IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 11351 OF 2014

ITD Cementation India Limited ..Petitioner.

Vs

1. The State of Maharashtra and Ors. .. Respondents

Mr. G.S.Godbole, Senior Advocate a/w Ms Mansi Patel, Advocate for Petitioner.

Mr. S.D.Rayrikar, A.G.P for Respondents no. 1 to 3.

CORAM : R.G.KETKAR,J.
DATE : 04/05/2017

PC:

1. Heard Mr.G.S.Godbole, learned senior counsel for the petitioner and Mr. S.D.Rayrikar, learned A.G.P for respondents no.1 to 3 at length. Mr.Godbole seeks permission to delete respondents no. 4 and 5 from the proceedings on the ground that they are formal parties and no relief is claimed against them. In view thereof, on the motion made by Mr. Godbole, leave to delete respondents no. 4 and 5 is granted. Amendment shall be carried out forthwith.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged: (i) Notices dated 11.9.2013 (at Exhibit-G, page 235); (ii) dated 12.9.2013 (at Exhibit G-1, page 236); (iii) dated 18.10.2013 (at Exhibit-I, page 242); and (iv) Order dated 18.12.2013 (at Exhibit-J page 243);

issued/passed by respondent no.2-Tahasildar, Satara.

3. Respondent no.2 has issued notices dated 11.9.2013, 12.9.2013, 18.10.2013 under Section 48(7) of the Maharashtra Land Revenue Code,1966 (for short, 'Code') calling upon the petitioner to show cause as to why penal action under section 48(7) of the Code should not be taken against the petitioner. By order dated 18.12.2013, respondent no.2 has directed that royalty of Rs.67,46,000/- together with penalty of Rs.3,84,52,200/-, in all 4,51,98,200/-, is payable by the petitioner within eight days failing which the same will be recovered as a land revenue.

4. Rule. Mr.Rayrikar waives service on behalf of the respondents. Having regard to the narrow controversy raised in this Petition and at the request and by consent of the parties, Rule is made returnable forthwith and petition is taken up for final hearing.

5. The petitioner is a Company incorporated under the Companies Act, 1956 on 20.1.2010. The petitioner is engaged in the business of various civil, mining, highways and other engineering works. A consortium of M/s Reliance Infrastructure Ltd and M/s Jiangsu Provincial Transportation Engineering Group Company, i.e. P.S.Toll Company was awarded a tender for construction of road project. The said P.S.Toll Company entered into a Concession Agreement on 10.3.2010 for the purpose of

execution of the said road project. A construction agreement was executed between the petitioner and Reliance Infrastructure Ltd. Mr. Godbole submitted that respondent no.2 issued notices under Section 48(7) of the Code, inter-alia, on the ground that the petitioner has unauthorizedly excavated minor minerals from the earth without any transportation pass or licence and, therefore, show cause why action against the petitioner should not initiated under section 48(7) of the Code.

6. Mr.Godbole has relied upon the decision of the Apex Court in the case of Promoters and Builders Association of Pune Vs. The State of Maharashtra, (2015) 1 Bom.C.R. 26 and in particular paragraphs 16 and 17 thereof. He also relied upon order dated 13.1.2015 passed by Division Bench of this Court (Coram: A.S.Oka and A.K.Menon, JJ.) in Writ Petition No.2743 of 2010 (Rahul Rasiklal Nahar and Ors Vs. State of Maharashtra and Ors). Mr. Godbole relied upon amended Rule 46(i) of the Maharashtra Minor Mineral Extraction (Development and Regulation) Rules, 2013, which lays down that no royalty shall be required to be paid on earth which is extracted while developing a plot of land and utilized on the very same plot for land levelling or any work in the process of development of such plot. He submitted that in view thereof, it is necessary to direct the second respondent to adjudicate the notices after setting aside order dated 18.12.2013 at Exhibit J, Page 243.

7. On the other hand, Mr.Rayrikar submitted that the petitioner has an equally efficacious alternate statutory remedy by filing Appeal under Section 247 of the Code. He, therefore, submitted that this is not a fit case for invocation of powers under Article 227 of the Constitution of India.

