

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.3297 OF 2016

M/s. Pabal Housing Pvt. Ltd. & Anr. ...Petitioners
Versus
The State of Maharashtra & Ors. ...Respondents

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Mr. Uday Warunjikar for the Petitioners.
Mr. Manish Pabale, AGP for the Respondent Nos.1 and 2.

**CORAM : A.S. OKA &
SMT. ANUJA PRABHUDESSAI, JJ.**

DATED: 15th MARCH, 2017.

ORAL JUDGEMNT (PER A.S. OKA, J.):-

On the earlier date, the parties were put to notice that the Petition will be taken up for final disposal at the admission stage considering the narrow controversy involved. Accordingly, we issue Rule. The learned AGP waives service for the first and the second Respondents. Considering the order which we propose to pass, notice to the third Respondent is not necessary.

2. By this Petition under Article 226 of the Constitution of India, the Petitioners have taken an exception to the notices dated 24th June, 2013, 5th July, 2014 and 15th February, 2016, as well as the

order dated 24th June, 2013 passed by the Tahasildar, Vasai in purported exercise of powers under sub section (7) of section 48 of the Maharashtra Land Revenue Code, 1966 (for short 'the said Code'). It is alleged that the first Petitioner has carried out illegal excavation of certain quantity of soil, stones and sand. Therefore, the first Petitioner was called upon to deposit a sum of Rs.1,39,18,720, as the royalty for illegally excavation of minor minerals and penalty. The penalty component demanded was in the sum of Rs.1,19,77,320/-.

3. The Petitioners have also impugned the further demand (Exhibit -I) which is dated 29th April, 2013. This is a communication addressed by the Circle Officer to Tahasildar, Vasai regarding illegal excavation of minor minerals by the first Petitioner. By the communication dated 15th February, 2016 the first Petitioner was called upon to deposit a sum of Rs.1,53,39,540 on account of illegal excavation. On 22nd February, 2016 two cheques in the sum of Rs.7,00,000/- and Rs.7,20,820/- respectively were deposited by the Petitioner with the Talathi. We must note here that the cheque in the sum of Rs.7,20,820/- was not honoured. Therefore, the Petitioners have deposited a sum of Rs.7,20,820/- with the State Bank of India. A photocopy of challan dated 10th March, 2017 is placed on record.

4. The learned counsel appearing for the Petitioners relies upon a decision of the Apex Court in the case of ***Promoters and Builders Association of Pune Vs. State of Maharashtra***¹. He invited our attention to paragraph No.15 of the said decision. He submitted that while taking action under sub section (7) of section 48 of the said Code, the purpose of the excavation has to be seen. The excavation undertaken to lay foundation or the excavation of soil for the purpose filling up or levelling will not amount to any illegality. His submission is that a fresh adjudication is required to be made in the context of the law laid down by the Apex Court. The learned AGP submitted that a remedy of preferring appeals under the said Code is available against the orders passed by the Tahasildar. He pointed out that recovery proceedings have already been initiated by issuing notices dated 5th May, 2015 and 5th September, 2015. His submission is that only to avoid the statutory deposit that the Petitioners have not adopted the remedy of statutory appeals and therefore, this Petition should not be entertained.

5. We have given careful consideration to the submissions.

¹ (2015) 12 SCC 736

The case of the Petitioners is that after obtaining development permission from the third Respondent-Planning Authority, construction work was undertaken. It is their case that a development permission was granted on 31st March, 2012. After completing the construction, an Occupation Certificate was issued by the second Respondent. It is the contention of the Petitioners that during the period between 6th November, 2012 till 11th April, 2013 royalty was paid by the Petitioners for purchasing soil and stones from Mumbai. The contention of the Petitioners is that sub section (7) of section 48 of the Code will apply only in a case where there is excavation or disposal of minor minerals from mines, quarries, etc. It is the submission that for the work of digging for the construction of a building, sub section 7 of section 48 of the Code cannot be invoked.

