REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 10717 OF 2014
(Arising out of S.L.P. (C) NO. 33002 of 2010)

Promoters and Builders Association of Pune ... Appellant

Versus

The State of Maharashtra & Ors. ... Respondents

WITH

Civil Appeal No. 10718 of 2014
(Arising out of SLP(C) No.34306 of 2010)

Civil Appeal No. 10716 of 2014
(Arising out of SLP (C) No.4571 of 2011)

Civil Appeal No. 10715 of 2014
(Arising out of SLP(C) No.13828 of 2011)

J U D G M E N T

RANJAN GOGOI, J.

1. Leave granted in all the special leave petitions.

2. The appellant in the first batch of appeals before us is an Association representing individual builders of the State of Maharashtra who carry out construction activities in the normal course of business. The Association and also the individual builders are aggrieved by the judgment of the Bombay High Court dated

8.10.2010, *inter alia,* holding that "excavation activity even for the purposes of laying foundation of the building would still attract rigours of Section 48(7) of the Revenue Code". Under the aforesaid provision of the Code extraction of minerals by any person without assignment of any right by the State Government makes such person liable to penalty, as prescribed.

3. The Nuclear Power Corporation, the second appellant before us is a Government Company engaged in the construction, maintenance and operation of nuclear power station in India. It is aggrieved by the fact that though an issue similar to the one raised by the builders had been raised by it before the High Court the writ proceeding instituted by the Corporation has been dismissed on the ground that statutory remedy under the Maharashtra Land Revenue Code, 1966 (hereinafter referred to as 'the Code') had not been resorted to by the Corporation.

4. The relevant facts may, at the outset, be alluded to.

In the first set of appeals, digging of earth for the purpose of laying of foundation of a building is an integral part of the building activities undertaken by the appellants. According to the appellant-builders, the earth excavated or dug up is redeployed in the building itself at a particular stage of the construction. On the basis that such activity amounts to mining of a "minor mineral" i.e. ordinary

earth and that the same is without due permission/lease or assignment of the right to do so, the respondent authorities have invoked the power under Section 48(7) of the Code to levy penalty by the order(s) impugned before the High Court. The challenge having resulted in the findings of the High Court, as extracted above, the present appeals have been filed by the Association of the Builders and also by some of the builders themselves.

5. The facts in the appeal filed by Nuclear Power Corporation of India Limited are largely similar. In consonance with its objects, the Corporation in whose favour the grant of land was made had carried out digging activities for the purpose of widening of the water channel through which sea water is drawn for the purposes of cooling the nuclear plant in the Tarapur Atomic Power Station. The Corporation categorically denies any commercial use of the extracted earth.

6. On behalf of the appellants it is pointed out that to attract Section 48(7) of the Code, the activity undertaken has to be unlawful. The building operations undertaken by the appellant-builders are pursuant to a final development plan sanctioned under Section 31 of the Maharashtra Regional and Town Planning Act, 1966 (hereinafter for short 'the MRTP Act'). In this regard the attention of the Court has also been drawn to the provisions of Section 2(7) of the MRTP Act

which define "development" to mean "carrying out of buildings, engineering, mining or other operations in or over or under, land ……..". It is also pointed out that by Notification dated 3.2.2000 issued under Section 3(e) of the Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter for short referred to as 'the Act of 1957') ordinary earth has been declared to be a minor mineral but only if it is used for filling or levelling purposes in construction of embankments, roads, railways, buildings etc. According to the learned counsel for the appellant-builders, the earth which is dug up for the purposes of laying of foundation of buildings is not intended for filling up or levelling purposes; digging of the earth is inbuilt in the course of building operations. The activity undertaken, therefore, cannot be characterised as one of excavation of a minor mineral. Additionally, the provisions of Rule 6 of the Maharashtra Land Revenue (Restriction on Use of Land) Rules, 1968 (hereinafter for short 'the Rules of 1968') has been relied upon to contend that excavation of land for purposes of laying of foundation for buildings do not require any previous permission of the Collector which is otherwise mandated prior to use/excavation of land for any of the purposes covered by the provisions of the Rules of 1968. The definition of 'Mine' in Section 2(j) of the Mines Act, 1952 and the meaning of the expression 'mining operation' assigned by Section 3(d) of the Act of 1957 has also been

