

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 989 OF 2016

Mrs. Maria de Lourdes Filomena Figueiredo de Albuquerque, Legal Heir and Cabeça de Casal of Amalia Rodrigues G. Figueiredo, major of age, Indian National, Resident of House No.377, Loutolim, Salcete, Goa. Through her duly constituted POA, Mr. Imran Khan.

.... Petitioner

Versus

The Ministry of Environment, Forest and Climate Change, Through its Joint Secretary, Impact Assessment Division, Government of India, 3rd Floor, Indira Paryavaran Bhawan, Jorbagh Road, Aliganj, New Delhi 110 003.

.... Respondent

Shri Agnelo F. Diniz with Shri Kaif Noorani, Advocates for the Petitioner.

Shri Mahesh Amonkar, Central Government Standing Counsel for the Respondent.

CORAM : SMT. R.P. SONDURBALDOTA &

C.V. BHADANG, JJ.

RESERVED ON: 16th JANUARY, 2017

PRONOUNCED ON: 3rd MARCH, 2017

(Signed judgment is pronounced by C.V. Bhadang, J. as per clause (i) of Rule 1 of Chapter XI of Bombay High Court Appellate Side Rules as R.P. Sondurbaldota, J. is sitting at Mumbai.)

JUDGMENT: (Per C.V. Bhadang, J.)

Rule made returnable forthwith. The learned Central Government Standing Counsel for the respondent, waives service. Heard finally by consent of parties.

2. This is the second round of litigation between the parties before this Court. The challenge in this petition is to the order dated 22.09.2016, whereby the respondent has refused to revoke the abeyance of the Environmental Clearance (EC) in respect of the Title Concession (TC) No.65/51, "Pola Dongor Iron and Manganese Ore" of the petitioner, on the ground that a part of the mining area, is a forest land, in respect of which, forest clearance has not been obtained.

3. The brief facts necessary for the disposal of the petition may be stated thus:

(i) That on 18.07.2007, the respondent had granted EC to the petitioner's Mining Lease (TC No.65/51) under the Environment Impact Assessment (EIA) Notification 2006.

(ii) The Central Government had formed a Commission better known as "Shah Commission" to enquire into illegal mining carried in the State of Goa. The Shah Commission submitted its

report in the Ministry of Mines on 15.03.2012 and 25.04.2012. Consequently, the Ministry of Mines submitted its Action Taken Report (ATR) in the Parliament on 07.09.2012.

(iii) The Government of Goa issued orders, suspending the mining operation of all iron ore and manganese ore mining leases in the State with effect from 11.09.2012.

(iv) The Hon'ble Apex Court as per order dated 05.10.2012 in Writ Petition (Civil) No. 435/2012, directed suspension of transportation of iron and manganese ore from those mining leases.

(v) The Ministry of Environment, Forest & Climate Change (MoEF, for short) by an order dated 14.09.2012, under Section 5 of the Environment Protection Act, 1986 (the EP Act, for short) directed all the Environmental Clearances, in each of the cases referred by State Government (including TC No.65/51), to be kept in abeyance and issued show cause notices to the project proponents (PP) to show cause.

(vi) The MoEF constituted an Expert Appraisal Committee (EAC) on 21.03.2013, with a view to examine the reply

submitted by 139 PPs in pursuance of the directions of the MoEF dated 14.09.2012 and to assess the status of compliance to the EC conditions. The EAC submitted its report on 14.10.2013 categorizing the various violations.

(vii) Under the Mines and Minerals (Development and Regulation) (Amendment) Ordinance, 2015 dated 12.01.2015, the mining leases in respect of the mines stood extended till 31.03.2020. Consequently, the State Government requested the MoEF to revoke the abeyance on environment clearance of the various mining leases in the State of Goa.

(viii) The MoEF considered the matter of revoking of the abeyance of EC in respect of various leases, including the subject lease held by the petitioner bearing TC No. 65/51. There were 22 leases having forest land in the lease area or dispute about involvement of forest land, and forest clearance was not available. Incidentally, TC No. 65/51 is one of those 22 mining leases, having forest land in the lease area.

(ix) The MoEF by an order dated 20.03.2015, refused to revoke the abeyance of EC in respect of these leases, including the subject lease held by the petitioner, on the ground that the part of

the mining area is a forest land, in respect of which forest clearance is not available. The MoEF placed reliance on the decision of the Hon'ble Supreme Court in the case of **Lafarge Umiam Mining Private Limited Vs. Union of India (UOI) and others, (2011) 7 SCC 338**. It was found that the EC can be granted only after obtaining Stage-I Forest Clearance. The MoEF therefore directed that these cases for revoking of abeyance of EC, would be considered after the forest clearance is obtained.

