

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO.5758 OF 2023**

Anand Subhash Shah

...Petitioner

***Versus***

State of Maharashtra through the Secretary  
Revenue and Forest Dept. and Ors.

...Respondents

Mr. R. S. Datar i/b Ms. Druti Datar for the Petitioner.

Ms. M. J. Kajle, B Panel Counsel for the Respondent-State.

**CORAM : SHARMILA U. DESHMUKH, J.**

**DATE : 28<sup>th</sup> FEBRUARY, 2024.**

**P. C. :**

1. By this petition the challenge is to the order dated 28<sup>th</sup> December 2022 passed by the Tahsildar levying a penalty of Rs.9,53,97,008/- in exercise of powers under Section 48(7) of the Maharashtra Land Revenue Code, 1966 (MLRC).

2. The Petitioner is owner of property being agriculture land bearing survey No.133/1/B and 134 situated at village Sakadbav, Taluka Shahpur on which the Petitioner proposed “*Goshala*” and for the said purpose the Petitioner made an application to Respondent No.2 seeking permission to use the said property for non agricultural purpose. As the Petitioner did not receive any response from Respondent No.2 for a

period of 45 days, the Petitioner commenced the work of construction of “*Goshala*” in view of deeming provision under Section 44 of Maharashtra Land Revenue Code, 1966. On 20<sup>th</sup> May 2021, the Group Grampanchayat Sakadbav issued No Objection certificate for the fencing of the said property and for construction of farm pond on the said property. After obtaining the permissions, Petitioner constructed “*Goshala*” on the said property. On 25<sup>th</sup> July 2022 the Petitioner received a Show Cause Notice dated 11<sup>th</sup> July 2022 from the Respondent No.3 informing the Petitioner that during the site visit by the Talathi on 30<sup>th</sup> June 2021, the Talathi observed that 8865 brass earth was excavated on the said property and used for land filling and while carrying out excavation for construction of pond the natural “nallah” was obstructed and pond was constructed in the same “nallah” and for the purpose of letting out water from the pond 74 brass earth was excavated.

3. Invoking Section 48(7) and (8) of MLRC the Tahsildar called upon the Petitioner to show cause as to why action should not be initiated under Section 48(7) and (8) of the MLRC. On 30<sup>th</sup> July 2022 Petitioner filed his reply to the Show Cause Notice denying that any excavation and land filling was carried out. It was contended that the farm pond was constructed on the said survey number for which an appropriate

permission was taken. It was also contended that considering the nature of the land which was rocky it is difficult that 8939 brass earth could be excavated. On 8<sup>th</sup> February 2023 the Petitioner was served with the impugned order dated 28<sup>th</sup> December 2022 levying penalty of Rs.9,53,97,008/- towards illegal excavation of 8939 brass earth. On 10<sup>th</sup> February 2023, Petitioner filed written submissions to the order passed pointing out that excavated earth was used by the Petitioner for levelling the said property and the said activity does not entail payment of any royalty. On 29<sup>th</sup> March 2022 Respondent No.3 passed an order of attachment of the property on the ground that the Petitioner has defaulted in payment of arrears of land revenue of Rs.11,92,46,267/-. Aggrieved by the said order of imposing of penalty as well as order of attachment, the present petition has been filed.

4. Heard Mr. R. S. Datar for the Petitioner and Ms. M. J. Kajle, B Panel Counsel for the Respondent-State.

5. Mr. Datar, learned Counsel appearing for the Petitioner would submit that the Show Cause Notice as well as the impugned order of 28<sup>th</sup> December 2022 itself would indicate that it is the Respondent No.2's own case that the earth which was excavated was used on the same

survey number for the purpose of land filling. He would submit that the impugned order of 28<sup>th</sup> December 2022 also suffers from misapplication of mind inasmuch as it is mentioned that no written reply has been received by Respondent No. 2 from Sillu Patel and therefore Anand Shah has no response to the notice. He submits that Sillu Patel is a stranger to the dispute and it is therefore clear that the impugned order is copy paste order of some other matter. He submits that the issue as regards the payment of royalty upon excavation of earth which is used for the purpose of land filling on the same property is no longer *res integra* and stands decided by the decision of the Apex Court in the case of ***Promoters and Builders Association of Pune vs. State of Maharashtra (2015) 12 SCC 736***. He submits that the Division Bench of this Court in the case of ***P. S. C. Pacific vs. The State of Maharashtra and Ors. in Writ Petition No.7390/2010*** by judgment dated 23<sup>rd</sup> November 2021 has followed the decision in the case of ***Promoters and Builders Association (supra)*** and has held that excavation of ordinary earth for construction of building purpose will not entail levy of royalty and penalty under Section 48 (7) of MLRC especially when excavated earth has been used for levelling and development of the suit land. He would further submit that the decision has been subsequently followed by Co-ordinate Division Benches in other matters and the issue now stands settled.

