

(2024) 03 BOM CK 0030
In the Bombay High Court
Case No : Writ Petition No. 10449 Of 2023

AIGP Developers (Pune) Private Limited APPELLANT
Vs
State Of Maharashtra And Others RESPONDENT

Date of Decision : 08-03-2024

Acts Referred:

Constitution Of India, 1950 — Article 226
Maharashtra Minor Minerals Extraction (Development And Regulation) Rules, 2013 — Rule 46, 46(i)
Maharashtra Land Revenue (Restriction On Use Of Land) Rules, 1968 — Rule 6
Maharashtra Land Revenue Code, 1966 — Section 48(7)
Special Economic Zones Act, 2005 — Section 4, 10(3)
Maharashtra Land Revenue Code, 1966 — Section 48(7), 48(9)
Monopolies And Restrictive Trade Practices Act, 1969 — Section 2(7)
Mines And Minerals (Development And Regulation) Act, 1957 — Section 3(d), 3(e), 15
Mines Act, 1952 — Section 2(1)(j), 3(e), 4
Code Of Criminal Procedure, 1973 — Section 48(7)

Citation : (2024) 03 BOM CK 0030

Hon'ble Judges : B. P. Colabawalla, J;Somasekhar Sundaresan, J

Bench : Division Bench

Advocate : Dr. Milind Sathe, Saket Mone, Devansh Shah, Vidhi Partners, A.I. Patel, M.S. Bane

Final Decision : Disposed Of

Judgement

Somasekhar Sundaresan, J

1. Rule. By consent, Rule made returnable forthwith, and taken up for final hearing and disposal.
2. The challenge in this Writ Petition is to an order dated 29th June, 2023 ("Impugned Order") passed by Respondent No. 2 viz. the Tehsildar, Haveli (Pune), directing the Petitioner viz. AIGP Developers (Pune) Pvt. Ltd. to pay an aggregate sum of Rs. 13,45,86,252/- (Rs. 2,45,14,800/- towards royalty and Rs. 11,00,71,452/- towards monetary penalty) for allegedly excavating minor minerals (ordinary earth) without due authorisation. The Impugned Order is

passed under Section 48(7) of the Maharashtra Land Revenue Code, 1966 ("MLRC").

3. The Petitioner is entitled to various land parcels being Survey Nos.1344/3 and 1344/4 at Wagholi (approximately 0.89 hectares and 5.69 hectares respectively); and Survey No.63/1/6 at Kharadi (approximately 0.11 hectares), totally admeasuring approximately 6.69 hectares. The Petitioner envisaged setting up an information technology and information technology-enabled services park consisting of four buildings, with a total construction of 30,00,000 Sq.Ft. of net leasable area. All the excavation of earth that is the subject matter of these proceedings, relates only to the land at Wagholi ("Subject Land").

4. In 2018, the Petitioner was accorded permissions for development of land and construction of buildings at Wagholi, by the Pune Metropolitan Regional Development Authority ("PMRDA") under the Maharashtra Regional and Town Planning Act, 1966 ("MRTP Act"). The Petitioner proposed to avail of fiscal benefits that would become available to a sector-specific special economic zone ("SEZ"), and applied to the Government of India, for being notified as such. On 8th February, 2019, the Petitioner was granted a Letter of Approval under Section 10(3) of the Special Economic Zones Act, 2005 ("SEZ Act"). The land came to be notified on 18th March, 2019 as an SEZ under Section 4 of the SEZ Act.

5. The Petitioner developed the Subject Land and started construction of the buildings. At the time of filing the Writ Petition, the constructed buildings represented approximately 15,00,000 Sq.Ft. of leasable area with the requisite Occupation Certificates too being received for two buildings constructed on the developed Subject Land.

6. It is common ground that in the course of such development and construction, the Petitioner excavated a total quantity of 80,858 brass[A "brass" is a unit of measure for volume of mineral excavated – essentially, 100 cubic feet constitutes 1 "brass".] of soil, of which, 40,000 brass is said to have turned out to be boulders and black cotton soil, which were unfit for redeployment in the development of the Subject Land. The Petitioner would submit that the 40,000 brass of such excavated earth, had to be removed and transported away from the site. Towards this end, the Petitioner applied for permission from time to time, and received four different quarry permits under the Mines and Minerals (Development and Regulation) Act, 1957 ("Mining Act") read with the Maharashtra Minor Minerals Extraction (Development and Regulation) Rules 2013 ("Extraction Rules"), upon payment of the applicable royalty for extraction and removal from site. Such permissions received by the Petitioner, the quantum of soil removed, and royalty paid therefor, may be summarized thus:

