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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2743 OF 2010

- | | | |
|----|---|-----------------|
| 1. | Rahul Rasiklal Nahar, |] |
| | Age: 55 years, Occu: Business & |] |
| | Agri., Residing at 150, Ratnadeep |] |
| | Bungalow, Mukund Nagar, Pune-411037. |] |
| | |] |
| 2. | Sekhar Dattatraya Savalekar, |] |
| | Age: 39 years, Occu: Service, |] |
| | residing at Kondhwa (Bhurduk), Pune. |] |
| | |] |
| 3. | Riddhi Siddhi Vrukash Lagwad & |] |
| | Samwardhan Sansthan Maryadit |] |
| | Having office at 125, 126 & 127, Patil |] |
| | Plaza, Near Mitra Mandal Chowk, |] |
| | Pune 411 037. |] |
| | |] |
| 4. | Eiffel Developers & Realtors Ltd., |] |
| | a company duly registered under The |] |
| | Indian Companies Act, 1956, having its |] |
| | Head office at Mantri House, 1 st Floor, |] |
| | 929, F.C. Road, Pune - 411 004. |] |
| | |] ..Petitioners |

V/s.

- | | | |
|----|--|------------------|
| 1. | The State of Maharashtra, |] |
| | through its Principal Secretary, |] |
| | Ministry of Revenue, Mantralaya, |] |
| | Mumbai - 400 032. |] |
| | |] |
| 2. | The Divisional Commissioner, Pune |] |
| | Division, Pune, having its office at Pune. |] |
| | |] |
| 3. | The Collector, Pune, having office at |] |
| | Collectorate compound, Pune. |] |
| | |] |
| 4. | Sub-Divisional Officer, Haveli |] |
| | District Pune, having office at Pune. |] |
| | |] |
| 5. | The Tahsildar, Tal. Muslhi, Dist. Pune, |] |
| | having office at Paud Road, Pune. |] |
| | |] ..Respondents. |

Mr.G.S.Godbole with Siddharth Ronghe for the petitioners.

Mr. V.S.Gokhale, A.G.P. for respondent Nos. 1 to 5.

**CORAM : A.S.OKA AND
A.K. MENON, JJ.**

DATED : 13TH JANUARY, 2015

ORAL JUDGMENT (PER A.S.OKA, J.)

1. Heard learned counsel appearing for the petitioners and learned AGP for the respondents. The substantive challenge in this petition under Article 226 of the Constitution of India is to the order dated 4th July, 2009 passed by the Tahsildar, Mulshi, Dist. Pune under sub-section (7) of section 48 of the Maharashtra Land Revenue Code, 1966 (for short the 'Code'). The said order is passed on the basis of the allegation against the petitioners of illegal excavation of minor minerals quantified at 23148 brass and, therefore, a penalty has been imposed on the petitioners under the said order. There is a further notice dated 13th August, 2009 issued by the Tahsildar for execution of the demand raised under the aforesaid order by attachment of the properties of the petitioners.

2. Learned counsel appearing for the petitioners relies upon the judgment and order dated 3rd December, 2013 passed by the Apex Court in *Civil Appeal No.10717 of 2014 (Promoters*

and Builders Association of Pune V/s. State of Maharashtra & Ors.). Considering the law laid down by the Apex Court, the petition will have to be disposed of finally at this stage.

3. We must make it clear that there is a remedy of an appeal available against the impugned order under the provisions of the said Code. However, in the light of the law laid down by the Apex Court, which in our opinion will squarely apply to the facts of the case, instead of relegating the petitioners to the remedy of appeal in this petition which is kept pending from the year 2010, we are dealing with the merits of the controversy.

4. The case made out in the petition by the petitioners is that after obtaining permission of the District Collector for conversion of the land bearing Gat Nos.693 and 694 admeasuring 3,97,517.61 sq. Mtrs. of village Mugawade, Mulshi, District Pune for non agricultural use, the petitioners obtained a building permission under section 18 of the Maharashtra Regional and Town Planning Act, 1966 (for short 'MRTP Act) for the development of the said land. A show cause notice dated 17th January, 2009 was served by the Tahsildar to the first petitioner alleging that without permission of the Competent Authority, illegal excavation of 23148 brass of murum / earth / sand was made by the petitioners and, therefore, the petitioners

were called upon to show cause as to why an action under sub-section (7) of section 48 of the Code should not be initiated. A reply was submitted to the said notice by the petitioners, a copy of which is at Exhibit-P to the petition. In the reply, the petitioners denied that they have carried out any quarrying activities for extracting any minerals, but stated that the excavation work has been done with a view to construct the foundation of a building and for construction of a basement as per the development permission granted to the petitioners. It is pointed out that the material excavated has not been used for any commercial use. Therefore, it is submitted that the petitioners are not liable to pay any amount in terms of sub-section (7) to section 48 of the said Code.

5. In the impugned order dated 4th July, 2009, it was stated that the petitioners have carried out illegal excavation of earth / murum by collecting 23148 brass and, therefore, the petitioners were called upon to pay various amounts towards royalty, penalty, etc., totally amounting to Rs.2,34,75,485/-. The notice dated 18th January, 2010 which is also under challenge is for the execution of the said order by attachment of the properties of the petitioners.

6. It will be necessary to advert to the judgment and

order dated 31st December, 2014 of the Apex Court in the case of the Promoters and Builders Association, Pune. In paragraph 2 of the said judgment and order, the Apex Court observed thus :-

"The appellant in the first batch of appeals before us is an Association representing individual builders of the State of Maharashtra who carry out construction activities in the normal course of business. The Association and also the individual builders are aggrieved by the judgment of the Bombay High Court dated 8.10.2010, inter alia, holding that "excavation activity even for the purposes of laying foundation of the building would still attract rigours of Section 48(7) of the Revenue Code". Under the aforesaid provision of the Code extraction of minerals by any person without assignment of any right by the State Government makes such person liable to penalty, as prescribed."

