

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

WRIT PETITION NO. 13308 OF 2018

Tata Projects Limited. ... Petitioner.
V/s.
The State of Maharashtra and others. ... Respondents.

Mr.Sriram Sridharan with Mr.Jas Sanghavi and Mr.Viraaj
Bhate i/b. PDS Legal for the petitioner.
Mr.A.B.Vagyani, GP with Mr.Y.S.Khochare, AGP
for the respondents.

CORAM : A.S.OKA AND M.S.SANKLECHA, JJ.

DATE : 30th April 2019.

ORAL JUDGMENT : (Per A.S. Oka, J.)

The parties were put to notice on the earlier date that the petition will be disposed of finally at the stage of admission. Rule. Learned Government Pleader (GP) waives service for the respondents.

2. The petitioner claims to have formed a Joint Venture with other entities as pleaded in paragraph-4 of the petition. A tender notice was published by Mumbai Metro Rail Corporation Limited (for short "MMRCL") inviting bids for excavation and construction of underground tunnels for Mumbai Metro. The aforesaid Joint Venture submitted a bid which was accepted and a contract dated 24th August 2016 was executed by MMRCL.

3. On 13th January 2017, an application was made on behalf of the Joint Venture for grant of permission for excavation and disposal of excavated material for the design and construction of underground stations at Siddhivinayak, Dadar and Shitladevi Temple. A reply was issued by the Superintendent of Land Records, Mumbai calling upon the Joint Venture company to make certain compliances by submitting the documents. Another application was made on 8th March 2017 by the Joint Venture seeking permission for excavation of secant piles at Siddhivinayak Station and disposal of the muck. In exercise of powers under Rule 59 of the Maharashtra Minor Mineral Excavation (Development and Regulation) Rules, 2013 (for short “the said Rules of 2013”), the Additional Collector, Mumbai City granted permission for excavation of minor minerals having quantity of 648 brass subject to terms and conditions incorporated in the said letter.

4. A letter was addressed by the Joint Venture to the third respondent on 9th May 2017 contending that the Joint Venture has not made any excavation of minor minerals and only ordinary earth is excavated for non-commercial purposes. It is alleged that the amount of royalty as mentioned in the said letter has been deposited under protest and, therefore, a prayer was made for refund. The said letter was followed by a reminder dated 22nd June 2017. As the said applications were not decided, the present petitioner filed Writ Petition No.10845/2017 in this Court which was disposed of by the order dated 8th November 2017 wherein this Court directed the Additional Collector, the third respondent therein, to take appropriate and reasoned decision on

the applications made by the petitioner for refund. On the basis of the said order, an order was passed on 27th March 2018 by the Additional Collector, Mumbai City by which the prayer for refund was rejected. Being aggrieved by the said order that the present writ petition has been filed by the petitioner wherein various declarations are claimed and writ of mandamus is also prayed for directing refund of the premium paid by the petitioner under protest.

5. The submission of the learned counsel appearing for the petitioner is that what is excavated by the petitioner is an ordinary earth which is not *per se* covered by the definition of “minor mineral” under clause (e) of section 3 of the Mines and Minerals (Development and Regulation) Act, 1957 (for short “the said Act of 1957”). It is pointed out that in exercise of powers under section 3(e) of the said Act of 1957 various notifications have been issued including the notification dated 3rd February 2000 which declares “ordinary earth” used for filling or levelling purposes in construction of embankments, roads, railways, buildings to be a minor mineral in addition to the minerals already declared as minor minerals. It is contended that all categories of ordinary earth does not become minor minerals unless the same is used for the purposes specified in the notification dated 3rd February 2000. The submission is that in the impugned order, the Additional Collector has come to an incorrect conclusion that ordinary earth is also covered by definition of minor minerals by virtue of the said notification. Reliance was placed by the petitioner on the decision of this Court dated 29th March 2019 in the case of *Ircon International Limited and others v. The State of Maharashtra and others* in Writ Petition No.3704/2018. It is submitted