Sr. No

Permission Date

Quantity of Soil (Brass)

Royalty Paid

1

1 st, January, 2019

10,000

Rs.45,32,250/-

2

11th March, 2019

10,000

Rs.45,32,250/-

3

7 th October, 2019

5,000

Rs.22,92,250/-

4

18th February, 2020

15,000

Rs.70,72,250/-

7. The balance 40,858 brass of earth excavated was used for back-filling and levelling of the very same land. According to the Petitioner, when the earth so excavated is used for development and levelling of the very same land, no additional permission under the Mining Act or under the MLRC is required. For such excavation, no charge of royalty is attracted under the MLRC. The Petitioner would submit that such activity inherently constituted "development", for which the Petitioner had "lawful authority" by way of the development permissions from the PMRDA under the MRTP Act.

8. Eventually, citing poor market response and lack of demand for SEZ space due to change in the fiscal incentive regime and non-extension of direct tax benefits to SEZs, the Petitioner decided to seek de-notification of the Subject Land as SEZ, choosing to continue with the development project without availing the SEZ benefits. The Petitioner secured the approval for such de-notification on 24th September, 2021 in respect of land admeasuring approximately 4.97 hectares.

9. Pursuant to another application dated 31st January, 2022 for de-notifying the balance land admeasuring approximately 1.72 hectares, the Petitioner was asked

to obtain a 'No Objection Certificate' from the Development Commissioner (Industries), Directorate of Industries, Government of Maharashtra. Such an application was made on 16th February, 2022. The Additional Director of Industries, Government of Maharashtra addressed a letter to the Deputy Secretary, Finance Department, and to the Deputy Secretary, Revenue Department and Joint Commissioner, Revenue Department, State Tax Head Quarters (forming part of Respondent No. 1), to issue a "No Dues Certificate" before processing the request for de-notification of the balance land from the SEZ status.

10. On 7th July, 2022, the Petitioner wrote to the District Collector, Pune i.e., Respondent No.3 asserting that the Petitioner had not availed of any tax benefits or exemptions from royalty, and thereby being entitled to a No Dues Certificate. On 8th August, 2022 Respondent No.3 wrote to Respondent No.2 asking for details of all royalty payments that may have been made by the Petitioner in connection with the development of the land. Thereafter, on 20th September, 2022 Respondent No.2 wrote to the Divisional Officers of Wagholi and Kharadi to conduct a site inspection and submit their reports. The officers forwarded their respective site inspection reports. No excavation was reported in respect of the land at Kharadi, on which roads had been constructed. Excavation of 80,858 brass was reported in respect of the Subject Land. Payment of royalties and granting of permits for excavation and removal of earth to the tune of 40,000 brass from the site was also noticed.

11. In these circumstances, the Petitioner was served with a show cause notice dated 22nd November, 2022 ("Show Cause Notice") alleging that the Petitioner had carried out unauthorised excavation of minor minerals to the extent of 80,858 brass, and seeking an explanation as to why penal action under Section 48(7) of the MLRC should not be taken. Written submissions dated 29th November, 2022 and 9th March, 2023, with detailed arguments on the subject matter of the Show Cause Notice were filed by the Petitioner. A opportunity of being heard was provided to the Petitioner on 29th November, 2022, and thereafter, the Impugned Order came to be passed imposing penalty and claiming royalty in respect of excavation to the extent of 40,858 brass.

Submissions by the Parties:

12. In a nutshell, the submissions of Dr. Milind Sathe, Learned Senior Counsel on behalf of the Petitioner, are that there has been no unauthorised excavation at all and no penal action under Section 48(7) of the MLRC was at all warranted. Out of the 80,858 brass extracted, royalty had indeed been paid for 40,000 brass extracted and removed from the site, and for which applicable royalties had been paid and requisite licenses had been received, and that to this extent, there is no dispute. The Petitioner represented that since the balance 40,858 brass was used for levelling and development of the very same plot of land from which it was excavated, there was no requirement to either obtain approval or to pay royalty. According to the Petitioner, such authorisation to excavate, level the land and

develop the land, was inherent in the development approvals received. In support of the aforesaid contention, Dr. Sathe relied upon a decision of the Hon'ble Supreme Court in the case of Promoters and Builders Association of Pune vs. State of Maharashtra - 2015 (12) SCC 736 ("Promoters and Builders"); the decision of this Court in Paranjpe Scheme (Construction) Ltd. vs. State of Maharashtra - 2021 SC OnLine Bom 5059 ("Paranjpe Scheme") and in BGR Energy System Ltd. vs. Tahasildar, Saoner - 2017 SCC OnLine Bom 6760 - ("BGR Energy"). Although these judgements had also been cited in response to the Show Cause Notice, it was pointed out that these were not even referred to in the Impugned Order.

