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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 197 OF 2022

1. M/s. Royale Urbanspace
   A Partnership Firm registered under
   The Indian Partnership Act, 1932
   Having its registered office at
   Tehsil Shahpur, District Thane.

2. Shri. Rajesh Devji Bhadra

3. Shri. Sunil Liladhar Gajra

..Petitioners

Versus

1. State of Maharashtra
   Through Revenue and Forest Department,
   Mantralaya, Mumbai.

2. The Tahasildar, Shahapur, Thane. ..Respondents

.....

- Mr. Pradeep J. Thorat, Advocate for the Petitioners
- Ms. M.P. Thakur, AGP for the Respondents - State

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CORAM : S. J. KATHAWALLA &
MILIND N. JADHAV, JJ.

DATE : MARCH 01, 2022.

JUDGMENT (PER : S.J. Kathawalla & Milind N. Jadhav, JJ.)

. By the present Writ Petition, the Petitioner has prayed for the following reliefs:

> "a. That by on Order of this Hon'ble Court the Order dated 21st October, 2021, Notice bearing No. 10068/2021-22 dated 29th January, 2021 and Notices dated 23rd August, 2021 issued under Section 48(7) and (8) of the Maharashtra Land Revenue Code, 1966 thereby levying penalty of Rs.1,07,12,000/- and Rs.5,71,35,104/- respectively towards payment of alleged Royalty and extraction of earth in plot of land bearing Survey No.44/4 admeasuring 2 Hectares situated at Mouje Borsheti, Taluka Shahapur, District Thane be quashed and set aside."

2. The Petitioners have challenged two show cause notices, both dated 29.01.2021, hearing notice dated 30.06.2021, two final notices, both dated 23.08.2021 issued by the Respondent No. 2 - Tahasildar, Shahapur, demanding payment of royalty and penalty of Rs.1,07,12,000/- and Rs. 5,71,35,104/- and order dated 21.10.2021 passed by the Respondent No. 2 - Tahasildar, Shahapur calling upon the Petitioners to deposit an amount of Rs.1,09,18,000/- under the provisions of Section 48(7) of "the Maharashtra Land Revenue Code, 1966" (for short "**MLR Code, 1966**"). The Respondent No.2 has issued the impugned notices and passed the impugned order against the Petitioners for extraction of minor minerals unauthorisedly.

3. Before we advert to the submissions made by the respective Advocates, it will be apposite to state the relevant facts in brief:

3.1. The Petitioners are owners of land bearing survey No.44/1 ad-measuring 2 hectares situated at Mauje Borsheti, Tal. Shahapur, Dist. Thane (for short: "**the said property**"). In

2013, Petitioners desired to develop the said property for residential purpose and submitted the proposal and building plans to the Collector - Thane. The Collector - Thane forwarded the proposal to the Town Planning Department, Thane for approval;

3.1.1. On 16.04.2013, the Deputy Director of Town Planning, Thane by his order bearing No.NA/BP/Mouje Borsheti/Tq. Shahapur/Dist. Thane/933 approved the building plans submitted by the Petitioners and granted permission for construction of residential buildings on the said property;

3.1.2. On 23.04.2014, the Collector, Thane by his order bearing No. Revenue/REV/C1/ TEE-11/ NAP / Borsheti / SR-113 / 2012 granted permission for non-agricultural user of the said property;

3.1.3. The Petitioner constructed various buildings on the said property from time to time in respect of which occupation / building completion certificates dated 27.12.2019 and 28.01.2020 were granted by the Respondent No. 2;

3.1.4. The Petitioners registered their project of development on

the said property under the Real Estate (Regulation and Development), Act and have obtained all necessary permissions in accordance with law;

3.2. On 29.01.2021, Respondent No. 2 issued show cause notice bearing No. 6389/2021-22 for unauthorised excavation of 1030 brass of minor minerals on the said property without seeking prior permission from the Competent Authority. Petitioners were called upon to submit their explanation alongwith documentary evidence within 7 days as to why the Petitioners were not liable to pay an amount of Rs. 1,07,12,000/- towards royalty and penalty for the unauthorised excavation, failing which necessary steps would be taken under the provisions of Section 48(7) of the MLR Code, 1966;