(x) The petitioner challenged the aforesaid order before this Court in Writ Petition No. 573/2016 inter-alia on the ground that the decision in the case of **Lafarge Umiam Mining** (supra), would not apply, in as much as, the guidelines, as set out in para 2 of the said judgment are to be followed in future cases and the EC granted to the subject mining lease was of the year 2007, which was granted as per the EIA Notification of 2006 and was prior to the decision in the case of **Lafarge Umiam Mining** (supra). Secondly, it was contended that the forest area comprising in the lease, has already been cordoned off, which is apparent from the letter dated 14.03.2011, from the Deputy Conservator of Forest, confirming that no mining operation was being carried out in the forest area.

(xi) In the circumstances, this Court found that it would be appropriate if, the competent Authority of MoEF decides the matter afresh, after hearing the petitioner. In that view of the matter, Writ Petition No.573/2016 was partly allowed on 26.07.2016, directing the MoEF to decide the matter afresh after hearing the petitioner.

(xii) The MoEF in compliance of the said direction of this Court heard the petitioner. The MoEF has passed the impugned order on 22.09.2016, once again refusing to revoke the abeyance, which order is subject matter of challenge in this petition.

4. We have heard Shri Diniz, the learned Counsel for the petitioner and Shri Amonkar, the learned Central Government Standing Counsel for the respondent. With the assistance of the learned Counsel for the parties, we have gone through the record and the impugned order passed.

5. It is submitted by the learned Counsel for the petitioner that the reliance placed by the respondent on Section 2 of the Forest (Conservation) Act, 1980 (the FC Act, for short) and para 4.4 of the guidelines framed thereunder, is entirely misplaced. The learned Counsel has referred to an affidavit in reply filed by Shri

Vijai Sharma, the then Secretary, Ministry of Environment and Forests, Government of India and the affidavit of Shri Ansar Ahmed, the then Inspector General of Forests, filed in Writ Petition No. 722/2008 (Goa Foundation through Secretary Dr. Claude Alvares & Another Vs. State of Goa and others), in order to submit that it has all along been the stand of the respondent that para 4.4 of the guidelines, would apply to new projects, which involve commencement of work on both forest and non-forest land. It is pointed out that the respondent had taken a stand that in appropriate case, para 4.4 can be deviated from, if the facts and circumstances of the case warrant and where such deviation is not arbitrary. It is pointed out that in the present case, as the mine has been in operation since 2006-2007, atleast on non-forest land and in such a case, para 4.4 of the guidelines would not apply. It is submitted that the impugned order is contrary to the stand taken by the respondent in Writ Petition No. 722/2008. He submits that, in any event, there is no non-forest activity being carried out in the part of the mining lease, which is a forest land. He thus submits that the respondent could not have refused to revoke the abeyance.

6. Shri Amonkar, the learned Central Government Standing

Counsel submits that in terms of para 4.4 of the guidelines, if a project involves forest as well as non-forest land, work cannot be started on the non-forest land, till the approval of the Central Government, for release of the forest land under the FC Act is obtained.

7. We have given our anxious consideration to the rival circumstances and the submissions made. As noticed earlier, the respondent has refused to revoke the abeyance, on the basis of the provisions of the FC Act and more particularly, Section 2 thereof and para 4.4 of the guidelines. Section 2 of the FC Act to the extent relevant reads thus:

Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing-

(i)

(ii) that any forest land or any portion thereof may be used for any non-forest purpose;

(iii)

(iv)

It can thus be seen that under the said Section, State Government or other Authority shall not make, except with the prior approval of the Central Government, any order, directing permitting the use of any forest land or any portion thereof for any non-forest purpose. We find that Section 2 of the FC Act cannot apply where there is no diversion or use of the forest land for any non-forest purpose.

8. Guideline no. 4.4, on which heavy reliance is placed by the respondent reads thus:

“4.4 Project involving forest as well as non-forest land:

Some projects involve use of forest land as well as non-forest land. State Governments/ project authorities sometimes start work on non-forest land in anticipation of the approval of the Central Government for release of the forest lands required for the projects. Though the provisions of the Act may not have technically been violated by starting of work on non-forest land, expenditure incurred on works on non-forest land may prove to be infructuous if diversion of forest land involved is not approved. It has, therefore, been decided that if a project involves forest as well as non-forest land, work should not be started on forest land till approval of the Central

Government for release of forest land under the Act has been given.”

It can thus be seen that all that the guideline stipulates in respect of projects, which involve use of the forest land as well as non-forest land, is that work cannot to be started on the non-forest land till the approval of the Central Government for release of the forest land has been obtained. The reason for such stipulation, is that though, in such a case, the provisions of the Act may not be technically violated (by starting of work on non-forest land), expenditure incurred on work on non-forest land may go waste and prove to be 'infructuous', if eventually, the diversion of the forest land is not approved. Thus, the guideline is aimed at preventing a situation where the PP starts some work on the non-forest land (which is not prohibited), however, eventually the diversion of the forest land for non-forest purpose, is not approved.

