

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

WRIT PETITION NO. 3240 OF 2022

(Krishna Developers – Honai Constructions (JV) thr. its Power of Attorney holder Mr. Babasaheb s/o Bhagorao Ghuge Vs. State of Maharashtra & Ors.)

WITH

WRIT PETITION NO. 3246 OF 2022

(Honai Constructions thr. its Power of Attorney holder Mr. Jaydhaval s/o Ashok Karkamkar Vs. State of Maharashtra & Ors.)

*Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders.*

Court's or Judge's order

Shri R.F. Totla with Shri S.A. Mohta, Advocate for the petitioners.

Ms. S.S. Jachak, Assistant Government Pleader for respondent No.1/ State.

Shri S.G. Jagtap with Shri A.M. Kukday, Advocate for respondent Nos. 2 and 3.

CORAM : A. S. CHANDURKAR AND URMILA JOSHI-PHALKE, JJ.

ARGUMENTS WERE HEARD ON : AUGUST 4, 2022.

ORDER IS PRONOUNDED ON : SEPTEMBER 13, 2022.

Since identical challenges have been raised in these Writ Petitions, they have been heard together and are being decided by this common order.

2. In Writ Petition No. 3240/2022, the petitioner has been issued a work order on 29/8/2009 of the Alewadi Larger Minor Irrigation Project. This was pursuant to the tender notice issued by respondent Nos. 2 and 3. In the said tender notice, various conditions were stipulated. As per Clauses 36 and 36(A) thereof, it was the responsibility of the Contractor to pay quarry fees, royalties, octroi dues and ground rent for stacking materials. The tendered rates were to be inclusive of all the liability under the Maharashtra Minor Mineral Extraction Rules. As per Clause 36(A), on failure of the Contractor in payment of quarry fees, royalties, etc., the requisite sum was liable to be withheld from the bills payable to the Contractor. The Contractor was to indemnify the Corporation of any claim of the Revenue Department in the matter of payment of quarry fees and royalties. It was stated that the Contractor was solely responsible for paying the quarry fees and royalty fees. As per Clause 33, the manner in which price variation was to be applied was stipulated. The same was in accordance with the formula for labour component, material component, formula for petrol, oil and lubricant component, etc. It was stipulated that apart from the criteria

mentioned, no other adjustment was liable to be made in the contract price for any reason whatsoever. In Writ Petition No. 3246/2022, on the basis of similar tender notice issued by the Corporation, the petitioner was issued a work order of Chondhi Larger Minor Irrigation Project. Similar Clauses such as Clauses 36, 36(A) and 33 were incorporated in the tender document. It is the case of the petitioners that in accordance with the work order, the work in question is being executed by them.

3. On 22/4/2021, the Corporation issued Circular No. 11 in the matter of payment of royalty on minor minerals. It was stated in the said Circular that the royalty amount on minor minerals was to be paid by the concerned Contractor. Since there was some difficulty in the matter of payment of royalty and application of the price variation Clause in that context, the Corporation had passed Resolution No. 55/6. By the said Resolution, if there was any increase in the amount of royalty while undertaking work under the contract, the actual expenditure towards royalty ought to be verified and after obtaining revised administrative sanction, the amount should be included in the budget. As per this resolution, on verification of the expenditure on the amount of royalty and after excluding the increase in view of the price variation Clause, steps were to be taken to ensure that the benefit of the actual amount of royalty paid is received by the Contractor. Since it was realized by the Corporation that in the earlier Circulars issued there was some inconsistency, it was decided to withdraw all the earlier Circulars including the Circular dated 17/2/2020 and issue modified directions.

As per the modified directions, it was stated that Clauses 36, 36(A) and 33 were included in various contracts. While the Contractor was liable to pay the amount of royalty, the amount of price variation was to be as per Clause 33. It was stated that in those tenders in which the material component (K1) did not include the amount of royalty, then in such contracts, while making payment on account of price variation on the material component, no variation was liable to be paid on the amount of royalty. In accordance with Resolution No. 55/6, the Contractor was entitled for the actual amount of royalty paid by him. The amount actually paid was liable to be deducted from the amount of royalty

indicated in the contract. In those tenders where royalty was included in K1 component while determining price variation on material, as per the tender conditions price variation was liable to be paid even on the amount of royalty. Hence while drawing the bills of a Contractor insofar as the amount of difference in the payment of royalty was concerned, the actual amount paid as well as the price variation on the amount of royalty were required to be deducted and thereafter the balance payment was to be made. The actual payment of royalty as well as the price variation on the amount of royalty was to be verified by the Divisional Accountant. As per the resolution of the Corporation, the amount payable to the Contractor was the actual amount of royalty paid after deducting the amount of royalty mentioned in the contract and the price variation thereon.