pressed into service to contend that mere digging of earth as undertaken by the appellants cannot amount to a mining activity. The learned counsel for the appellants (builders) have alternatively contended that if the appellants are still to be held liable under the provisions of Section 48(7) of the Code, the aforesaid provision itself is liable to be adjudged as constitutionally invalid. The Act of 1957 which is relatable to Entry 54 of List I comprehensively deals with all questions of liability on account of unauthorised/unlicensed mining and the field being wholly occupied by a central enactment, Section 48(7) of the Code is constitutionally suspect being relatable to Entry 23 of List II which is subject to Entry 54 of List I.

7. Insofar as the appeal of the Nuclear Power Corporation is concerned, apart from the common grounds of challenge as in the case of the builders, it is 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 State Government. The said grant was made way back in the year 1964 on freehold basis for the purpose of establishing an atomic power station and for maintenance thereof. It is further submitted that the very jurisdiction

to levy penalty under Section 48(7) of the Code having been raised in the writ petition filed by the appellants, the High Court was not justified in refusing adjudication on merits.

8. In reply, the State has contended that after the inclusion of ordinary earth in the definition of "minor minerals" by Notification dated 3.2.2000 under Section 3(e) of the 1957 Act, excavation of ordinary earth without authorization under the Act of 1957 would make the appellants liable not only to payment of penalty under the Code but also for criminal prosecution under the Act of 1957. It is contended that mere permission for construction of buildings; sanction of the development plans or the provisions of Rule 6 of the Rules of 1968 does not absolve the appellants from fulfilling the statutory obligations under the 1957 Act. Such a contention, if accepted, according to the learned State counsel, would have the effect of nullifying the provisions of the 1957 Act insofar as one specie of minor mineral i.e. ordinary earth is concerned. As regards the challenge to the constitutional validity of Section 48(7) of the Code the State contends that the penalty imposed under Section 48(7) is compensatory and in the nature of a civil liability for the loss suffered by the State. Consequently, the challenge is without any substance as the two enactments i.e. the Code and the Act of 1957 operate in different fields. The enactment of the Code is traceable to Entry 18

and 45 of the List II and not Entry 23 of the said List as contended on behalf of the appellants.

9. We may proceed to analyse the issues arising by reproducing Section 48(7) of the Code under which the impugned actions have been made.

> "48. *Government title to mines and minerals-*
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> *(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 construction of bunds of the fields or on 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, to pay penalty not exceeding a sum determined, at three times the market value of the minerals so extracted, removed, collected, replaced, picked up or disposed of, as the case may be.*
>
> *Provided that, if the sum so determined is less than one thousand rupees, the penalty may be such larger sum not exceeding one thousand rupees as the Collector may impose."*

10. A plain reading of the aforesaid provision would make it clear that the quintessence of the provision contained in Section 48(7) is extraction/removal of any mineral vested in the State without lawful authority or without a lawful assignment by the State.

11. What is a mineral is not defined either under the MRTP Act or the Code. The said expression is however defined by Section 2(j) of the

Mines Act, 1952 and Section 3(a) read with Section 3(e) of the Act of 1957. As mining activities and operations are regulated by the provisions of the Act of 1957 it is the definition contained in the said Act which will be more relevant for the present. Section 3(a) and Section 3(e) is in the following terms:

> "**Section 3**.—In this Act, unless the context otherwise requires,—
>
> (a) "minerals" includes all minerals except mineral oils:
>
> (b) xxxxx xxxx xxxxx
> (c) xxxxx xxxx xxxxx
> (d) xxxxx xxxx xxxxx
>
> (e) "minor minerals" means 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;"

12. Ordinary earth has been bought within the fold of a Minor Mineral by Notification of 3.2.2000 issued under Section 3(e) of the Act of 1957. The said Notification is in the following terms:

> "NOTIFICATION
>
> GSR (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 mineral in addition to the minerals already declared as

minor minerals hereinbefore under the said clause.

(F.No.7/5/99-M.VI)
Sd/-
(S.P.Gupta)
Joint Secretary to the Government of India"
(emphasis supplied)

13. It is, therefore, clear that "ordinary earth" used for filling or levelling purposes in construction of embankments, roads, railways, buildings is deemed to be a minor mineral. 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".