that the case is covered by the said decision. The learned GP tenders across the bar a letter dated 3rd March 2018 issued by the District Mining Officer to the Additional Collector of Mumbai. He submitted that the said letter indicates that from the technical report submitted by the petitioner, it appears that excavation of mixture of gravel, sand silt and clay was being carried out and not only of ordinary earth. He pointed out that what is excavated will fall in the category of building stones. He submitted that what is excavated is mixture of gravel, sand silt and clay and, therefore, what is excavated is covered by the definition of minor minerals. He, therefore, submitted that a finding of fact has been recorded by the Additional Collector and no interference is called for. He submitted that the decision of this Court in *Ircon International Limited and others* (supra) is in the peculiar facts of that case before the Division Bench.

6. We have given a careful consideration to the submissions. In terms of the judgment and order dated 8th November 2017 in Writ Petition No.10845/2017 filed by the petitioner, the petitioner was given an opportunity of being heard by the Additional Collector. The petitioner filed written submissions dated 6th December 2017. A specific contention was raised therein (paragraph A.8) that what is excavated by the Joint Venture of the petitioner is nothing than the ordinary earth and the said material does not satisfy the test of the notification dated 3rd February 2000.

7. Now we turn to the impugned decision of the Additional Collector. The impugned decision does not dispute that the amount of

royalty was paid as per the said Rules of 2013 and that the royalty was paid under protest. We have carefully perused the findings recorded by the Additional Collector. The Additional Collector observed that as per the agreement between the Joint Venture and the principal, it was the responsibility of the Joint Venture to pay the royalty. It is observed in the impugned order that as the petitioner is doing the work of digging tunnel and construction of underground stations for the Metro Project, the excavation of minerals will be covered by the definition of minor minerals under the said Act of 1957 and, consequently the said Rules of 2013. In the subsequent paragraphs of the impugned order, it is mentioned that certain categories of stones were excavated. In fact, in the impugned order, it is mentioned that only with a view to avoid stoppage of work of the Metro Railway, the petitioner deposited the royalty amount.

8. In the written submissions submitted by the petitioner on 6th December 2017 on the basis of the order dated 8th November 2017 passed in the earlier petition filed by the petitioner, a specific contention has been raised that what is excavated by the petitioner is an ordinary earth which is not used for any of the purposes specified in the notification dated 3rd February 2000 and, therefore, the said ordinary earth will not fall in the definition of minor minerals and, therefore, royalty was not payable.

9. As far as the issue whether ordinary earth excavated will be covered by the definition of minor minerals under the said Act of 1957 is concerned, the same is no longer *res integra*. The same has been decided by the Division Bench of this Court in the case of *Ircon International*

Limited and others (supra). Paragraphs-8 to 11 of the said judgment reads thus:

“8. Before adverting to deal with the aforesaid rival submissions, it may be apposite to note the statutory and regulatory framework, which governs the situation at hand. The Mines and Minerals (Development and Regulation) Act, 1957 contains the provisions for the regulation of mines and development of minerals. The 'minor mineral' is defined in Section 3(e) of the said Act, 1957 as under :

“3(e) “Minor minerals” as 'building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed purposes, and any other mineral which the Central Government may, by notification in the Official Gazette, declare to be a minor mineral'”

9. Evidently, the ordinary earth is not specifically defined as 'minor mineral'. However, the Central Government is empowered to declare any other mineral as a minor mineral. In pursuance of such power, the Central Government issued the Notification on 3rd February 2000 ('the Notification') and thereby declared ordinary earth as a 'minor mineral'.

10. Since the construction of the terms of the said Notification has a material bearing on the issue at hand, it is extracted below :

“NOTIFICATION

New Delhi, the 3rd February, 2000

C.S.F. 95 (E) In exercise of the powers conferred by clause (e) of Section 3 of the Mines and Minerals (Development and Regulation) Act, 1957 (67 of 1957), the Central Government hereby declares the 'ordinary earth' used for filling or levelling purposes in construction of embankments, roads, railways, buildings to be a minor minerals in addition to the minerals already declared as minor minerals hereinabove under the said clause.”