9. It would now be necessary to refer to the affidavit of Shri Vijai Sharma, the then Secretary to Ministry of Environment and Forests, Government of India. Para 5 of the said affidavit would make it clear that the affidavit was filed specifically with a view to clarify the stand of the respondent on para 4.4 of the guidelines. Insofar as the applicability of para 4.4 of the

guidelines, this is what is stated in para 10 of the affidavit:

“10. The guidelines including those contained in para 4.4 can be deviated from in a given case if the facts and circumstances warrant and where such deviation is not arbitrary.

10. Let us now refer to the affidavit of Shri Ansar Ahmed, the then Inspector General of Forests, Ministry of Environment and Forests, Government of India on the stand of the Ministry on para 4.4 of the guidelines. Para 8 of the affidavit, which is apposite reads thus:

“In the understanding of the Ministry, the spirit of para 4.4 of the guidelines is that in a 'new project', which involves commencement of work on a lease area having both forest and non-forest land, prior approval of the Central Government under Forest (Conservation) Act, 1980 should be obtained and no non-forest activity including mining should be started on the non-forest portion of the land till approval of the Central Government for release of the forest land under the Act has been given.

To throw further light in the matter, it is submitted that in a project which absolutely requires diversion of the forest portion of the land for completion of the project, it would generally be prescribed that no work

should be started even on the non-forest portion of the land, till the forest clearance is obtained. Such a situation would arise, eg. in the case of a railway line/road/other such linear projects, which obligatorily pass through the forest area even for a portion of the length. In such a case, the expenditure incurred on the works on the non-forest land would become infructuous, if diversion of the forest land involved were not approved.

In the case of existing mining leases, involving forest lands, the position emanating from the Forest Conservation Act, 1980 is that non-forest activity including mining can continue on the lease land till the date of expiry of the existing lease, after which renewal can be done following the process of the Forest (Conservation) Act, 1980.

A query has been raised in this Hon'ble Court how a situation will be dealt with where a portion of the land under the existing valid lease is declared as a forest subsequent to the date of commencement of the said lease. In other words, the question raised is in respect of a situation wherein the original lease would have been granted assuming that entire area was non-forest land. It is humbly submitted that this sort of situation has not been addressed specifically in the guidelines referred to above.

However, on a preliminary examination of the issues, involved, it is humbly and respectfully submitted that

the requirement of seeking clearance under Forest Conservation Act, 1980 has been waived in the case of the existing valid leases on the land which was already notified as forest at the time of granting of lease (i.e. prior to enactment of Forest Conservation Act, 1980). This waiver would appear to be applicable a fortiori in the case of land which came to be declared as forest later on. However, where overwhelming public interest and ecological safety are involved, it may be open to insist on application of the Forest Conservation Act, 1980, even in such cases, as the guideline 4.4 is in the nature of clarification and not a law."

(Emphasis supplied)

11. At the request of the learned Central Government Standing Counsel, Shri Amonkar and in order to ascertain the stand of the respondent, in the context of affidavits of Shri Vijai Sharma and Shri Ansar Ahmed, filed in Writ Petition No. 722/2008, we had adjourned the matter. Shri Amonkar, the learned Central Government Standing Counsel, on instructions, fairly states that the respondent abides by the stand taken by the above two affidavits filed in Writ Petition No. 722/2008. Thus, in all fairness, the learned Counsel for the respondent does not dispute that clause 4.4 of the guidelines would apply to new leases and that

too, where there is a diversion of forest land for a non-forest activity.

12. It can thus clearly be seen that as per the stand of the respondent, para 4.4 of the guidelines would apply to new leases and that too, where such lease involves diversion of the forest land for a non-forest purpose. Such a situation would arise for example in a case of a railway line/road/other such linear projects (for carriage of the ore), which pass through the forest area, even for a part of the length. It is in such cases and with a view to avoid expenditure incurred on the non-forest land going waste, it is stipulated that the work on non-forest land would not be started, unless the diversion of the forest land for non-forest purpose, is approved.

