IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1429 OF 2020

M/s. Atharva Construction, a Proprietary concern, through its Proprietor Milind Kacheshvar Jadhav, Flat No.1104, Building No.9, Ozan Vally, Parsik Nagar, Kharghar, Thane-Mumbra Road, Thane – 400 405.] … Petitioner

Versus

1. The State of Maharashtra, Through Urban Development Department Secretary, Urban Development Department, Mantralaya, Mumbai.]
2. Thane Municipal Corporation Through Municipal Commissioner, having office at Dr. Almeda Road, Chandanwadi, Panchpakhadi, Thane – 400 602.] … Respondents

…

Dr. Uday P. Warunjikar for the Petitioner.

Mr. Y.S. Khochare, A.G.P. for Respondent No.1 -State.

Mr. Mandar Limaye for Respondent No.2-Corporation.

…

ALONG WITH

WRIT PETITION NO.1430 OF 2020

M/s. Shapoorji Pallonji & Co. - KIPL (JV)]
having office at S.P. Center, 41/44, Minoo]
Desai Marg, Colaba, Mumbai – 400 005.] … Petitioner

Versus

1. The State of Maharashtra,]
   Through Urban Development]
   Department, Mantralaya, Mumbai.]
2. The State of Maharashtra,]
   Through Revenue & Forest]
   Department, Mantralaya, Mumbai.]
3. Collector at Thane,]
   Through Government Pleader,]
   Appellate Side, High Court, Bombay.]
4. Thane Municipal Corporation]
   Through its City Engineer, Thane.] … Respondents

…

Dr. Uday P. Warunjikar for the Petitioner.

Mr. Y.S. Khochare, A.G.P. for Respondent Nos.1 to 3.

Mr. Mandar Limaye for Respondent No.4-Corporation.

…

CORAM : PRADEEP NANDRAJOG, C.J. &
SMT. BHARATI DANGRE, J.

DATED : 13TH FEBRUARY, 2020.

JUDGMENT:- [Per: Smt. Bharati Dangre, J.]

1. The two Writ Petitions revolve around congruent facts and, hence, they were heard together and are being disposed of by this singular order.

2. The Thane Municipal Corporation invited tenders for providing, laying and commissioning of gravity sewer along with construction of a manhole for sewerage zone in certain areas in Thane City. The Petitioner in Writ Petition No.1429 of 2020 participated in the tender process and was issued with a Work Order on 02nd February, 2018 for the work to be carried out in Kalwa Prabhag Samiti in Thane City. The time limit for completion of the work which was allotted was stipulated to be twelve months : time to be reckoned from the date of issuance of the Work Order. Another tender was floated for construction of supply, erection, testing and commissioning as well as start up of three Sewerage Treatment Plants with performance run along with operation and maintenance of the three Sewerage Plants and three Sewerage Pumping Stations for five years. The Petitioner in Writ Petition No.1430 of 2020 participated in the tender process floated by the Thane Municipal Corporation and the bid offered by him for an amount of ₹72,88,98,150/- was accepted. The Thane Municipal Corporation

issued a Work Order to the Petitioner on 16th December, 2014 and the work which was to be completed within time span of twelve months was granted extension from time to time and the duration of the work to be undertaken was extended till 30th June, 2018 by freezing indices as on December, 2015.

3. The Petitioners in both the Writ Petitions are aggrieved by the notice received by them dated 30th September, 2019 demanding royalty in terms of the Government Resolution issued by the State Government. In the first Petition, the royalty for the two works allotted in favour of the Petitioners is to the tune of ₹1,38,32,800/- and ₹19,59,200/- respectively whereas in case of the Petitioner in Writ Petition No.1430 of 2020, the royalty demanded is of ₹44,78,000/-.

4. The impugned notices make a reference to the letter issued by the Urban Development Department on 06th June, 2019. The notices state that the work was awarded in favour of the Petitioners by the Thane Municipal Corporation and as per the said Work Order, certain compliance were imperative including payment of royalty for digging and, since there was neglect to pay the royalty to the Government, seven days' time was granted to the noticee to comply with the direction of payment and obtain a 'No Due Certificate'. Failure to pay the said amount contemplated invocation of Bank Guarantee and stoppage of further payment till the amounts from the Bank Guarantee were recovered. These notices are assailed in the two Writ Petitions.

5. The contention of the Petitioners is plan and simple. According to them, the work allotted comprised in the Scheme floated by the Central Government being Jawaharlal Nehru Urban and Rural Mission (JNNURM) and they were the successful bidders. According to the Petitioners, the work to be undertaken by them involved removal of earth, laying down and commissioning of the gravity sewer for a Sewerage network and construction of a manhole in the first Work Order and in the second Work Order, it involved the construction and commissioning of the Sewerage Treatment Plants and Sewerage Pumping Stations, which necessarily involved excavation of earth as well as minor minerals underneath. In the wake of the peculiar activity to be carried out, the excavated material was stored by the Petitioners at the site allotted by the Thane Municipal Corporation. The excavated material was then put to use for the purpose of back-filling and the quantity of the excavated and back-filled material was certified by the officials of the Thane Municipal Corporation. The Petitioners have placed on record the chart certifying the same. The balance quantity transported to the Thane Municipal Corporation and stored in its plot also form part and parcel of the said certificate. It is the specific case of the Petitioners that the royalty directed to be deposited, as a part of tender condition, has been deposited by them.