13. Dr. Sathe also drew our attention to a notification dated 11th May, 2015, which amended Rule 46 of the Extraction Rules, to stipulate that excavation of earth while developing a plot of land and utilised on the very same plot of land for levelling, or any work in the process of developing such plot, would not attract any obligation to pay royalty. Dr. Sathe, therefore, submitted that the Impugned Order cannot stand, and therefore must be set aside by us in exercise of powers under Article 226 of the Constitution of India.

14. On the other hand, Mr. A.I. Patel, the Learned Additional Government Pleader submitted that the non-compliance by the Petitioner would lie in not securing approval for the extraction of the 40,858 brass that was redeployed on the Subject Land. According to Mr. Patel, regardless of removal of soil from the land from which it is excavated, one must seek permission to extract soil. He submitted that it does not matter that the extracted soil was used for backfilling and development of the very same land.

15. The Ld. AGP would argue that such authorisation not having been taken in respect of 40,858 brass (only 40,000 brass having been covered by the permits taken), the extraction of such quantum of soil is per se unauthorised, and would therefore attract not only royalty but also penalty. He would submit that failure to get permission for excavation would render the mining of minor minerals to be unauthorised, as a result of which, the penal jurisdiction under Section 48(7) of the MLRC would indeed be attracted. Therefore, he argued, the Impugned Order is fully justified and requires no interference from us in exercise of powers under Article 226 of the Constitution of India.

Analysis and Findings:

16. We have reviewed the material on record and considered the provisions of law invoked by the Respondents and the Petitioner. We have also reviewed the law declared not only by this Court but also by the Hon'ble Supreme Court of India.

17. The Impugned Order is evidently, summary in nature. It does not deal with the provisions of law invoked either in the Show Cause Notice or in the written replies. It also does not deal with the case law cited and presented by the Petitioner. The Impugned Order has computed royalty in the sum of

Rs.2,45,14,800/- (Rs.600/- per brass on the 40,858 brass mined allegedly without authorisation); and penalty in the sum of Rs.11,00,71,452/-, computed at three times the market price for the minor minerals (Rs.898/- per brass on 40,858 brass). Be that as it may, in our opinion, it is important to set out a definitive iteration of the law on the subject, particularly since multiple orders imposing royalty on earth excavated while developing land are coming to our attention, despite the earth being redeployed for work on the same land.

18. The material on record points to the fact that 80,858 brass of soil was excavated and permits to remove and transport the soil was obtained in respect of 40,000 brass. These are figures contained across the record – in the status report of the Divisional Officer of Wagholi; in the Show Cause Notice; and indeed, in the Impugned Order.

19. In a nutshell, we find that the issue involved in the present Writ Petition is no longer res integra, particularly in view of the law declared way back in 2014 by the Hon'ble Supreme Court in Promoters and Builders, followed by an amendment made in 2015, by the State to the Extraction Rules. Promoters and Builders stipulates that the purpose for which an extraction is made would determine whether the excavated earth is at all a "minor mineral". A reading of Promoters and Builders would make the position in law clear. The following extracts are relevant:-

"5. 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 1957 Act") 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.

6. 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 1968 Rules") 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 1968 Rules. The definition of "mine" in Section 2(1)(j) of the Mines Act, 1952 and the meaning of the expression "mining operations" assigned by Section 3(d) of the 1957 Act 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 1957 Act 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 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.

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 off the grant of the land in favour of Nuclear Power Corporation. The appellant builders contend that there is no commercial exploitation of the dug up earth inasmuch as the same is redeveloped in the construction activity itself. In the case of 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 a 'Intake Channel' was not sent outside or sold to anybody for commercial gain".

13. None of the provisions contained in the MRTP Act referred to above or the provisions of Rule 6 of the 1968 Rules 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 licence / permission under the 1957 Act 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.

14. Though Section 2(1)(j) of the Mines Act, 1952 which defines "mine" and the expression "mining operations" appearing in Section 3(d) of the 1957 Act 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 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.

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 1957 Act read with the Notification dated 3-2-2000.

16. Insofar as the appeal filed by 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 3-2-2000. 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 Ltd. v. State of Maharashtra* while dealing with a somewhat similar question: (1992 SCC OnLine

Bom para 14)

"14. If it were a mere question of the 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 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."

