Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL APPLICATION NO.25 OF 2021
IN
WRIT PETITION NO.214 OF 2020

RAJARAM BANDEKAR (SIRIGAO)
MINES PRIVATE LIMITED,
a Company set up under the
Companies Act, 1956, with its
Registered Office at 601, 6th floor,
Dr. Ozler Forum, near
St. Andrews' Church,
Vasco-Da-Gama, Goa 403802.
(represented by its director,
Rajan N. Bandekar, aged 51 years
601, 6th floor, Dr. Ozler Forum,
Vasco da Gama, Goa. …APPLICANT/ PETITIONER

Versus

1. THE STATE OF GOA, through
its Chief Secretary, Secretariat,
Alto Porvorim, Bardez, Goa.

2. DIRECTOR OF MINES & GEOLOGY,
Directorate of Mines & Geology,
Government of Goa,
Menezes Braganza Institute,
Panaji, Goa 403001.

3. THE NORTH GOA DISTRICT
MINERAL FOUNDATION,
a Trust established under
Section 9B(1) of the Mines and
Minerals (Development and Regulation)

Act, 1957, (Represented by its Chairman,
District Magistrate (North),
Panaji, Goa). ...RESPONDENTS

Mr. A. F. Diniz, Senior Advocate with Mr. Ryan Menezes, Ms. Gina Maria Almeida & Mr. N. Fernandes, Advocates *for the applicant.*

Mr. D. Pangam, Advocate General with Ms. Maria Correira, Additional Government Advocate *for the State.*

CORAM: M. S. SONAK &
M. S. JAWALKAR, JJ
DATED: 1st September 2021

P.C.:

1. The Writ Petition challenging the Proviso to Rule 13(1)(b) of the Goa District Mineral Foundation (Trust) Rules, 2018 (said Rules) has already been admitted. By this application, the applicant seeks for a stay on the operation and implementation of the impugned Proviso and further, to direct immediate return of any amounts that may have been deposited/paid by the applicant herein, under the said Proviso.

2. Mr. Diniz, learned counsel for the applicant submits that the impugned Proviso is *ultra vires* Section 9B of the Mines and Minerals (Development & Regulation) Act, 1957 (MMRD). He submits that under the Proviso to Section 9B(3), only the Central Government can give directions regarding the composition and utilization of funds by the District Mineral Foundation (DMF).

He submits that the impugned Proviso, made by the State Government, is, therefore, *ultra vires* the rule-making powers conferred upon the State Government.

3. Mr. Diniz further submits that in any case, the Proviso is illegal, arbitrary, unreasonable, null, and void. He submits that the entire purpose of establishing DMF is to take up, *inter alia* environmental preservation and pollution control measures incidental to mining activities in a specified area. He submits that if some measures are necessary on account of mining pollution, then, the funds from DMF ought to be allowed to be used for the said purpose. He submits that the Proviso, to the extent it excludes the activities meant to be taken up under the "*polluter pays principle*" is *ex facie* illegal, unreasonable, arbitrary, and unconstitutional. He submits that excluding this class of activities amounts to discrimination and therefore, the impugned Proviso is liable to be declared as *ultra vires* and struck down.

4. Mr. Diniz relies on the ***Order dated 14.08.2021 in Agij Promotion of Nineteenonea Media Pvt. Ltd & Ors. v. Union of India & Anr. - Writ Petition (L) No.14172/2021***, in which, the Division Bench of this Court, (Principal Bench) stayed the implementation of Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, on the ground that they are *ultra vires* the Information Technology Act, 2000 and the provisions of Articles 14, 19(1)(a) and 19(1)(g) of the Constitution. Mr. Diniz also relies on the ruling in ***Samaj Parivartana Samudaya and Others v. State of Karnataka and Others – (2017) 5 SCC 434*** in support of his contention about the proper utilization of the contribution made to DMF.

5. Learned Advocate General submits that the petition as instituted proceeds based on a misconception as to the scope of Section 9B of the MMRD. Besides, he refers to the provisions of Sections 15 and 20A of the MMRD and submits that the impugned Proviso is entirely *intra vires* the provisions of MMRD. He submits that one of the considerations for enacting the impugned Proviso and excluding the activities under the "*polluter pays principle*" was the Order dated 16.09.2015 issued by the Central Government under Section 20A of the MMRD. He submits that there is nothing unreasonable or arbitrary about the Proviso. He submits that if the funds from the DMF were required to be spent for activities having nexus with the "*polluter pays principle*", then, the most polluting industries would virtually claim to be indemnified at the cost of the mining companies not causing any pollution. He submits that the contention raised on behalf of the applicant herein is what is unreasonable and not the impugned Proviso. He relies on ***Indian***

Council for Enviro-Legal Action and Others v. Union of India and Others – (1996) 3 SCC 212 to explain the "*polluter pays principle*".