6. We have considered the decision of the Apex Court in case of Promoters and Builders Association of Pune. The appeal before the Apex Court arose out of a decision of a Division Bench of this Court in the case of *Promoters and Builders Association of Pune V/s. State of Maharashtra*². The challenge in the writ petition before this Court was to the action initiated under sub section 7 of section 48 of the said

² 2011 (1) Bombay Cases Reporter, page 51

Code. While disposing of the said writ petition, the Division Bench of this Court came to the conclusion that the Petitioners therein had an alternative efficacious remedy of appeals. The Apex Court in the aforesaid decision interfered with the decision of the Division Bench by setting aside the judgment of the Division Bench. Paragraph Nos.14 and 15 of the decision of the Apex Court read thus:-

“14. Though Section 2(1)(j) of the Mines Act, 1952 which defines 'mine' and the expression "mining operations" appearing in Section 3(d) of the 1957 Act may contemplate a somewhat elaborate process of extraction of a mineral, in view of the Notification dated 3.2.2000, insofar as ordinary earth is concerned, a simple process of excavation may also amount to a mining operation in any given situation. However, as seen, the operation of the said Notification has an inbuilt restriction. It is ordinary earth used only for the purposes enumerated therein, namely, filling or levelling purposes in construction of an embankments, roads, 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 1957 Act.

15. 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 1957 Act read with the Notification dated 3.2.2000."

(underlines supplied)

7. While setting aside the demand under Sub-Section 7 of Section 48, made by the State Government, the Apex Court granted liberty to proceed against the Builders.

8. Now coming back to the facts of the present case, before issuing impugned order dated 24th June, 2013 a show cause notice was issued to the Petitioner on 21st May, 2013. On plain reading of the order dated 24th June, 2013 and from the affidavit in reply filed by Gajendrakumar Narendra Patole, it is apparent that before issuing the demand in exercise of powers under sub section (7) of section 48 of the said Code, the Tahasildar has not taken into consideration the purpose of excavation. The Tahasildar, Vasai seems to have made a blanket determination of liability, which is criticised in paragraph No. 15 of the aforesaid decision of the Apex Court.

9. In the light of law laid down by the Apex Court, we propose to set aside the order dated 24th June, 2013 and all consequential actions taken for implementation of the said order with liberty to the Tahasildar to proceed against the Petitioners in terms of the law laid down by the Apex Court after giving an opportunity of being heard to the Petitioners.

10. Accordingly, we dispose of the Petition by passing following order:-

(i) the orders /notices dated 24th June, 2013, 5th July,

2014 and 15th February, 2013 are hereby set aside and action taken on the basis of notice /orders including the action of freezing the bank accounts of the Petitioners as well as attachment of their property stands set aside;

(ii) We direct the Petitioners to appear before the Tahasildar, Vasai on **30th May, 2017 at 11.00 a.m.** It will be open for the Petitioners to file a reply to the notice dated 21st May, 2013 (Exhibit-'h' to the Petition) on or before 30th May, 2017. After giving an opportunity of being heard to the Petitioners, the Tahasildar shall make adjudication in terms of the law laid down in paragraph No.15 of the aforesaid decision;

(iii) The Tahasildar, Vasai shall pass appropriate order in accordance with law as expeditiously as possible and preferably within a period of three months from 30th May, 2017;

(iv) The order passed by him shall be communicated to the Petitioners. If the order be adverse to the Petitioners, the same shall not be implemented for a period of three weeks from the date on which the same is communicated to the Petitioners to enable the Petitioners to adopt appropriate

statutory remedies;

(v) The amount of Rs.7,00,000/- and Rs.7,20,820/- deposited by the Petitioners will be subject to the orders which may be passed by the Tahasildar, Vasai and /or by the Appellate /Revisional Authorities. In the event, the Tahasildar finds that the Petitioners are not liable to pay any amount, he shall order refund of the aforesaid amount with interest, if any, accrued thereon;

(vi) If the Tahasildar, Vasai holds that the Petitioners are liable to pay any amount in excess of the said amounts, the said amounts shall be adjusted by the Tahasildar, Vasai towards dues payable by the Petitioners subject to the orders which may be passed by the Appellate /Revisional Authorities;

(vii) All contentions on merits are kept open;

(viii) Rule is made partly absolute on above terms.

(ANUJA PRABHUDESSAI, J.)

(A.S. OKA, J.)