[Emphasis Supplied]

20. In short, in Promoters and Builders, the Hon'ble Supreme Court has stipulated the need to examine the use to which the exca-vated earth is applied. According to the Hon'ble Supreme Court, it is the use to which the excavated earth is put, that would determine whether it can ever be regarded as a minor mineral, to attract the provi-sions of Section 48(7) of the MLRC.

21. Section 4 of the Mining Act provides that for any mining op-erations, permission under the Mining Act or rules made thereunder would be required. Section 15 of the Mining Act provides that the State Government may make rules to regulate the the grant of leases and concessions in respect of "minor minerals" and for connected purposes. For other minerals, the power to administer the Mining Act would be with the Central Government.

22. Section 3(e) of the Mining Act defines the term "minor min-erals" as follows:

"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.

[Emphasis Supplied]

23. A notification dated 3rd February, 2000 issued by the Gov-ernment of India

under Section 3(e) of the Mining Act (which has been interpreted by the Hon'ble Supreme Court in Promoters and Builders), is extracted below:-

"GSR 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 declared 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."

[Emphasis Supplied]

24. According to the law declared in Promoters and Builders, the liability under Section 48(7) of the MLRC would depend truly on the use to which the excavated earth is put. According to the Hon'ble Supreme Court, a blanket determination of liability merely because ordinary earth was dug up would not be justified. In order to invoke Section 48(7), the State would need to make a "more precise determination of the end use". The Hon'ble Supreme Court had stipulated the accuracy of the stand of the builders that the extracted earth "was not used commercially but was re-deployed in the building operations" would need to be seen. If it were found that the extracted earth was not used commercially but was re-deployed in the building operations, the Hon'ble Supreme Court has ruled in Promoters and Builders, the notification extracted above, would have no application, and as a result, the excavated earth, would not constitute a "minor mineral" under Section 3(e) of the Mining Act.

25. Against this backdrop, Section 48(7), and also Section 48(9) of the MLRC may be noticed:

(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 on any other plea), nallas, creeks, riverbeds, 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 Tahsildar 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:

(9) The State Government may make rules to regulate the extraction and removal of minor minerals required by inhabitants of a village, town or city for their domestic, agricultural or professional use on payment of fees or free of charge as may be specified in the rules.

Explanation: For the purposes of this section, "minor minerals" means the minor minerals in respect of which the State Government is empowered to make rules

under Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957.

[Emphasis Supplied]

26. It will be seen that the penalty under Section 48(7) is linked to the market value of the mineral involved. The inference we would draw from the articulation in *Promoters and Builders* by the Hon'ble Supreme Court is that commercial exploitation in the market (as distinguished from use for oneself) would be an important factor in determining whether the excavated earth would at all constitute "minor mineral". This is why *Promoters and Builders* has placed emphasis on the need for the State to find out whether the excavated earth was re-deployed or was used commercially.

27. As seen above, the State Government is empowered to make rules under Section 15 of the Mining Act. Using this power, the Extraction Rules have been made. After the ruling in *Promoters and Builders*, the State Government, explicitly amended Rule 46 of the Extraction Rules, which provides for royalty on minor minerals removed from the leased area. With effect from 11th May, 2015, Rule 46 was amended to explicitly make a conscious distinction between minor minerals extracted and used on the same land and minor minerals extracted and removed from that land. The amended Rule 46(i) of the Extraction Rules provides as follows:-

"(i) The lessee shall pay royalty on minor minerals removed from the leased area at the rates specified in Schedule I:

Provided that, such rates shall be revised once in every three years :

Provided further that, no royalty shall be required to be paid on earth which is extracted while developing a plot of land and utilized on the very same plot for land levelling or any work in the process of development of such plot;

[Emphasis Supplied]

28. A plain reading of the foregoing provision would show that where earth is extracted in the course of development of a plot of land and is utilised on the very same plot of land for levelling or for any other work in the course of such development, no royalty is required to be paid. Since *Promoters and Builders* made it clear that re-deployment on the very same land (as opposed to commercial use after its removal from the said land) is the key jurisdictional fact to determine if the "wrath of Section 48(7)" would be attracted, the amended Rule 46(i) of the Extraction Rules has also done away with royalty being payable on the extracted earth, if it is re-deployed in the development of the same plot of land, for land levelling or any other work incidental to the process of developing the same plot of land. Therefore, where the excavated earth is removed from the plot of land, royalty would be payable but where the excavated earth is re-deployed on the very same plot of land, there would be no charge of royalty. If there was no charge of royalty, the extraction being incidental to levelling that

very land or any work relating to the development of that very plot of land, would naturally not require any separate permission. As stated by the Learned Single Judge of this Court in the judgement in Rashtriya Chemicals and Fertilizers Ltd. V. State of Maharashtra (supra), which is extracted and endorsed by the Hon'ble Supreme Court in Promoters and Builders, any other view would point to the need to get government approval for every piercing of the land with a pick-axe and equate every pebble or particle of soil as partaking the character of a minor mineral.

