HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3704 OF 2018

1.	Ircon International Limited a Company registered under there Companies Act, 1956 having its registered office at C-4, District Centre, Saket, New Delhi-110 017	]
2.	Raghuvir Buildcon Pvt. Ltd. a Company registered under there Companies Act, 1956 having its registered office at 201, Jalaram, 2nd Floor, Near Atmajyoti Ashram, Ellorapark, Vadodara – 390 023	]
3	M/s. S.A. Yadav residing at 213-214, Second Road, Decision Tower, Satara Road, Near City Pride Theater, Bibwewadi, Pune – 411 037	]
4	M/s. M.H. Khanusiya residing at 1st Floor, Divine India Building, Near RTO Office By-Pass Road, Post Savgadh (Panpur), Himmatnagar Dist. S K, Gujarat – 383 001	]
5	GHV India Private Limited a Company registered under there Companies Act, 1956 having its registered office at AML Centre-1, 8 Mahal Industries Area, Mahakali Caves Road, Andheri (E), Mumbai – 93	] .. Petitioners

Versus

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1.	The State of Maharashtra through the Government Pleader High Court, Mumbai	]]]	
2.	The Revenue and Forest Department of the State of Maharashtra through the District Collector of Palghar having his office at 2nd Floor, Parshwath, 9 Bidco Naka, District Palghar,	]]]]]	
3.	The Tehsildar, Dahanu having his office at Tehsildar & Executive Magistrate, Office of Sub-divisional Officer, Dahanu	]]]]..	Respondents

Mr.V. Sridharan, Senior Advocate a/w. Mr.Sriram Sridharan, Ms.Divyasha Mathur I/b PDS Legal for petitioners.

Mr.R.S. Pawar, AGP for respondent Nos.1 to 3-State.

CORAM	**: R.M. BORDE & N. J. JAMADAR, JJ.**
RESERVED ON	**: 19th MARCH 2019**
PRONOUNCED ON	**: 29th MARCH 2019**

JUDGMENT (PER N.J. JAMADAR, J.) :

1. The challenge in this petition is to a notice dated 4th December 2017 issued by the Tehsildar, Dahanu, District Palghar, Maharashtra whereby a penalty of Rs.34,80,744/- was proposed to be levied for excavation of minor mineral, i.e., ordinary earth, without obtaining requite permission.

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2. The petition arises in the backdrop of the following facts :-

The petitioner No.1 is a Public Sector Undertaking of the Ministry of Railways. The petitioner No.1 is executing construction of 186 km. long Dedicated Freight Corridor Project from Vaitarna to Sachin, which is a part of the Western Dedicated Freight Corridor. The petitioner Nos.2 to 5 have been engaged by petitioner No.1 as sub-contractors for the execution of the said work. As a part of the project, the petitioners are required to cut and level the ground along the 186 km. stretch. In the process, if the earth extracted is scientifically found to be of suitable quality, it is used for embankment. However, if the earth is not found to be of suitable quality, the petitioners dump the earth at alternate locations.

3. On 17th November 2017, the respondent No.3-Tehsildar, Dahanu visited one of the worksites and, thereafter, issued the impugned notice proposing to levy penalty of Rs.34,80,744/- under Section 48(7) of the Maharashtra Land Revenue Code, 1966 ('the Code of 1966'). Though a suitable reply was submitted by the petitioners, the respondent No.3 threatened to pursue the action in pursuance of the impugned notice. Contending that the action of the respondents is in contravention of the provisions contained in Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as 'the said Act, 1957') and the

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Maharashtra Minor Mineral Extraction (Development and Regulation) Rules, 2013, the petitioners have preferred this petition.

4. The respondents have contested the claim of the petitioners by filing counter, sworn by Rahul Arun Sarang, Tahsildar Dahanu, Dist. Palghar. The respondent No.3 contends that the persons who were found in the possession of the ordinary earth, extracted from the worksite of the petitioners, have given statements to the effect that the said work was obtained from the worksite of the petitioners, i.e., Ambevadi, Taluka Dahanu. Since the extraction of the ordinary earth and its end use, as ascertained, brings action of the petitioners within the ambit of the said Act, 1957, the petitioners cannot deny the liability to pay the royalty, as stipulated in the Code, 1966.

5. In the backdrop of the aforesaid factual setting of the matter, we have heard Shri V. Sridharan, the learned Senior Advocate for petitioners and Shri R.S. Pawar, the learned AGP for respondent Nos.1 to 3-State at some length.

