

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO. 12169 OF 2017**

Agile Real Estate Private Limited, a company
incorporated under the Companies Act, 1956,
having its registered office at 101, Kalpataru
Synergy, Opp. Grand Hyatt, Santacruz (East),
Mumbai-400 055.

....Petitioner.

Vs.

- 1 State of Maharashtra,
Through the Ministry of Forests and
Revenue, Through Office of
Government Pleader (A.S.),
High Court Bombay.
- 2 The Tahasildar, Thane,
Office of the Tahasildar Thane,
Station Road, Thane (West), 400 601,
Through Office of Government Pleader (A.S.),
High Court Bombay.
- 3 Talathi Saza Balkum,
Office at Village- Balkum, Taluka and Dist.
Thane (West), 400 601,
Through Office of Government Pleader (A.S.),
High Court Bombay.

....Respondents.

Dr. Milind Sathe, Senior Advocate a/w Mr. Saket Mone, Mr. Vishesh Kalra, Mr. H.B. Savant, Mr. Subit Chakrabarti, Ms. Neha Joshi i/by Vidhii Partners for the Petitioner.

Ms. Jyoti Jadhav, AGP for the Respondents.

**CORAM : ANOOP V. MOHTA AND
MANISH PITALE, JJ.**

DATE : 16 NOVEMBER 2017.

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

Rule is made returnable forthwith.

Heard finally the learned Senior Counsel appearing for the Petitioner and the learned AGP for the Respondents.

2 The basic events leading to file this Writ Petition are-

The Petitioner is engaged in the business of real estate development with focus on development of premium residential, commercial, retail, integrated townships, lifestyle gated communities and re-development projects, primarily in the Mumbai Metropolitan Region and Pune. The Petitioner is the owner of various lands situated at revenue village Balkum in Thane district, which not include Survey Nos. 203/13 and 203/14. There is Notification dated 5 May 2015, amending the Maharashtra Minor Minerals Extraction (Development and Regulation Rules) 2013 (*“the Rules”*) to the effect that no royalty shall be required to be paid on earth extracted whilst developing the plot which is used for development of the same plot. On 30 March 2017, the Competent Authority granted two separate

permissions to the Petitioner to excavate the minor minerals to the extent of 20,000 brass and 10,000 brass respectively. On 13 April 2017, the Petitioner received notice from Respondent No.2-the Tahasildar, Thane calling the Petitioner the written clarification with relevant documents so as to show that the Petitioner had necessary permissions for carrying out excavation of minor minerals to the tune of 541 brass and 1502 brass on lands, including lands at Hissa No. 203/13 and 203/14. On 25 April 2017, the Petitioner replied to the notice and pointed out that the Petitioner has paid all the dues and possesses necessary permission dated 30 March 2017, for carrying out excavation on the site. On 1 November 2017, at 12.45 p.m. the Petitioner received impugned notice dated 30 October 2017. On the same day, at 3.55 p.m., the Petitioner received impugned order dated 6 September 2017, wherein Respondent No.2 has alleged that the Petitioner has excavated 2043 brass of minor minerals and bound to pay the sum aggregating to Rs.2,12,47,202/- within a period of seven days from the receipt of the order. Being aggrieved by the same, the Petitioner has filed the present Writ Petition.

3 The learned Senior Counsel appearing for the Petitioner has placed on record a recent Judgment of this Bench (*Coram: Anoop V. Mohta and Manish Pitale, JJ.*) passed in Writ Petition No.10845 of 2017, (Tata Projects Limited Vs. The State of Maharashtra & Ors.) dated 8 November 2017, by referring to the facts, circumstances and the similar provisions of the law and the Supreme Court Judgment passed in Promoters and Builders Association of Pune Vs. State of Maharashtra & Ors.¹. The relevant paragraphs of the Judgment Tata Projects Limited (supra) are as under-

“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.², 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

1 2015 (12) SCC 736

2 2015 (12) SCC 736

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, 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.

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.”

4 After going through the impugned order/notice, we have noted that while passing the impugned order/notices, there was no

reference made to the specific provisions and the reasons referred in the Supreme Court Judgment (Promoters and Builders Association of Pune (Supra)). The facts of no personal hearing given is also undisputed. Attachment order dated 30 October 2017 was issued even before serving impugned order dated 6 September 2017.

5 The important factor is, which is clear from the punchanama and the findings in the impugned order, that the excavated earth is still lying on the site. The amended provisions, so referred above, make the position very clear that if it is used and utilized for the same project/development, the Respondents are not permitted to demanding such royalty. Nothing is mentioned and/or referred about the same on facts. Therefore, taking overall view of the matter, in our view, the Authority has misdirected itself and misused and revoked wrongly the provisions by taking such drastic action of attachment and demand of such royalty. This is unsustainable and liable to be quashed and set aside, as it breaches the provisions of law, apart from the principle of natural justice. Therefore, we are inclined to quash and set aside both the actions/orders and direct the Respondents to re-consider the case by

giving opportunity to the Petitioner and pass the reasoned order by keeping in mind the provisions of law, as referred above.

6 Therefore, the following order:-

ORDER

- a) Impugned order dated 6 September 2017 and notice dated 30 October 2017 passed/issued by Respondent No.2-the Tahasildar, Thane are quashed and set aside, so also related actions.
- b) The Respondents are at liberty and free to take steps in accordance with law.
- c) Writ Petition is allowed.
- d) Rule made absolute, accordingly.
- e) No costs.

(MANISH PITALE, J.)

(ANOOP V. MOHTA, J.)