6. The contention of the Petitioners is that there is no "mining" in strict sense and the material in the form of minerals / earth which was

excavated for undertaking the work of construction has been redeployed in the activity of construction. According to the Petitioners, this was done with the prior permission of the Authorities since the tender which was floated and the Work Order which was awarded in favour of the Petitioners contemplated the activity of construction.

7. The Petitioners find justification for their claim in the position of law laid down by the Apex Court in the case of *Promoters and Builders Association of Pune v. State of Maharashtra & Ors.* : (2015) 12 SCC 736, thereby expounding the scope of Section 48(7) of the Maharashtra Land Revenue Code , 1966 in relation to the penalty to be imposed for extraction / removal of any minerals vested in the State.

The Apex Court while quashing and setting aside the judgment delivered by a Division Bench of this court in the case of *Promoters and Builders Association of Pune v. State of Maharashtra & Ors.* : 2010 (7) Mh.L.J. 577, has held that a bare reading of sub-section (7) of Section 48 of the Maharashtra Land Revenue Code made it clear that the quintessence of the provisions is the extraction / removal of any minerals vested in the State without lawful authority or without lawful assignment by the State. It has further been held that the use can only follow extraction or excavation and, therefore, the purpose of excavation must be seen. In paragraph 15 of the said Law Report, the position of law is culled out by Their Lordships in the following words:

> "*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.*"

8. In the light of the law declared by the Apex Court, the State of Maharashtra has effected an amendment in the Maharashtra Minor Mineral Extraction (Development and Regulation) Rules, 2013 and in Rule 46, the following sub-rule has been substituted in place of the original sub-rule (i), which reads thus:

> "*(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".

9. The Petitioners seek extension of the proviso contained in sub-rule (i) of Rule 46 of the Rules of 2013 as amended in 2015 to them, in contesting the demand of royalty.

10. Perusal of the amended Rules leave no doubt in our mind that the case of the Petitioners falls strictly within the second proviso which contemplate a situation where the earth extracted while developing a plot of land is utilized on the very same plot for carrying out an activity of levelling the land or any work in the process of development of such plot. In such situation, the Rules contemplate that no royalty is liable to be paid. The Petitioners' specific case as set out is that the material excavated while digging the land for carrying out an underground sewerage in the first case and in the second case for the construction of Sewerage Treatment Plants and Sewerage Pumping Stations involved excavation of material which was consumed by back-filling the same on the same plot. The Certificate placed on record also confirms the said statement and reflect that the balance quantity was transported on the plot of the Thane Municipal Corporation. Thus, the Petitioners have

not used the said material by monitising the same or gainfully exploiting it. The material has been used for filling or levelling while development activity was undertaken and this, in our considered opinion by applying the law laid down by the Apex Court in the case of *Promoters and Builders Assocaition of Pune (supra)*, would not amount to a mining activity so as to attract the provisions of the Maharashtra Land Revenue Code and surely not the penalty leviable under the same.

11. The Petitioners are denied the benefit of the law laid down by the Hon'ble Apex Court and the proviso appended to Rule 46 of the Maharashtra Minor Mineral Extraction (Development and Regulation) Rules, 2013 on the pretext that the Notification issued by the State Government on 12th January, 2018 do not contemplate a retrospective effect since the work was allotted to the Petitioners prior to the said period, the benefit cannot be extended.

12. We are unable to accede to the stand taken by the Respondents. It is settled position of law that when the highest court of this country interprets a provision of law, it conveys that the statutory provision always carried the said interpretation and declaration unless and until specified by the Apex Court to be prospective in operation, would be construed as has been declared by the Court. In the case of *Promoters and Builders Association of Pune (supra)* in the absence of the proviso exempting the utilization of the minerals for development of the plot an exemption from payment of royalty, the position of law is enunciated by

the Apex Court : the redeployment of the earth in laying foundation of the building without any commercial usage would not attract penalty under Section 48(7) of the Maharashtra Land Revenue Code since the excavation *ex-facie* being relatable to the purpose of grant of land and the excavation was coincidental. The underlying principle that the State being the owner of all the mines and minerals, the royalty is payable only when there is excavation without permission and for monitisation. However, this proposition of law is armed with a caveat that there cannot be a blanket determination of no liability and a precise determination of end use of extracted earth must be undertaken. The notices issued to the Petitioners lack any details except alleging that approximately 20% to 30% material which was excavated have been used at some other place. Barring this, no details of the quantity as alleged to be transported finds place in the notice. The royalty has been charged on the entire excavated quantity as per the bills without undertaking the exercise of ascertaining what quantity has been used for re-filling and what has been transported. In absence of particulars being contained in the Show Cause Notices, the direction contained in the impugned notice to pay the royalty in terms of the policy decision of the State Government contained in the direction issued to the Commissioner of the Thane Municipal Corporation on 06th June, 2019 cannot be justified in law. We, however, record that if the State Government, from the bills remitted to the Petitioners is able to discern the exact quantity of the excavated material, which has been commercially exploited by the Petitioners, it is at liberty to issue a fresh notice based on the same and by affording an opportunity to the

Petitioners to deal with the same and initiate an action, we quash and set aside the impugned notices dated 30th September, 2019 issued to the Petitioners.

13. In the light of the aforesaid direction, the Writ Petitions are allowed in terms of prayer clauses (a) and (b).

(SMT. BHARATI DANGRE, J.) **(CHIEF JUSTICE)**

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