8. Mr. Godbole invited my attention to paragraph 3 of the order dated 13.12.2015 passed by Division Bench of this Court in Writ Petition No. 2743 of 2010 where the Division Bench considered similar objections about alternate remedy of filing appeal against the notices under the Code. The Division Bench of this Court, in the light of the law laid down by the Apex Court, observed that instead of relegating the petitioners to the remedy of appeal, would be appropriate to deal with the merits of the controversy.

9. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, respondent no.2 has issued notices on 11.9.2013, 12.9.2013 and 18.10.2013 calling upon the petitioner to show cause as to why action under section 48(7) of the Code should not be initiated.

10. In the case of Promoters and Builders Association, Pune (supra), the Apex Court considered the provisions of Section 48(7) of the Code as also the provisions of the Mines and Minerals (Development and Regulation) Act, 1957. In paragraphs

16 and 17, the Apex Court observed 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 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.
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> 17. Insofar as the appeal filed by the Nuclear Power Corporation is concerned, the purpose of excavation, ex facie, being relatable to the purpose of the grant of the land to the Corporation by the State Government, the extraction of ordinary earth was clearly not for the purposes spelt out by the said Notification dated 03.02.2000. The process undertaken by the Corporation is to further the objects of the grant in the course of which the excavation of earth is but coincidental. In this regard we must notice with approval the following views expressed by the Bombay High Court in Rashtriya Chemicals and Fertilizers Limited v. State of Maharashtra and Ors, AIR 1993 Bombay 144 while dealing with a somewhat similar question.
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>> 14. If it were a mere question of Mines and Minerals Act, 1957 covering the removal of earth, there cannot be possibly any doubt whatever, now, in view of the very wide definition of the term contained in the enactment itself, and as interpreted by the authoritative pronouncements of the Supreme Court. As noted earlier, the question involved in the present case is not to be determined with reference to the Central enactment but with reference to the clauses in the grant and the provisions in the Code. When it is noted that the Company was given the land for the purpose of erecting massive structures as needed in setting up a chemical

> factory of the designs and dimensions of the company, the context would certainly rule out a reservation for the State Government of the earth that is found in the land. That will very much defeat the purpose of the grant itself. Every use of the sod, or piercing of the land with a pick-axe, would, in that eventuality, require sanction of the authorities. The interpretation so placed, would frustrate the intention of the grant and lead to patently absurd results. To equate the earth removed in the process of digging a foundation, or otherwise, as a mineral product, in that context, would be a murder of an alien but lovely language. The reading of the entire grant, would certainly rule out a proposition equating every pebble or particle of soil in the granted land as partaking the character of a mineral product. In the light of the above conclusion, I am clearly of the view that the orders of the authorities, are vitiated by errors of law apparent on the face of the record. They are liable to be quashed. I do so."

11. In view thereof, it is necessary for respondent no.2-Tahasildar to determine the use/purpose for which the excavated earth is put to. As observed by the Apex Court, 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. The Apex Court also quoted with approval the decision of this Court in the case of Rashtriya Chemicals and Fertilizers Limited Vs. State of Maharashtra and Ors, AIR 1993 Bombay 144.

12. In view thereof, the order dated 18.12.2013 passed by respondent no.2 without determining the use/purpose of

excavation is liable to be set aside. Hence, the following order.

(i) Impugned order dated 18.12.2013 is set aside.

(ii) The petitioner is at liberty to file additional reply to the show cause notices. The Tahasildar will determine the liability keeping in mind the decision of the Apex Court in the case of Promoters and Builders Association, Pune (supra) as also the provisions of the Maharashtra Minor Mineral Extraction (Development and Regulation) Rules, 2013 as amended in 2015. All contentions of the parties on merits are expressly kept open.

(iii) Mr.Godbole assures that the petitioner will file additional reply within four weeks from today and will appear before Respondent no.2-Tahsildar after six weeks, i.e. 13.6.2017. Respondent no.2-Tahasildar will fix a suitable date and will decide the proceedings within eight weeks thereafter.

(iv) Rule is made absolute accordingly with no order as to costs.

(R.G.KETKAR, J.)