3.2.1. On the same date i.e. 29.01.2021 Respondent No. 2 issued an identical show cause notice bearing No. 10068/2021-22 in respect of unauthorised excavation of 5493.76 brass of minor minerals without seeking prior permission of the Competent Authority in respect of the said property and calling upon the Petitioners to submit their explanation alongwith documentary evidence within 7 days as to why

the Petitioners were not liable to pay an amount of Rs. 5,71,35,104/- towards royalty and penalty for the unauthorised excavation, failing which necessary steps would be taken under the provisions of Section 48(7) of the MLR Code, 1966;

3.2.2. Petitioners filed two separate replies to the aforesaid notices through their Advocate, *inter alia*, stating that the Petitioners had obtained all necessary permissions for carrying out development on the said property and in the process of development extraction of minor minerals was done while laying the foundation of the buildings and the extracted minor minerals were utilized on the said property for filling up the excavated portions after completing the foundation of the buildings and hence in view of the provisions under the amended Rule 46 of the Maharashtra Minor Mineral Extraction (Development and Regulation) (Amendment) Rules, 2015 (for short: "**the said Rules**"), no royalty was payable by the Petitioners;

3.2.3. On 30.06.2021, Respondent No. 2 issued a notice for hearing to the Petitioners calling upon the Petitioners to submit their written submissions alongwith relevant

documentary evidence within 7 days to the Respondent No. 2. This notice for hearing stated that the Petitioners were liable to pay a sum of Rs. 1,07,12,000/-, but did not fix any date for hearing;

3.2.4. On 09.08.2021, the Petitioners filed their written reply to the notice dated 30.06.2021;

3.2.5. Thereafter, the Respondent No. 2 issued two final notices, both dated 23.08.2021 to the Petitioners stating that the replies filed by the Petitioners were not satisfactory and confirmed the amount of royalty and penalty payable by the Petitioners at Rs.5,71,35,104/- and Rs.1,07,12,000/- for illegal unauthorised excavation of minor minerals;

3.2.6. On 21.10.2021, the Respondent No. 2 issued an order under the provisions of Section 48(7) of the MLR Code, 1966 rejecting the replies filed by the Petitioners in reply to the show cause notices and the final notices and directed the Petitioners to deposit a sum of Rs.1,09,18,000/- within 7 days towards royalty and penalty for unauthorised excavation of 1030 brass of minor minerals;

3.2.7. On 30.10.2021, the Petitioners filed the present Writ Petition.

4. Shri. Pradeep J. Thorat, learned Advocate appearing on behalf of the Petitioners has taken us through the pleadings and has made the following submissions:

i. that the Petitioners while carrying out development and construction of buildings have excavated minor minerals for laying the foundation of the buildings, but have used the said minor minerals on the said property for development / while developing the said property;

ii. that Respondent No. 2 - Tahasildar, Shahapur has not disputed the aforesaid case of the Petitioners in her Affidavit-in-Reply dated 27.01.2022;

iii. that if the extracted minor minerals are used on the same property while developing the said property, then in terms of the provisions of Amended Rule 46 of the said Rules, no royalty is payable by the Petitioners (being the developer);

iv. that the impugned action of levying royalty and penalty for excavation of minor minerals for the purpose of laying the

foundation of plinth and development on the same is clearly illegal as the entire development is carried out by the Petitioners pursuant to grant of valid building permissions and non-agricultural user order issued by the Competent / Planning Authorities, and the subsequent occupation / building completion certificates issued by the Respondent No. 2 - Tahasildar, Shahapur;

v. that the provisions of the Section 48 of the MLR Code, 1966 deals with lands, the title of which is vested in the Government and cannot be made applicable to privately owned lands which are developed under valid development permission granted by the Planning Authority;

vi. that the provisions of Section 48 of the MLR Code, 1966 can only be applied to lands vested in the Government which are used for the purpose of mining operations, similarly placed allied operations; excavation of digging up of land for the purpose of development and construction of buildings and reusing the excavated material on the same property / land cannot be considered as mining activity and as such no royalty is payable;

vii. that the provisions of Sub-section 2 of Section 48 clearly reflect the intention of the legislature in the words "....right to all mines and quarries...." which is related to the principal activity of mining and quarrying and cannot be equated with development and construction of buildings;

viii. that in the present case, there is no material evidence to show that the Petitioners have transported the extracted minor minerals from the said property so as to be held liable for payment of royalty and penalty under the MLR Code, 1966.