14. 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.

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.

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 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.

17. Insofar as the appeal filed by the Nuclear Power Corporation is concerned, the purpose of excavation, ex facie, being relatable to the purpose of the grant of the land to the Corporation by the State Government, the extraction of ordinary earth was clearly not for the purposes spelt out by the said Notification dated 03.02.2000. The process undertaken by the Corporation is to further the objects of the grant in the course of which the excavation of earth is but coincidental. In this regard we must notice with approval the following views expressed by the Bombay High Court in ***Rashtriya Chemicals and Fertilizers Limited*** Vs. ***State of Maharashtra and Others***[1] while dealing with a somewhat similar question.

> *14. If it were a mere question of Mines and Minerals Act, 1957 covering the removal of earth, there cannot be possibly any doubt whatever, now, in view of the very wide definition of the term contained in the enactment itself, and as interpreted by the authoritative pronouncements of the Supreme Court. As noted earlier, the question involved in the present case is not to be determined with reference to the Central enactment but with reference to the clauses in the grant and the provisions in the Code. When it is noted that the Company was given the land for the purpose of erecting massive structures as needed in setting up a chemical factory of the designs and dimensions of the company, the context would certainly rule out a reservation for the State Government of the earth that is found in the land. That will very much defeat the purpose of the grant itself. Every use of the sod, or piercing of the land with a pick-axe, would, in that eventuality, require sanction of the authorities. The*

1 AIR 1993 Bombay 144

interpretation so placed, would frustrate the intention of the grant and lead to patently absurd results. To equate the earth removed in the process of digging a foundation, or otherwise, as a mineral product, in that context, would be a murder of an alien but lovely language. The reading of the entire grant, would certainly rule out a proposition equating every pebble or particle of soil in the granted land as partaking the character of a mineral product. In the light of the above conclusion, I am clearly of the view that the orders of the authorities, are vitiated by errors of law apparent on the face of the record. They are liable to be quashed. I do so."

18. For the aforesaid reasons all the appeals are allowed, however, with the direction that in the cases of the appellant-builders the respondent-State will be at liberty to proceed further in accordance with the observations contained in this order if it is so advised. So far as the appeal of the Nuclear Power Corporation is concerned the writ petition is allowed and the orders impugned before the High Court are set aside and quashed. In view of our conclusions above, we do not consider it necessary to go into the larger question raised i.e. the constitutionality of the provision of Section 48(7) of the Code which issue is left open for decision in an appropriate case.

.....J.
[RANJAN GOGOI]

.....J.
[R.K. AGRAWAL]

NEW DELHI,
DECEMBER 03, 2014.

ITEM NO.1B COURT NO.9 SECTION IX

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

C.A.No.10717 /2014 @
Petition(s) for Special Leave to Appeal (C) No(s). 33002/2010

(Arising out of impugned final judgment and order dated 08/10/2010 in WP No. 785/2008 passed by the High Court Of Bombay)

PROMOTERS & BUILDERS ASSN.OF PUNE Petitioner(s)

VERSUS

STATE OF MAHARASHTRA & ORS. Respondent(s)

WITH
C.A.No. 10718 /2014 (@ SLP(C) No. 34306/2010)

C.A.No. 10716/2014 (@ SLP(C) No. 4571/2011)

C.A.No.10715/2014 (@ SLP(C) No. 13828/2011)

Date : 03/12/2014 These petitions were called on for pronouncemet of judgment today.

For Petitioner(s) Mr. Nirnimesh Dube,Adv.

Mr. Gaurav Agrawal,Adv.

Mr. Shivaji M. Jadhav,Adv.

M/s. Parekh & Co.,Adv.

For Respondent(s) Mr. Aniruddha P. Mayee,Adv.

Ms. Asha Gopalan Nair,Adv.

…..

Hon'ble Mr. Justice Ranjan Gogoi pronounced the judgment of the Bench comprising His Lordship and Hon'ble Mr. Justice R.K. Agrawal.

Leave granted.

The appeals are allowed in terms of the signed reportable judgment.

(MADHU BALA) **(ASHA SONI)**
COURT MASTER **COURT MASTER**
(Signed reportable judgment is placed on the file)