

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO. 10845 OF 2017**

Tata Projects Limited,
a Company registered under the
Companies Act, 1956 having its
registered office at
1-7-80 to 87, Prenderghast Road,
Secunderabad-500003.

....Petitioner.

Vs.

1 The State of Maharashtra
through the Government Pleader
High Court, Mumbai.

2 The Revenue and Forest Department
of the State of Maharashtra through the
Collector of Bombay having his
Office at Old Custom House,
Shaheed Bhagat Singh Marg,
Fort, Mumbai-400001.

3 The Additional Collector (R/B)
Old Custom House, Shaheed Bhagat
Singh Marg, Fort, Mumbai-400001.

....Respondents.

Mr. V. Shridharan, Senior Advocate a/w Mr. Prakash Shah and Jus
Sanghavi i/by PDS Legal for the Petitioner.

Mr. A.I. Patel, Additional G.P. a/w Ms. Jyoti P. Jadhav, AGP for the
Respondents.

**CORAM : ANOOP V. MOHTA AND
MANISH PITALE, JJ.
DATE : 8 NOVEMBER 2017.**

ORAL JUDGMENT (PER ANOOP V. MOHTA, J.):-

Rule. Rule is made returnable forthwith.

2 By consent, heard finally the learned Senior counsel appearing for the Petitioner and the learned AGP for the Respondents.

3 The Petitioner has invoked Article 226 of the Constitution of India by referring to the provisions of the Mines and Minerals (Development and Regulation) Act, 1957 (for short, “*the Act*”) read with the Maharashtra Minor Mineral Extraction (Development and Regulation) Rules, 2013 and thereby prayed for declaration that the materials excavated by the Petitioner for the purposes of constructing the Mumbai Metro Underground Project (“*the metro project*”) are not “*minor minerals*” contemplated as per Notification dated 3 February 2000, (“*the notification*”); and that the Petitioner is not liable to pay any “*royalty*” on such excavated earth. Therefore, prayed for the refund of the amount already paid, under protest.

4 The Petitioner is one of the members of a Consortium namely CEC-ITD CEM-TPL Joint Venture with M/s. ITD Cementation India Limited and M/s. Continental Engineering Corporation. For the metro project, they have to excavate the earth from many areas and underground tunnels regularly. In view of the provisions of the Act and the Rules, they have applied accordingly from time to time. There was demand of royalty for such excavated earth, the Petitioner has been depositing the amount, under protest. The Petitioner has moved the applications with the details along with the orders of the Supreme Court and the provisions of law. The Petitioner has requested the Respondents to consider their grievances before granting the conditional permission of penalty for excavation and prayed for the refund. Those pending representations are part of the record.

5 The law is settled that the demand of any such “royalty” by the Competent Authority, and/or agency must be within the framework of law. The minor minerals are the property of the Government and the same cannot be removed and used without

payment of royalty. The whole purpose of monitoring such excavation is to ensure that no minerals will be excavated and used without payment of royalty. However, the Respondent-Authority are authorized to claim royalty based upon the provisions of the Act and the Circulars so issued from time to time. The contractor/builder is liable to pay the royalty based upon the actual use in the work and subject to fulfillment of the conditions so provided.

6 The Apex Court in Promoters and Builders Association of Pune Vs. State of Maharashtra & Ors.¹, has dealt with the very aspect by referring to the provisions of Act and Rules as under:-

“14. Though Section 2(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 embankment, roads, railways and buildings which alone is a minor mineral. Excavation of ordinary earth for uses not contemplated in the aforesaid notification, therefore,

1 2015 (12) SCC 736

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.

16. 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 3-2-2000. 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.”

7 The above observations required to be taken note of by the Respondents before insisting for such royalty. The Respondents, though requested by the Petitioner from time to time, to refund the amount in view of the above observations and the position of law, have unable to take any reasoned decision. On the contrary, they have been regularly insisting for royalty for the excavation of the earth for the development of the project. The judicial notice is required to be taken in the matter of this nature, as until such project is completed, such excavation of the earth will be the regular features for all the concerned developers, builders, and the parties. The Application for permission so required under the law is *sine-qua-non* and therefore, everybody concerned need to apply for the same. However, while granting the permission, the insistence of the royalty in advance in view of above position of law, is required to be adjudicated first to avoid the complications in the matter. There should be finding, based upon the facts and the details of use and utilization of excavated earth for the stated purpose. It is therefore, desirable that the Respondents to take decision at the earliest on the representations/applications so made by the Petitioner. The reasoned

order ultimately can be the foundation for such claim/royalty in future also.

8 The building/project operations undertaken by the developer/contractor, based upon the permission/sanction, cannot be treated as unlawful and illegal. The sanction/permission so required for such extraction of earth/digging up of the land for filling or leveling purpose, use of sand/minerals that itself cannot be treated as commercial purpose, unless actually used for it. There is no finding that the Petitioner has used the excavated earth for any commercial purposes or such related purposes.

9 Strikingly, by notification dated 11 May 2015 there is amendment to Rule 46. The relevant part is reproduced as under:-

“3. In rule 46 of the Principal Rules :-

(a) for the sub-rule (i), the following sub-rule shall be substituted, namely :-

“(i) The lessee shall pay royalty on minor minerals removed from the leased area at the rates specified in Schedule I :

Provided that, such rates shall be revised once in every three years :

Provided further 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”;
(b) in the sub-rule (v), for the words “as specified by the Government, from time to time,” the words “at the rate specified in Schedule II” shall be substituted.”

10 This amendment is after the Supreme Court Judgment passed in Promoters and Builders Association (Supra). On the date of impugned order/communication /action, the effect of this amendment ought not to have been overlooked. The earth so extracted while developing a plot of land and utilized on the very same plot of land in levelling for the process of developing such plot, no royalty requires to be paid/collected. Therefore, in view of clear position of law so recorded above, unless there is a clear findings given by the Authority after giving opportunity to the parties, that the said earth is used and/or utilized for any commercial purpose and/or the earth so extracted not used and utilized on the very same plot of land, there is no question of imposing any royalty.

11 In the present case, we have noted that there was no such finding and/or conclusion drawn even before issuing or raising such demand of royalty. The Petitioner has paid the royalty under protest inspite of above position of law and facts. We are of the view that the

concerned Authority needs to decide their representation/Application for refund, in accordance with law, at the earliest. The whole demand of penalty is unjust, unsustainable, contrary to the provisions of the Act and Rules and reflects non-application of mind to the position of law and wrong exercise of discretion and the jurisdiction, therefore, it is illegal.

12 Hence the following order:-

ORDER

- a) By keeping all contentions open, Writ Petition is disposed of by directing Respondent No.3 to decide and to take an appropriate and reasoned decision expeditiously on the representations/Application filed by the Petitioner for refund of the amount and for requisite permission, including the leviability of any royalty, in accordance with law.
- b) As suggested, the parties to appear on 17 November 2017 at 11.00 a.m. in the office of Respondent No.3, at Mumbai.
- c) Respondent No.3 to fix the schedule and dispose of

the Applications, as early as possible, preferably within period of six weeks thereafter.

- d) If it is found that the Appellant is entitled to refund of any amount, an appropriate consequential action may be taken without delay.
- e) Rule disposed of, accordingly.
- f) No costs.

(MANISH PITALE, J.)

(ANOOP V. MOHTA, J.)