5. Advocate Mr. Thorat has referred to and relied upon the following judgments in support of the Petitioners' case;

i. ***Promoters and Builders Association of Pune Vs. State of Maharashtra.***[1];

ii. Judgment and order dated 09.12.2021 in the case of ***P.S.C. Pacific Vs. The State of Maharashtra and Ors***.[2] passed by this Bench.

6. *PER CONTRA*, Ms. M.P. Thakur, learned AGP appearing for the Respondent has drawn our attention to the Affidavit-in-Reply

1 (2015) 12 SCC 736
2 Writ Petition No.7390 of 2010

dated 27.01.2022 of Nileema Suryawanshi - Tahasildar (Respondent No. 2) and contended that the entire action against the Petitioners is invoked under the provisions of Section 48(7) of the MLR Code, 1966 read with Rule 59 of the said Rules as the Petitioners have extracted the minor minerals and filled the plot with outside soil without any lawful authority. This submission made on behalf of the Respondents is contained in para No. 8 of the Affidavit-in-Reply which is reproduced below:

> "8. I say that an action initiated by the Respondent State is only under the provision of Section 48(7) of the Maharashtra Land Revenue Code and under Rule 59 of the Maharashtra Minor Mineral Extraction (Development and Regulation) Rules, 2013, as the Petitioner has extracted minerals and filled the plot with outside soil without any lawful authority."

6.1. However, when called upon, Ms. Thakur, learned AGP has not been able to produce any documentary evidence, panchnama etc. to prove that the Petitioners have excavated and used outside soil to fill the plot. Ms. Thakur has also attempted to distinguish para No. 16 of the judgment in the case of Promoters and Builders Association of Pune *(supra)* passed by the Supreme Court alongwith the provisions of sub-section 7 of Section 48 of the MLR Code, 1966 and submitted that the action initiated by the Respondent No. 2 - Tahasildar is correct in law. She has therefore prayed for dismissal of the Writ Petition.

7. We have perused the Writ Petition as well as the Affidavit-in-Reply filed on behalf of the Respondents, considered the submissions made by the learned Advocates for the parties and the case law relied upon by them.

8. We note that admittedly and undisputedly the Petitioners in the present case have been granted the following permissions for carrying out development and construction on the said property.

i. Order dated 16.04.2013 passed by the Dy. Director of Town Planning Thane approving the building plans and sanction for construction of residential buildings;

ii. Order dated 23.04.2014 passed by the Collector, Thane granting permission for non-agricultural user of the said property;

iii. Occupation / Building Completion Certificate dated 27.12.2019;

iv. Occupation / Building Completion Certificate dated 28.01.2020.

8.1. Copies of the above permissions have been placed on record by the Petitioners in the Affidavit-in-Rejoinder dated 28.01.2022 at page Nos. 63 to 77 of the Writ Petition. We have perused the said permissions.

9. Though it is the case of the Respondents as appearing in para No. 8 of the Affidavit-in-Reply dated 27.01.2022 that the Petitioners have extracted minerals and filled the plot with outside soil

without lawful authority, save and except this bare statement there is no material placed on record to substantiate such a charge. It is also not the case of the Respondents that the Petitioners are guilty of transportation of the excavated minor minerals from the said property. The two panchnamas referred to and relied upon by the Respondents which are Exhibited to the Affidavit-in-Reply at page Nos. 53 and 56 of the Writ Petition, merely state that the excavation has been carried out for the purpose of construction of residential buildings and the dimensions of the excavated area have been stated in the panchnamas. We have also perused the two show cause notices, both dated 29.01.2021, the notice for hearing dated 30.06.2021, the two final notices, both dated 23.08.2021 and the final order dated 21.10.2021 all issued by the Respondent No. 2 - Tahasildar and do not find an iota of evidence indicting the Petitioners of transporting the excavated minor minerals or using outside soil to fill the plot without lawful authority as alleged by the Respondents.

10. We may state that, on 11.05.2015, the State Government notified an amendment to the Maharashtra Minor Mineral Extraction (Development and Regulation) (Amendment) Rules, 2015 by introducing a proviso to Rule 46(a)(i), *inter alia*, providing that no royalty shall be required to be paid on earth which is extracted while developing a plot of land and if utilized on the very same plot for land

levelling or any work in the process of development of such plot.

