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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.6801 OF 2015**

Mr. Rahul Rasiklal Nahar and Anr.	... Petitioners
Vs.	
The State of Maharashtra and Ors.	... Respondents

Mr. G.S. Godbole i/by Mr. Siddharth R. Ronghe for the Petitioners.
Ms. Aparna D. Vhatkar, AGP for the Respondent Nos.1 to 5.

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

DATE : 27th APRIL, 2017

PC.

1 Parties were put to notice on earlier occasion that the petition will be taken up for final disposal. Accordingly, we issue Rule. The learned AGP waives service for the respondents.

2 The real challenge which survives for consideration in this Petition is to the order dated 2nd July, 2015 passed by the Tahsildar, Khalapur in exercise of power conferred under Sub-Section (7) of Section 48 of the Maharashtra Land Revenue Code, 1966 (for short “the said Code”). The show cause notice was issued by the Tahsildar to the

first petitioner on 7th January, 2015 based on a report submitted by the Talathi of village Madap, Taluka Khalapur. The notice alleges that in the land bearing Survey No.1/4, 55/4, 57, 91/1, 91/6 admeasuring 2-96-40 Ares, the first petitioner has illegally excavated the soil having quantity of 6555.68 brass. The show cause of notice was issued calling upon the first petitioner to show cause as to why royalty for illegal excavation and fine totally amounting to Rs.68,76,908/- should not be recovered from the first petitioner. On 21st January, 2015, a reply was submitted by the first petitioner contending that there is no unauthorised excavation of any minor minerals. Reliance is placed on permissions granted by the District Collector.

3 We may note here that in the said reply, reliance was placed by the petitioners on judgment and order of the Apex Court dated 3rd December, 2014 in SLP No.33002 of 2010. It was contended that the notice issued was contrary to the law laid down by the Apex Court.

4 After considering a reply, by the impugned order dated 2nd July, 2015, the Tahsildar directed the petitioners to pay total amount of Rs.68,76,908/-. He recorded a conclusion that illegal excavation was carried out for the purposes of constructing a road for the benefit of a new colony.

5 The learned counsel appearing for the petitioners relied upon the permissions dated 30th October, 2014 and 23rd April, 2015 granted by the District Collector in exercise of powers under Section 44 of the said Code and Section 45 of the Maharashtra Regional and Town Planning Act, 1966 (for short “the MRTP Act”). He pointed out that the lands subject matter of the impugned order are covered by the said two orders. He invited our attention to the decision of the Apex Court dated 3rd December, 2014 in Civil Appeal No.10717 of 2014 and other connected matters (Promoters and Builders Association of Pune Vs. The State of Maharashtra & Ors.). He submitted that the impugned order is completely contrary to the law laid down by the Apex Court. He submitted that if this Court is inclined to remand the matter, a direction be issued that show cause notice should not be decided by the Tahsildar, Khalapur as by filing an affidavit in reply, he has already taken a stand that the petitioners are liable to pay the amount as reflected from the affidavit filed by him in this Petition.

6 The learned AGP supported the impugned order and submitted that no interference is called for.

7 We have given careful consideration to the submissions. The petitioners are relying upon the permissions granted under Section 44 of the said Code (permission for non-agricultural use) and under

Section 45 of the MRTP Act (Development Permission). Their contention is that only when ordinary earth is used for filling up or levelling purposes in construction of an embankment, roads, railways and buildings, it is deemed to be a minor mineral. In paragraph No.16 of the aforesaid decision, the Apex Court held thus :-

“16. 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 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.”

8 Thus, the Apex Court held that for applying Sub-Section (7) of Section 48 to extraction of ordinary earth, the relevant consideration is the use/purpose for which the excavated earth has been put to. It was further observed that excavation undertaken to lay the foundation of a building would not, ordinarily, carry the intention to use the excavation of the earth for the purposes of filling up or levelling. Merely because there was digging of earth, the liability under Sub-Section (7) of Section 48 is not attracted. To decide whether the liability is attracted, determination of the end use of the earth will have to be made.

9 Perusal of the impugned order of the Tahsildar shows that determination which is contemplated by the Apex Court in terms of paragraph 16 above has not been made.

10 In the light of the decision of the Apex Court, the Tahsildar, before passing the impugned order ought to have applied his mind to the following issues :-

- 1] Whether there was an illegal excavation of the earth made by the petitioners from the concerned lands as stated in the report dated 13th December, 2014 of Talathi;

- 2] If it is established that there was such excavation, what was the use/purpose for which the excavated earth had been put to;

Thus, the Tahsildar was required to make precise determination of the end use of the excavated earth.

11 As the Tahsildar has not made any such adjudication as indicated above, the matter will have to be remanded to the Tahsildar for redetermination.

12 We have perused the affidavit of Shri Rajendra Bhimrao Chavan, Tahsildar, Khalapur which is dated 24th March, 2017. We find that he has already taken a stand that the petitioners are liable under Sub-Section (7) of Section 48 of the said Code.

13 Therefore, if Shri Rajendra B. Chavan continues to be the Tahsildar of Khalapur, the District Collector will have to transfer the enquiry to any other officer empowered to exercise powers under Sub-Section (7) of Section 48 of the said Code.

14 Hence, we pass the following order :-

ORDER

- (i) The impugned order dated 2nd July, 2015 is hereby quashed and set aside;
- (ii) We direct the Tahsildar, Khalapur to make a fresh adjudication on the show cause notice issued by him after giving an opportunity of being heard to the petitioners;
- (iii) The Tahsildar shall decide the show cause notice in the light of the observations made in this judgment and order;
- (iv) All issues including the contentions raised in the reply are kept open;
- (v) We direct the petitioners to submit a copy of this judgment and order in the office of the District Collector, Raigad. If the District Collector, Raigad finds that Shri Rajendra B. Chavan is still holding the post of Tahsildar, Khalapur, he shall transfer the enquiry on the basis of show cause notice to any other Revenue Officer having jurisdiction to pass an order under Sub-Section (7) of Section 48 of the said Code;
- (vi) The Tahsildar, Khalapur or the officer to whom the enquiry is entrusted by the District Collector shall pass

an appropriate order in accordance with law as expeditiously as possible and in any event on or before 31st July, 2017;

(vii) If the Tahsildar or the officer nominated by the Collector comes to the conclusion that the petitioners are liable to pay certain amount, time of one month shall be granted to the petitioners to pay the said amount from the date on which copy of the order is served to the petitioners;

(viii) All contentions on merits are kept open;

(ix) Rule is made absolute on above terms.

(A.K. MENON, J)

(A.S. OKA, J)