11. Section 15 of the said Act, 1957 empowers the State

Government to make the rules in respect of minor minerals. The State Government, in exercise of the powers conferred by Section 15 has framed rules entitled, “Minor Mineral Extraction (Development and Regulation) Rules, 2013”.

The Division Bench proceeded to hold that ordinary earth will not qualify test of the minor minerals under clause (e) of section 3 of the said Act of 1957 unless it is used for the purposes specified in the Government Notification dated 3rd February 2000.

10. In fact, the Division Bench relied upon the decision of the Apex Court dated 3rd December 2014 in Civil Appeal No.10717/2017 (*Promoters and Builders Association of Pune v. The State of Maharashtra*). In paragraph-12 onwards of the said decision, the Apex Court dealt with the issue after quoting the definition of minor minerals and the contents of the notification dated 3rd February 2000. In paragraph-15, the Apex Court held thus:

“15. Though Section 2(j) of the Mines Act, 1952 which defines 'Mine' and the expression "mining operations" appearing in Section 3(d) of the Act of 1957 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, road, 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 Act of 1957. “

(emphasis added)

11. In the light of this well settled law, now, coming back to the impugned order, firstly, we find that there is no specific finding recorded by the Additional Collector on the question whether what is excavated by the petitioner's Joint Venture is ordinary earth or some other material. If answer to the said question is that ordinary earth was excavated by the petitioner's Joint Venture, the other issue which arises is whether the ordinary earth was used by the petitioner for any of the purposes specified in the notification dated 3rd February 2000. There is no other notification placed on record issued under clause (e) of section 3 of the said Act of 1957 dealing with the ordinary earth. If it is established before the Additional Collector that what is excavated is an ordinary earth which is not used for any of the purposes specified in the notification dated 3rd February 2000, the royalty paid by the petitioner for excavation will have to be refunded. If the Additional Collector comes to the conclusion that the petitioner's Joint Venture has not extracted ordinary earth but some other minerals which are covered by the definition of minor minerals under the said Act of 1957, the petitioner will have to satisfy the Additional Collector regarding its entitlement for refund.

12. In this view of the matter, by setting aside the impugned order passed by the Additional Collector, the matter will have to be remanded to the Additional Collector, Mumbai.

Accordingly, we pass the following order:

ORDER

- (i) The impugned order dated 27th March 2018 is hereby quashed and set aside. We direct that the representative of the

petitioner shall appear before the Additional Collector, Mumbai City on 3rd June 2019 at 11.00 a.m. for fixing the schedule of hearing. As observed earlier, the Additional Collector will decide whether the material excavated by the petitioner was an ordinary earth. If he finds that what is excavated by the petitioner was an ordinary earth and if he finds that it was not used for any of the purposes specified in the notification dated 3rd February 2000, the Additional Collector shall pass an order of refund of royalty paid on the excavation of ordinary earth as prayed for;

- (ii) If the Additional Collector finds that the petitioner excavated some other minor minerals, appropriate order shall be passed by the Additional Collector on the prayer for refund;
- (iii) We make it clear that the Additional Collector will make an adjudication in terms of what is held in this judgment and order;
- (iv) We reiterate that the excavation of ordinary earth will not amount to excavation of minor minerals within the meaning of the said Act of 1957 and the said Rules of 2013, unless it is established that the ordinary earth excavated is used for the purposes specified in the notification dated 3rd February 2000;
- (v) The Additional Collector shall pass a fresh order on or before 31st August 2019;
- (vi) Rule is made absolute on the above terms.
- (vii) No order as to costs.

(M.S.SANKLECHA, J.)

(A.S.OKA, J.)