6. The learned counsel for the petitioners urged with a degree of vehemence that the action of the respondents to pursue with the impugned notice and threaten the recovery as an arrear of land revenue under the Code, 1966 is wholly arbitrary, illegal, and thus, unsustainable. The

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respondent No.3 has not at all adverted to the nature of the activity being carried out by the petitioners and the use of the ordinary earth excavated while digging the ground for laying the freight corridor, urged the learned counsel for the petitioners. What exacerbates the highhandedness on the part of the authorities is the audacity with which the authorities are pursuing the action despite the legal position, including the judgment of the Supreme Court in the case of ***Promoters and Builders Association of Pune Vs. The State of Maharashtra & Ors.***[1]***,*** being specifically brought to their notice.

7. Per contra, the learned AGP stoutly submitted that the respondent No.3 was within his rights in initiating action to levy the royalty. It was submitted that there is no dispute that the petitioners have excavated the ordinary earth, while executing the project. In view of the Notification issued by the Central Government on 3rd February 2000, in exercise of the powers conferred by clause (e) of Section 3 of the said Act, 1957, the ordinary earth used for filling and levelling purposes is included in the definition of minor minerals under the said Act, 1957. In the backdrop of these facts, according to the learned AGP, the levy of royalty and the penalty in terms of Section 48(7) of the Code of 1966, cannot be faulted at.

1 (2015) 12 SCC 736

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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*

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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."

12. It would be contextually relevant to note the provisions of Section 48(7) of Code of 1966, with reference to which the impugned notice was issued by the respondent No.3. It reads as under :

"S. 48 Government title to mines and minerals :

(7) Any person who without lawful authority extracts, removes, collects, replaces, picks up or disposes of any mineral from working or derelict mines, quarries, old dumps, fields, bandhas (whether on the plea of repairing or constructions of bund of the fields or an any other plea), nallas, creeks, river-beds, or such other places wherever situate, the right to which vests in, and has not been assigned by the State Government, shall, without prejudice to any other mode of action that may be taken against him, be liable, [on the order in writing of the Collector, or any revenue officer not below the rank of Tahasildar authorised by the Collector in this behalf to pay penalty on of an amount [upto five times] the market value of the minerals so extracted, removed, collected, replaced, picked up or disposed of, as the case may be :

13. In the light of the aforesaid statutory provisions, reverting to the facts of the case, it is pertinent to note that the extraction of ordinary earth as such is indisputable. In the light of the nature of the activity, i.e., clearing the ground for laying the freight corridor by an instrumentality of

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the State (Railways), the extraction of earth is inevitable. The question which, however, wrenches to the fore is whether the mere extraction of ordinary earth makes the petitioners liable to pay the royalty, under the aforesaid statutory framework.

14. The learned counsel for the petitioners urged that the issue is no longer *res-integra.* There are a series of judgments of this Court and also the authoritative pronouncement of the Supreme Court in the case of ***Promoters and Builders Association of Pune Vs. The State of Maharashtra & Ors.*** (Supra) which hold that mere extraction of earth does not invite the levy of royalty. The use of the ordinary earth for the purposes expressly mentioned in the aforesaid Notification is determinative, submitted the learned counsel for the petitioners.

15. At this juncture, reference to the decision of the Supreme Court in the case of ***Promoters and Builders Association of Pune Vs. State of Maharashtra & Ors.*** (Supra) may be apposite. In the said case, the Promoters and Builders Association of Pune-appellants therein, had urged that the earth which is dug for the purposes of laying of foundation of building is not intended for filling up or levelling purposes; digging the earth is inbuilt in the course of building operations. The activity undertaken, therefore, cannot be characterised as one of excavation of a

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minor mineral. In the connected appeal, preferred by the Nuclear Power Corporation, in addition to above contention of the builders, it was contended that no commercial exploitation of the excavated earth was involved in the process of repair/widening of the water channel; there was no sale or transfer of the excavated earth and the same was the incidental result of the process of repair/widening of the channel which is an activity in consonance with the grant of the land to the appellant by the Statement Government.

16. As against this, it was the contention of the State, before the Supreme Court, that after the inclusion of ordinary earth in the definition of "minor minerals" by the Notification under Section 3(e) of the 1957 Act, excavation of ordinary earth without authorisation under the said Act, would make the appellants liable not only to payment of penalty under the Code but also for criminal prosecution under the said Act.