4. The petitioners are aggrieved by the aforesaid circular since it is their contention that by issuing the said Circular dated 22/4/2021, the terms of the tender notice and the contract are being modified. The same amounts to unilaterally altering the conditions of the contract which was impermissible. The work order having been issued in the year 2009, it was not permissible to modify the terms of the contract. In this regard, the petitioners seek to rely upon the judgment of this Court in *M/s Musale Constructions, Builders and Contractors Vs. Vidarbha Irrigation Development Corporation and another [Writ Petition No. 2209/2020 decided on 29/10/2020]* with other connected matters and it is urged that the Circular dated 22/4/2021 cannot be made applicable to the contracts entered into in the year 2009. The petitioners were not claiming any amount of escalation on the royalty as increased by the Revenue Department but they were aggrieved by the failure to comply the escalation Clause on the total cost which the Corporation could not deny on the basis of the said Circular. As per Clause 36, the tendered rates were to be inclusive of all the liability under the Maharashtra Minor Mineral Extraction Rules and the said term was binding on both the parties. It was thus submitted that the Circular dated 22/4/2021 was liable to be set aside.

5. According to the Corporation, the Circular dated 22/4/2021 was merely clarificatory in nature and it did not alter or modify any of the terms of the contract. It was undisputed that the responsibility to pay the royalty was on the

Contractor on the basis of the rates fixed by the Revenue and Forest Departments. The price escalation was not intended on the total cost of the work but it was only on the net cost of the work. In the agreement entered into with the Corporation, there was no right provided to claim price escalation on the amount of royalty. Price escalation was liable to be paid in accordance with the conditions mentioned in the tender document. The rise in the amount of royalty was to be borne by the department while the price escalation was to be paid on the work actually executed. In the event of any increase in the amount of royalty charges, the same are liable to be reimbursed to the Contractor subject to the Contractor indicating that the payment was made to the Revenue Authorities. The price escalation on the royalty component was not liable to be included in the material component and this aspect was clarified by the impugned Circular. Since the same was clarificatory, it is the stand of the respondents that no interference was called for and the Writ Petitions were liable to be dismissed.

6. We have heard the learned Counsel for the parties and we have perused the documents on record. In our view, the Circular dated 22/4/2021 is clarificatory in nature and it does not in any manner alter the tender conditions on the basis of which the work order was issued to the petitioners. As per Clause 36, it is the duty of the Contractor to pay quarry fees, royalties, etc. The tendered rates are stated to be inclusive of all the liability under the Maharashtra Minor Mineral Extraction Rules. Clause 36(A) prescribes the consequence of failure on part of the Contractor in paying the quarry fees, royalties, etc. As per Clause 33, any variation in the Consumer Price Index in the manner stipulated is admissible and on the basis of the formula prescribed, the price adjustment on that basis is required to be calculated. On reading of the Circular dated 22/4/2021, it becomes clear that reference therein has been made to the contingency where in the material component, the amount of royalty has not been included. It is stated that while price variation is admissible on the material component, the increase in the amount of royalty is not payable. In contracts of such nature, the actual amount of royalty paid is liable to be deducted from the amount of royalty mentioned in the tender and credit of the balance amount would be admissible. The other contingency prescribed is with regard to the

tenders in which the material component includes the amount of royalty. In such contracts, the price escalation based on the amount of royalty is payable. The manner in which such Clause has to be worked out has been stipulated. The actual amount of royalty paid by the Contractor is required to be verified along with the increase in the amount of royalty. On that basis, the difference amount is to be calculated by considering the amount of royalty paid by the Contractor and deducting therefrom the original amount of royalty stated in the contract as well as the increase thereon.

7. From the aforesaid therefore it can be said that the Circular dated 22/4/2021 merely clarifies the manner in which the aspect of royalty has to be considered. It does not seek to modify the original terms of the agreement and it merely states the course to be followed in contracts where amount of royalty is not included in the material component and in contracts where it is included.

8. It was urged on behalf of the petitioners that in Clause 36, it was stated that the tendered rates would be inclusive of all the liability under the Maharashtra Minor Mineral Extraction Rules and hence the Circular dated 22/4/2021 seeks to modify the same. As stated above, that Circular merely clarifies the matters with regard to payment of royalty in the light of the price variation Clause. It has been directed to verify the actual amount of royalty paid by the Contractor and also to verify the actual increase in the amount of royalty till the measurement of the work executed is undertaken. In the affidavit filed on behalf of the Corporation, it has been clearly stated that on any increase in royalty charges, the same are reimbursed to the Contractor on it being shown that such payment has been made to the Revenue Authorities.

9. The earlier decision of this Court in *M/s Musale Constructions (supra)* merely holds that the Circular dated 17/2/2020 would not apply to the case of the petitioner therein and the matter would not governed by the contract entered into between the parties in the years 2011 and 2014. That Circular dated 17/2/2020 now stands withdrawn as stated in the Circular dated 22/4/2021. The ratio of the said decision therefore does not assist the case of the petitioners.

10. For the aforesaid reasons, we do not find any merit in the challenge raised to the Circular dated 22/4/2021. The Writ Petitions are accordingly dismissed with no order as to costs.

(URMILA JOSHI-PHALKE, J.)

(A. S. CHANDURKAR, J.)

SUMIT