(underline supplied)

7. The contention raised before the Apex Court was that the excavation activity carried out by the builders on the basis of the development permission granted to develop the land will not attract sub-section (7) to section 48. In paragraph 9 onwards of the said decision, the Apex Court analysed the issues arising. The Apex Court considered the scope of the sub-section (7) section 48 of the said Code. The Apex Court made a reference to the notification dated 3rd February, 2000 issued in exercise of the powers under section 3(e) of the Mines and Minerals

(Regulation and Development) Act, 1957. In paragraph 14, the Apex Court observed that unless the excavation of ordinary earth used undertaken by the builder is for any of the purposes contemplated under notification dated 3rd February, 2000, the liability of such builders to penalty under sub-section (7) of section 48 would be in serious doubt. In paragraph 15 of its decision, the Apex Court observed that:-

“ It is ordinary earth used only for the purposes enumerated therein, namely, filling or levelling purposes in construction of an embankment, road, railways and buildings which alone is a minor mineral. Excavation of ordinary earth for uses not contemplated in the aforesaid Notification, therefore, would not amount to a mining activity so as to attract the wrath of the provisions of either the Code or the Act of 1957. ”

Thereafter, in paragraph 16, the Apex Court proceeded to hold that :-

“ As use can only follow extraction or excavation it is the purpose of the excavation that has to be seen. The liability under Section 48(7) for excavation of ordinary earth would, therefore, truly depend on a determination of the use / purpose for which the excavated earth had been put to. An excavation undertaken to lay the foundation of a building would not, ordinarily, carry the intention to use the excavated earth for the purpose of filling up or levelling. A blanket determination of liability merely because ordinary

earth was dug up, therefore, would not be justified; what would be required is a more precise determination of the end use of the excavated earth; a finding on the correctness of the stand of the builders that the extracted earth was not used commercially but was redeployed in the building operations. If the determination was to return a finding in favour of the claim made by the builders, obviously, the Notification dated 3.2.2000 would have no application; the excavated earth would not be a specie of minor mineral under Section 3(e) of the Act of 1957 read with the Notification dated 3.2.2000."

(underline supplied)

8. In paragraph 18, while allowing the appeal, the Apex Court granted liberty to the State Government to proceed in accordance with the observations contained in the said judgment and order. What is held by the Apex Court in paragraph 16 is that a blanket determination of liability merely because ordinary earth was dug up would not be justified and what would be required is the precise determination of the end use of the excavated earth. The Apex Court observed that the liability under sub-section (7) to section 48 of the Code for excavation of earth would depend on the determination of the end use / the purpose for which the excavated earth has been used.

9. We find from the impugned order that the

determination as contemplated by the Apex Court has not been made by the Tahsildar. There is no adjudication on the purpose for which the excavated earth has been put to use. Thus, the impugned order has been passed without making the determination of the issue as contemplated by the paragraph 16 of the judgment and order of the Apex Court. The impugned order dated 4th July, 2009 proceeds on the presumption that by mere excavation of earth by the petitioners, sub-section (7) of section 48 of the said Code has been violated.

10. Thus, following the law laid down by the Apex Court in the aforesaid decision, the impugned order will have to be set aside. However, in the light of what is observed by the Apex Court in paragraph 18, it would be open for the State Government to initiate a fresh action under sub-section (7) of Section 48 of the said Code.

11. In the present case, as a show cause notice has already been issued, adjudication as contemplated by the aforesaid judgment can be made on the basis of the show cause notice. The respondents can serve even a supplementary notice. It will be also open for the petitioners to file additional reply to the show cause notice. It is obvious that before taking recourse to sub-section (7) to section 48 of the Code, the determination

will have to be made in terms of paragraph 16 of the decision of the Apex Court.

12. Hence, we pass the following order :-

- (i) The impugned order dated 4th July, 2009 as well as the impugned notice dated 18th January, 2010 are hereby quashed and set aside;
- (ii) We direct the petitioners to appear before the Tahsildar Munshi (Poud) on 23rd February, 2015 at 11.00 a.m. If the Tahsildar desires to issue a fresh show cause notice or a supplementary show cause notice, he can do so on the date fixed for appearance or even thereafter;
- (iii) The Tahsildar shall grant a reasonable time to the petitioners to file additional reply and to file a fresh reply to the additional or supplementary show cause notice issued to the petitioners;
- (iv) We direct the Tahsildar to make an adjudication as contemplated in paragraph 16 of the judgment and order of the Apex Court in the case of the Promoters and Builders Association, Pune after giving an opportunity of being heard to the petitioners;

- (v) The order passed by the Tahsildar shall be communicated to the petitioners;
- (vi) In the event, the order passed by the Tahsildar be adverse to the petitioners, to enable the petitioners to adopt a statutory remedy, no further steps shall be taken on the basis of the said order for a period of one month from the date of service of the order;
- (viii) We make it clear that all other issues raised by the petitioners are expressly kept open;
- (ix) The petition is partly allowed in the above terms;
- (x) All parties to act on an authenticated copy of this order;

13. We direct the Registry to place Writ Petition Nos.4795 of 2010 and Writ Petition No.4502 of 2010 under the caption 'fresh matters' on 20th February, 2015.

(A.K.MENON, J.)

(A.S.OKA, J.)