29. Therefore, Dr. Sathe is entirely right in stating that the law required payment of advance royalties in respect of such quantum of excavated earth that could not be utilised in development of the very same land (the 40,000 brass extracted and removed from the Subject Land), and the Petitioner indeed complied with such requirement. The excavated earth re-deployed in the development of the very same Sub-ject Land (the 40,858 brass) would not attract an obligation to pay any royalty, and neither, would it require any additional authorisation.

30. The amendment to Rule 46 of the Extraction Rules was given effect on 11th May, 2015. The decision in Promoters and Builders was delivered on 3rd December, 2014. The second proviso to Rule 46 squarely obviates any difficulty in discerning the state of the mind of the developer at the time the earth was excavated. It simply provides that if the earth excavated were to be utilised on the very same plot of land towards land levelling or any other work in the process of develop-ment of such plot, no royalty would need to be payable.

31. Therefore, in our opinion, no royalty was payable by the Pe-titioner in respect of the 40,858 brass of excavated earth but also as a logical consequence, no penalty is capable of being imposed on the Pe-titioner in respect of such excavated earth– all because the said exca-vated earth was not a “minor mineral” because it was re-deployed and used in the development of the very same Subject Land.

32. Multiple judgments by various other Division Benches of this Court have been cited to show the law declared on the very same is-sue. In the interest of brevity, each of these is not being cited. BGR En-ergy and Paranjpe Scheme, are judgements squarely on the point, and despite being cited, the Impugned Order does not even contain any ref-erence to them. It is ironical that show cause notices continue to be is-sued, and penalty orders continue to be passed, in the teeth of such ex-plicit legislation and such explicit declaration of the law, in interpreting the legislation.

33. At the fag end of the arguments, the Learned AGP came up with a novel argument. He would submit that the Petitioner has not proved that all that it excavated is 80,858 brass, and perhaps it could have excavated more. Such a submission, we are afraid, cannot be countenanced. The onus of bringing home an allegation in a show cause notice is on the authority levelling the allegation. We have al-ready noticed how the reports of the officers who conducted the

inspection, the Show Cause Notice and indeed the Impugned Order, all cite excavation of 80,858 brass and lawful permits to extract and remove only 40,000 brass. Therefore, it is obvious that the State clearly had a view on the quantity extracted and such crystallised quantity is a product of scrutiny by the officials who examined the land before deciding if a No Dues Certificate could be issued, and indeed led to the Show Cause Notice and the Impugned Order. Therefore, at this belated stage, to place the onus on the Petitioner, to prove that the Show Cause Notice and the Impugned Order are empirically accurate, is untenable.

Summary of Conclusions:

34. Therefore, for the aforesaid reasons, in conclusion, we hold the following:-

- a) Earth that is extracted while developing a plot of land and re-deployed on the very same plot of land for land levelling or any work in the process of development of such plot, does not partake the character of a "minor mineral", and therefore does not require any permission for excavation, and consequently does not entail payment of any royalty. The Petitioner was therefore fully compliant in respect of the 40,858 brass of earth extracted from the Subject Land and re-deployed in the development work on the very same Subject Land;
- b) Insofar as earth extracted while developing a plot of land that is not utilised on the very same plot of land but re-moved and transported elsewhere, royalty would be payable under the Extraction Rules with applicable permits under the Mining Act.
- c) In the facts of the present case, the Petitioner not only obtained the requisite permits for extraction and re-moval of such earth extracted, but also paid royalty in respect of the 40,000 brass that falls within this category;
- d) Consequently, the Impugned Order deserves to be quashed and set aside; and
- e) As a result, the State Government must not withhold the issuance of a "No Dues Certificate" in respect of the dues claimed under the Impugned Order, in the course of processing the Petitioner's request for de-notification of the balance land from the SEZ status.

35. Rule is made absolute in the aforesaid terms, and the Writ Petition is accordingly disposed of. There shall be no order as to costs.

36. This order will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.