13. In the present case, it is not in dispute that the forest area in the mining lease is already demarcated on the ground with 4 feet high RCC pillars serially numbered at 20 metre intervals and further that no mining activity is being carried out in the forest area. Further, it is nobody's case that the operation of the mining lease involves diversion of the forest area for non-forest purpose, by way of any linear project for carriage of the ore or otherwise. In

this regard a useful reference may be made to letter dated 14.03.2011 by the Deputy Conservator of Forests (page 97 of the compilation), which reads thus:

*"To,
Maria De Lourdes Filomena
Figueiredo De Albuquerque
C/o Imran Khan,
514, 515 & 525, 5th floor,
Lake Plaza Building,
Opp. Nehru Stadium,
Margao-Goa.*

*Sub: Operating mines in non-forest areas in
respect of Mining lease T.C. No.65/51 pola
Dongor Mine situated in Curpem village of
Sanguem Taluka.*

Sir,

With reference to your letter dated 09/03/2011 regarding the above subject this is to inform you that this office is frequently inspecting the mining lease and it is observed that the mine in T.C. No.65/5 is operational in non-forest area only. The forest area in the mining lease is already demarcated on ground with 4 feet high R.C.C. pillars serially numbered at 20 mts. intervals and it is confirmed during the inspection that the mine is not working in forest area. Since the renewal application of the above mining lease for clearance under Forest (Conservation) Act, 1980 is in process you are requested to ensure that no mining operation is carried out in forest area.

*Yours faithfully,
sd/-
Dy. Conservator of Forests,
South Goa Division,
Margao-Goa."*

That apart, it was not disputed during the course of the arguments at bar, that there is no mining activity being carried out in the forest area. In such circumstances, we are of the considered view that the respondent could not have refused to revoke the abeyance, placing reliance on Section 2 of the FC Act and para 4.4 of the guidelines as referred to above.

14. We would now propose to briefly dwell on the nature, scope and extent of interference available in such matters. It is now well settled that while considering the challenge of the present nature, the Court is expected to examine the decision making process to ensure that the decision is fair and fully informed and is based on correct principles. In this regard, it would be worthwhile to make a reference to para 30 of the judgment in the case of **Lafarge Umiam Mining** (supra), which reads thus:

"30. Time has come for us to apply the constitutional "doctrine of proportionality" to the matters concerning environment as a part of the process of judicial review in contradistinction to merit review. It

cannot be gainsaid that utilization of the environment and its natural resources has to be in a way that is consistent with principles of sustainable development and intergenerational equity, but balancing of these equities may entail policy choices. In the circumstances, barring exceptions, decisions relating to utilization of natural resources have to be tested on the anvil of the wellrecognized principles of judicial review. Have all the relevant factors been taken into account? Have any extraneous factors influenced the decision ? Is the decision strictly in accordance with the legislative policy underlying the law (if any) that governs the field? Is the decision consistent with the principles of sustainable development in the sense that has the decision-maker taken into account the said principle and, on the basis of relevant considerations, arrived at a balanced decision ? Thus, the court should review the decision-making process to ensure that the decision of MoEF is fair and fully informed, based on the correct principles, and free from any bias or restraint. Once this is ensured, then the doctrine of "margin of appreciation" in favour of the decision-maker would come into play. Our above view is further strengthened by the decision of the Court of Appeal in the case of R. V. Chester City Council reported in (2011) 1 All ER 476 (paras 14 to 16)."

15. It can thus be seen that while examining the decision making process, the Court has to see (i) whether all relevant factors have been taken into account (ii) whether any extraneous factors have influenced the decision (iii) whether the decision is strictly in accordance with the legislative policy underlying the law, if any, that governs the field and (iv) whether the decision is consistent with the principles of sustainable development, in the sense that the decision-maker has taken into account the said principle and on the basis of relevant considerations, arrived at a balanced decision ?

16. Applying these principles, we find that the MoEF has not taken into consideration the fact that the forest area has been cordoned off and there is no non-forest activity being carried out or proposed to be carried out in the forest area. We have also found that the para 4.4 of the guidelines could not have been invoked in this case, for refusing to revoke the abeyance. The legislative policy underlying the Forest Conservation Act is to preserve and conserve forests and prohibit the use of forest land for non-forest purpose. Once it is found that the forest area is not being put to any non-forest use, the legislative policy underlying the Forest Conservation Act, cannot be said to be violated. For these reasons,

we find that the impugned order cannot be sustained.

17. In the result, the following order is passed:

ORDER

(a) The impugned order dated 22.09.2016 refusing to revoke the suspension/abeyance of the EC in respect of TC No.65/51, is hereby set aside.

(b) The respondent is directed to revoke/withdraw the suspension/abeyance order dated 14.09.2012 on the EC dated 18.07.2007 granted to the petitioner's mining lease bearing TC No.65/51 at Curpem village, Sanguem, Goa, thereby reinstating the petitioner's EC dated 18.07.2007 for the said lease.

(c) Rule is made absolute in the aforesaid terms, with no order as to costs.

C.V. BHADANG, J.

R.P. SONDURBALDOTA, J.