6. On the aspect of the alternate remedy, he submits that the Division Bench of this Court in the case of *P. S. C. Pacific vs. The State of Maharashtra (supra)* has held that no purpose would be served to relegate the Petitioner to alternate remedy in the facts and circumstances of the case. He submits that the issue is already settled by the decision of the Apex Court and the Division Bench of this Court and driving the Petitioner to alternate remedy under Section 247 of MLRC read with Section 256 of MLRC would entail a deposit of 25% and would cause great prejudice. Mr. Datar would further point out the amended Rule 46 of the Mines and Minerals (Development and Regulation ) Act, 1957 specifically provides that no royalty shall be required to be paid on earth which is excavated while developing a plot of land and utilized on the same plot in the process of development of the suit land. He also relies upon the decision in the case of *Rahul R. Nahar and Ors. vs. The State of Maharashtra and Ors. in Writ Petition No.2743/2010 dated 13<sup>th</sup> January 2015*.

7. *Per contra*, Ms. Kajle, learned counsel appearing for Respondents would submit that this Court may not entertain the petition in view of the alternate remedy. In addition, she would submit that under Rule 59 of the Minor Mineral Extraction (Development and Regulation )

Rules, 2013, the Petitioner was bound to make an application which has not been done in the present case.

8. Considered the submissions and perused the records.

9. Section 48 of MLRC vests rights in all minerals in the State Government and provides that if any person without lawful authority extracts any mineral from sites, the right to which vests in the State Government shall be liable to pay penalty of five times the market value of minerals so extracted. The show cause notice issued by the Tahsildar - Respondent No.2 would indicate the specific case of the Tahsildar is that during the site visit by the Talathi on 30<sup>th</sup> June 2021 it was found that there was excavation of ordinary earth which was being used for the purpose of land filling on the same survey number and for the purpose of preparing the channel for letting out water from the pond. The said activity according to Respondent No.2 amounts to mining of ordinary earth and being without lawful authority entailed imposition of penalty under Section 48 (7) of MLRC.

10. The issue is no longer *res-integra* and has been decided by the Apex Court in the case of ***Promoters and Builders Association of Pune***

(*supra*). The Apex Court considered the import of the Notification of 3<sup>rd</sup> February, 2000 issued under Section 3(e) of Mines and Minerals (Development and Regulation) Act, 1957. In that case the Apex Court has held that a blanket determination of liability merely because ordinary earth was dug out would not be justified and what would be required is determination of the end use of excavated earth. In case of *P.S.C. Pacific (supra)*, Division Bench of this Court following the decision in *Promoters and Builders Association of Pune (Supra)* held that the excavated material used by the Petitioner for purpose of filling up, levelling and digging of earth is inbuilt in course of building operations, the activity so undertaken therefore cannot be categorized as one of excavation of minor minerals as contemplated under the Act of 1957.

11. In the present case, there is no dispute about the end use of excavated earth inasmuch as it is the Respondent No. 2 Tahsildar's own case that excavation of earth was for the purpose of land filling on the same survey number. The impugned show cause notice as well as the impugned order in fact determines the end use of the excavated earth and that being so in view of the judicial pronouncements the excavation of the earth for the purpose of land filling on the same plot would not attract penalty under the provisions of Section 48(7) of MLRC. The Authorities

have failed to take into consideration the amended Rules specifically providing that no royalty is required to be paid on earth which is extracted while developing a plot of land and utilized on the very same plot of land for land levelling or for any work in the process of development of such plot. Considering the decision of the Apex court as well as Division Bench of this Court read with notification dated 11<sup>th</sup> May 2015 amending the rules, the impugned order dated 28<sup>th</sup> December 2022 imposing penalty of Rs9,53,97,008/- is clearly unsustainable.

12. The contention of learned AGP as regards the existence of an alternate remedy cannot come in way of this Court in determining the present petition for the reason that against the background of the judicial pronouncements the Tahsildar while imposing penalty clearly exceeded his jurisdiction.

13. Learned counsel was right in pointing out Section 256 of MLRC which provides for deposit to be made while challenging the order. In the light of the clear enunciation of law by the Apex Court which has even led to the amendment of the Rules, the impugned order could not have been passed and in such event relegating the Petitioner to file an Application under Section 247 of MLRC, cannot be considered as an

efficacious remedy even if it were an alternate remedy. As regards the contention that as per the amended Rule 51 of the Maharashtra Minor Mineral Extraction (Development and Regulation) Rules, 2013 no permission has been taken for excavation, the consequence is not shown as imposition of penalty for the amount levied in the present case. The Authorities may adopt appropriate action for the same in accordance with the law. However the impugned order imposing penalty cannot be sustained.

14. In light of the discussion above, the Petition succeeds. The impugned order dated 28<sup>th</sup> December 2022 is hereby quashed and set aside and all consequential actions also stands quashed and set aside.

**(SHARMILA U. DESHMUKH, J. )**