11. We may usefully quote the findings of the Supreme Court in the case of Promoters and Builders Association of Pune (supra) which squarely cover the facts of the present case. Paragraphs 12 to 15 of the said judgment are relevant and read thus:-

> "12. It is not in dispute that in the present appeals excavation of ordinary earth had been undertaken by the appellants either for laying foundation of buildings or for the purpose of widening of the channel to bring adequate quantity of sea water for the purpose of cooling the nuclear plant. The construction of buildings is in terms of a sanctioned development plan under the MRTP Act whereas the excavation/widening of the channel to bring sea water is in furtherance of the object of the grant of the land in favour of the Nuclear Power Corporation. The appellant-builders contend that there is no commercial exploitation of the dug up earth inasmuch as the same is redeployed in the construction activity itself. In the case of the Nuclear Power Corporation it is the specific case of the Corporation that extract of earth is a consequence of the use of the land for the purposes of the grant thereof and that there is no commercial exploitation of the excavated earth inasmuch as "the soil being excavated for "Intake Channel" was not sent outside or sold to anybody for commercial gain".
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> 13. None of the provisions contained in the MRTP Act referred to above or the provisions of Rule 6 of the Rules of 1968 would have a material bearing in judging the validity of the impugned actions inasmuch as none of the said provisions can obviate the necessity of a mining license/permission under the Act of 1957 if the same is required to regulate the activities undertaken in the present case by the appellants. It will, therefore, not be necessary to delve into the arguments raised on the aforesaid score. Suffice it would be to say that unless the excavation undertaken by the appellant-builders is for any of the purposes contemplated by the Notification dated 3.2.2000 the liability of such builders to penalty under Section 48(7) of the Code would be in serious doubt.
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> 14. 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 embankment, 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 Act of 1957.
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> 15. 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 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."

11.1. In the present case, it is clearly not in dispute that the Petitioner has undertaken excavation of the earth on the said lands for laying foundation of the buildings i.e. for development and construction. The construction of buildings is in terms of the sanctioned development permission dated

16.04.2013 read with the permission for non-agricultural user dated 23.04.2014. The Respondents have also not alleged that there is commercial exploitation of the excavated earth / minor minerals i.e. the earth being excavated was sent outside or sold to anybody or transported by the Petitioners. As held by the Supreme Court, the purpose of excavation therefore needs to be considered. Any liability under the provisions of Section 48(7) of the MLR Code, 1966 for excavation of ordinary earth would truly depend on determination of the use / purpose for which the excavated earth has been put to. An excavation undertaken to lay the foundation of a building would therefore ordinarily carry the intention to use the excavated earth / material for the purpose of filling up or levelling as has been done in the present case.

11.2. As observed by us, in the present case the excavated material has been used by the Petitioners for the purposes of filling up and levelling**;** digging of the earth is inbuilt in the course of building operations**;** the activity so undertaken, therefore, cannot be characterized as one of excavation of minor minerals as contemplated under the Mines and Minerals (Development and Regulation) Act, 1957.

11.3 We have considered and followed the decision pronounced by the Supreme Court in the case of Promoters and Builders Association of Pune (*supra*) which has held that mere extraction of earth does not invite the levy of royalty. In the said case, Promoters and Builders Association of Pune had urged that the earth which is dug up for the purposes of laying of foundation of buildings is intended for filling up or levelling purposes as digging of the earth is inbuilt in the course of building operations, the said activity cannot be characterized as one of excavation of minor minerals and more particularly there was no commercial exploitation of the excavated earth involved**;** neither there was any sale or transfer of the excavated earth and the same was incidental to the purpose of development / construction under a valid development permission. The Supreme Court after analyzing the provisions contained in Section 48(7) of the MLR Code, 1966 in unequivocal terms held that the 'ordinary earth' used for filling or levelling purposes in construction of embankments, roads, railways, buildings though is a minor mineral, the liability under Section 48(7) for excavation of ordinary earth would truly depend on a determination of the use / purpose for which the excavated earth had been put to. 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 would be required on the stand of the builders that the extracted earth was not used commercially but was indeed redeployed in the building operations on the same plot.