6. According to us, no case has been made out by the applicant for a stay on the operation and implementation of the impugned Proviso. The prayer for the immediate return of the amounts that may have been paid/deposited by the applicant under the impugned Proviso, to say the least, is quite misconceived. There is a dispute as to whether any amounts have at all been paid by the applicant under the impugned Proviso. Mere contributions, if any, to the DMF, cannot by itself, be regarded as any payments made under the impugned Proviso.

7. In ***Bhavesh D. Parish & Ors. v. Union of India & Anr. - (2000) 5 SCC 471***, ***State of Tamil Nadu & Anr. V. P. Krishnamurthy & Ors. - (2006) 4 SCC 517*** and ***Global Energy v. CERC – (2009) 15 SCC 570***, the Hon'ble Apex Court has held that though there is a presumption in favor of constitutionality or validity of even subordinate legislation, the same can be challenged on the ground of legislative competence, violation of fundamental rights, manifest arbitrariness, and unreasonableness or to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling enactment; However, it is also held that unless a case of a much higher degree than a simple *prima facie* case is made out, there is no question of staying the operation of legislation whether primary or subordinate. In this matter, no such case has been made out by the applicant.

8. From the perusal of the provisions in Section 9B, 15, and 20A of the MMRD, we cannot say that any clear-cut case suggesting *ultra vires* has been made out by the applicant. At the highest, some issues are raised, which might require further consideration at the stage of the final hearing.

9. The affidavit filed by the respondents refers to the Order dated 16.09.2015 made by the Central Government in the exercise of powers conferred by Section 20A of MMRD. This order had directed the concerned State Governments to incorporate the Pradhan Mantri Khanij Kshetra Kalyan Yojana (said scheme) into the rules framed by DMF and to implement the said scheme. Now one of the clauses of the said scheme specifically excludes activities meant to be taken up under the "*polluter pays principle*". The affidavit filed on behalf of the State Government states that this was one of the reasons why the impugned Proviso excludes activities to be taken up under the "*polluter pays principle*". In such circumstances, no case is made out to stay the impugned Proviso on the ground that the same is *ultra vires* the MMRD.

10. On the aspect of the impugned Proviso being arbitrary or unreasonable, we are afraid, that not even a *prima facie* case was made out by the applicant. Acceptance of the applicant's contention would imply that the DMF funds could be consumed for compensating the victims of the pollution that may have been caused specifically by the applicant or similarly placed mining companies. The applicant seems to be under a misconception that its contribution to the DMF is in the nature of some insurance premium, which will indemnify or rather entitle the applicant to insist upon the utilization of the DMF funds, even in respect of the activities covered under the "*polluter pays principle*". Therefore, there is no case made out by the applicant for a stay on the operation and implementation of the impugned Proviso on the ground that the same is arbitrary or unreasonable.

11. The position in *Agij Promotion of Nineteenonea Media Pvt. Ltd. (supra)*, was not at all comparable to the position in the present case. Therefore, the interim order dated 14.08.2021 in the context of IT Rules, can be of no assistance to the present applicant. Incidentally, even this interim order, refers to the above decisions of the Hon'ble Supreme Court for determining the circumstances in which a stay can be granted to the implementation of subordinate legislation. Since in the present case, none of such parameters have been fulfilled, the application for stay deserves to be dismissed.

12. The ruling in *Samaj Parivartana Samudaya (supra)* is also of no assistance whatsoever to the applicant. The issue involved in the said matter was entirely different and the Hon'ble Supreme Court in fact rejected the contention that the iron ore lessees in the State of Karnataka should not be called upon to make any additional contribution, over and above the contribution that may have been made by them to the DMF. To this extent, this ruling is even against the contention now sought to be raised in this petition.

13. In *Indian Council for Enviro-Legal Action (supra)*, the Hon'ble Supreme Court has referred to an article by Carolyn Shelbourn – Journal of Planning and Environmental Law, August 1974 issue entitled *"Historic Pollution – Does the Polluter Pay?"* to explain the "*polluter pays principle*". This article states that the "*polluter pays principle*" demands that the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause the pollution or produce the goods which cause the pollution. *Under the principle, it is not* *the role of the Government to meet the costs involved in either prevention of such damage, or in carrying out remedial action, because the effect of this would be to shift the financial burden of the pollution incident to the taxpayer.*

14. In this case, if the contention of the applicant is to be accepted then, the financial burden for remedying the damage caused by a particular polluter will have to be shifted to the collective contributions made by the mining industry to the DMF. Therefore, we are unable to accept the applicant's case about any arbitrariness or unreasonableness in the impugned Proviso.

15. The applicant, in the petition, has not even bothered to furnish any details of the payments, if any, made by the applicant under the impugned Proviso. Therefore, the request that we should clarify that such payments will have to be refunded, in case the challenge succeeds, cannot be acceded to. Besides, there are several considerations involved at the stage of consideration of the request for a refund. Having regard to the absence of proper pleadings in this petition, we do not think that it would be safe to make any such direction at this stage.

16. For all the aforesaid reasons this application is dismissed.

M. S. JAWALKAR, J. **M. S. SONAK, J.**