17. Allowing the appeals, the Supreme Court, after analysing the provisions, contained in Section 48(7) of the Code of 1966 and the aforesaid Notification whereby the ordinary earth was declared as a minor mineral, observed in unequivocal terms that, *"ordinary earth" used for filing or levelling purposes in construction of embankments, roads, railways,*

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buildings to be a minor mineral in addition to the minerals already declared as minor minerals." (emphasis in original).

18. The observations of the Supreme Court in paragraphs 14 and 15 of the aforesaid judgment are instructive in nature. Thus, they are extracted below :-

> *"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 embankments, roads, 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 1957 Act.*
>
> *16. 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*

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application; the excavated earth would not be a specie of minor mineral under Section 3(e) of the Act of 1957 read with the Notification dated 3-2-2000."

(emphasis supplied)

19. The aforesaid judgment of the Supreme Court, was followed by a Division Bench judgment of this Court in the case of ***BGR Energy System Ltd, Khaparkheda Vs. Tahsildar, Saoner & Ors.***[2]. In the said case, the petitioner therein had challenged the order of the Tahasildar directing the petitioner to pay the royalty and penalty for the illegal excavation of the earth while executing the work of construction of thermal power project at Khaparkheda. This Court, after following the aforesaid judgment, quashed and set aside the order of the Tahasildar holding, *inter-alia,* that the use of the excavated earth to fill up the dug pits and in construction of the project did not fall within the ambit of the aforesaid Notification, and, thus, the Tahasildar could not have passed the order under Section 48(7) of the Land Revenue Code, 1966.

20. It is evident that the Supreme Court has enunciated in clear and explicit terms that excavation of ordinary earth for uses not contemplated in the aforesaid Notification would not amount to a mining activity so as to attract the wrath of the provisions of either the Maharashtra Land Revenue Code or the Act 1957. The Court further ruled that a blanket determination of liability for the mere fact that ordinary earth was dug up would not be

2 (2017) 2 SCC 6760

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justifiable. What is of determinative significance is the more precise determination of the end use of the excavated earth. If the end use of the extracted earth falls within the tentacles of the purposes specifically mentioned in the aforesaid Notification, then it would fall within the ambit of the Code of 1966 or the said Act, 1957. It is implies that the question of liability to pay the royalty hinges more on the end use of the extracted ordinary earth than the mere factum of extraction.

21. Readverting to the facts of the case in the light of the aforesaid legal position, it becomes evident that it is not the case of the respondent-authorities that the excavated earth was used for any of the purposes mentioned in the aforesaid Notification. The learned AGP, however, attempted to salvage the position by strenuously urging that the enquiry revealed that Mr.Ashwin Harish Rajavat, Mansukhlal Rajavat, Behram M. Afag of village Gholvad and Baman R. Irani of village Bordi had reported that they procured the ordinary earth, excavated at the worksite of the petitioners, and used the same for filling and levelling. Therefore, according to the learned AGP, the petitioners cannot avoid the liability to pay the royalty. The Panchanama, dated 27th February 2018 and the explanation of the above-named agriculturists were pressed into service in support of the aforesaid contention.

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22. We have perused the aforesaid Panchanama and the explanatory statements of the above-named persons annexed to the affidavit in reply of respondent No.3. Even if the case of the respondent No.3 is taken at par, yet we are afraid to note that it does not advance the cause of revenue. The Panchanama, dated 27th February 2018 reveals that the ordinary earth, allegedly excavated from the worksite of the petitioners was used for levelling the agricultural land for better cultivation. The explanatory statements of the above-named persons also proceed on the said line. Such use of the ordinary earth does not fall within the meaning of the definition, "minor mineral", as declared by the Notification, as it cannot be said to be for the purposes of filling or levelling in construction of embankments, roads, railways and buildings. The authorities, it seems, have proceeded on the premise that the very excavation of the ordinary earth was subject to levy of royalty *de hors* the use for which it was put to. In view of the plain language of the provisions especially the definition of "minor minerals" and the construction put thereon by the aforesaid pronouncements, the action of the authorities cannot be sustained. Thus, we are not inclined to accede to the submission on behalf of the State.

23. For the foregoing reasons, the impugned notice deserves to be quashed and set aside. The petition, therefore, deserves to be allowed.

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24. The Writ Petition stands allowed. The impugned notice dated 4th December 2017 issued by the Tehsildar, Dahanu, District Palghar and actions initiated in pursuance thereof are hereby quashed and set aside. In the circumstances, there shall be no order as to costs.

25. Rule is made absolute in the aforesaid terms.

[N.J. JAMADAR, J.] **[R.M. BORDE, J.]**

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