of ***Central Inland Water Transport Corporation vs. Brojo Nath Ganguly [(1986) 3 SCC 156]*** wherein a contract of employment was held to be unconscionable by holding *"the term would get included in the contract only at the instance of the employer where because of lack of bargaining power the employee would have no other option but to accept such term. It was in this context that the relevant term contained in the Contract of Employment was found to be unconscionable."*

The Hon'ble Supreme Court, on the matter of whether Clause 14 which was incorporated in the respective Policy Agreement could be termed manifestly arbitrary, did not accept the views in the case of **Central Inland Water Transport Corporation** and observed that the Appellant was neither in a lesser bargaining power nor was so vulnerable that by force

of circumstances they were forced to accept such terms by the Government. Therefore, the concerned clause cannot be termed as unconscionable.

Observed that the term Royalty has always been construed to be a compensation paid for rights and privileges paid to the grantee. In the current case, the charges paid for use of controlled release of water were for the privileges enjoyed by the Appellant and for such a privilege, the charges and royalty are perfectly justified.

Further held that the current relationship between the Appellant and the Government was simply and purely contractual and the Division Bench was right in rejecting the submissions advanced by the Appellant.

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