11.4. We may state that the aforesaid decision of the Supreme Court has been followed by a coordinate Bench of this Court in the case of ***BGR Energy System Ltd, Khaparkheda Vs. Tahsildar, Saoner***[3] wherein the Petitioner had challenged the order of the Tahsildar directing the Petitioner to pay royalty and penalty for illegal excavation of earth while executing the work of construction of a thermal power project at Khaparkheda. This Court after following the decision in the case of Promoters and Builders Association of Pune (*supra*), quashed and set aside the order of the Tahsildar holding, *inter alia,* that use of the excavated earth to fill up the dug pits and any construction of the project did not fall within the ambit of the Notification dated 03.02.2000 and thus, the Tahsildar could not have passed the order under Section 48(7) of the MLR Code, 1966. We may also add that our

3 2018(1) Mh.L.J. 332

Bench has also followed the decision of the Supreme Court in Promoters and Builders Association of Pune (supra) in the case of *P.S.C. Pacific v/s. State of Maharashtra and Others* (supra), the facts of which are somewhat similar to the present case in hand. It is, therefore, evident that the Supreme Court had enunciated in clear and unambiguous terms that excavation of ordinary earth for construction of building purposes / development would not attract levy of royalty and penalty under the provisions of Section 48(7) of the MLR Code, 1966, especially when the excavated earth has been used for levelling and development on the same plot.

12. Respondent(s) have failed to place on record any panchnama / evidence in order to justify the charge / claim made in the notices dated 29.01.2021, 30.06.2021, 23.08.2021 and order dated 21.10.2021 which state that the Petitioners has unauthorisedly removed 1030 brass and 5493.76 brass of earth, exploited it commercially and transported the same.

13. We have carefully perused the pleadings and annexures placed before us by the parties. We do not find any evidence pertaining to the Petitioners illegally transporting the excavated minor

minerals / materials from the construction site. Though it is alleged that the Petitioners has excavated 1030 brass and 5493.76 brass of minor minerals, positive evidence is required to be placed on record to show that the Petitioners have illegally transported the said minor minerals. The two panchnamas at page Nos.53 and 56 of the Writ Petition prepared by the Talathi, Aasangaon, Tal. Shahapur, Dist. Thane do not show that the Petitioners have transported or removed any earth / minor minerals from the construction site. Respondents have merely proceeded on the premise that the very excavation of ordinary earth by the Petitioners is subject to levy of royalty *dehors* the use for which it was put to. However, in view of the ratio of the judgment of the Supreme Court in the case of Promoters and Builders Association of Pune (*supra*) and followed by us in the case of *P.S.C. Pacific V/s. State of Maharashtra* (*supra*), we are not inclined to accept the submissions made on behalf of the Respondent(s).

14. In so far as the grievance of the Respondents about availability of alternate remedy to the Petitioners is concerned, though it may be stated that the Petitioners have an alternate efficacious remedy to challenge the final order passed by the Respondent No. 2 - Tahasildar before the Appellate Authority under the MLR Code, 1966, according to us no purpose shall be served to relegate the Petitioners to the Appellate Authority in the strong facts and circumstances of the

present case. We have perused the final order dated 21.10.2021 which is annexed at Exhibit "F" to the Writ Petition. The said order has been passed without adhering to the principles of natural justice and solely relying on the show cause notice dated 29.01.2021, hearing notice dated 30.06.2021 and final notice dated 23.08.2021 passed by the Respondent No. 2 Tahsildar, Shahapur, *inter alia*, levying royalty, penalty and other charges against the Petitioners.

15. In view of the above discussion and findings, the two show cause notices dated 29.01.2021, the hearing notice dated 30.06.2021 and the two final notices dated 23.08.2021 and the final order dated 21.10.2021 need to be interfered with and deserve to be quashed and set aside.

16. In view of the above, we pass the following order:

(i) The two show cause notices dated 29.01.2021, the hearing notice dated 30.06.2021, the two final notices dated 23.08.2021 and the final order dated 21.10.2021 issued / passed by the Respondent No. 2 - Tahasildar, Taluka Shahapur, District Thane are hereby quashed and set aside.

17. The above Writ Petition stands allowed in the above terms. However, there shall be no order as to costs.

[MILIND N. JADHAV, J.] **[S. J. KATHAWALLA, J.]**