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**(2009) 05 BOM CK 0015**

**In the Bombay High Court**

**Case No :** Writ Petition No. 2608 of 2009 and Civil Application No. 4680 of 2009

Gangadhar Mohan Lamkane

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

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**Date of Decision :** 06-05-2009

**Acts Referred:**

Constitution of India, 1950 — Article 226

**Citation :** (2009) 3 BomCR 548

**Hon'ble Judges :** Potdar A.V., J; Dabholkar N.V., J

**Bench :** Division Bench

**Advocate :** D.J. Chaudhari, for the Appellant; K.B. Chaudhari, A.G.P. for Respondent Nos. 1 to 5, R.J. Nirmal in C.A. 4680/09, for the Respondent

**Final Decision :** Allowed

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## Judgement

Potdar A.V., J.—Rule. Rule made returnable forthwith and with the consent of the parties, heard finally at the stage of the admission.

2. At the time of hearing of the writ petition, learned Advocate Mr. R.J. Nirmal, who has appeared on behalf of the interveners, was allowed to address the Court, and as such the intervenors are allowed to address the Court, no separate order is passed in civil application and thus the civil application No. 4680/2009 stands disposed of.

3. By present writ petition, under Article 226 of the Constitution of India, the petitioner has prayed for quashing and setting aside the orders dated 30.3.2009 and 31.3.2009 passed by the respondents. The petitioner has also prayed for directions to extend the period for excavation from 7.3.2009 to 31.7.2009 in respect the sand spot at Indalgaon, by equal number of days of stoppage of business by the respondents.

4. The facts, which gave rise to file the present writ petition, can be summarised as follows:

a) Respondent No. 3, the Collector, Jalna, published an advertisement in daily newspaper "Asantosh" dated 9th February, 2009 for auction of right to excavate sand from the spots in the Godavari river-bed and also notified the proclamation by giving the terms and conditions of the said auction. In the said notification, 7 sand spots were notified for auction. Out of the said 7 sand spots, the sand spot at Indalgaon, Tq-Ambad from Godavari river-bed is the subject matter of the present writ petition.

b) Gram Panchayat, Indalgaon has passed a resolution in the Gram Sabha dated 2.10.2008 and gave no objection for the auction of the sand spot. Senior Geologist from Ground Water Survey Department has certified the spot as available for excavation (Certificate Exhibit P-5). Accordingly, thereafter, the respondent No. 5, Tahsildar, Ambad, recommended the said spot for auction vide his communication dated 24.11.2008. The auction took place on 21.2.2009. The petitioner quoted the highest price in the bid, amounting to Rs. 6,65,000/- for the sand spot at Indalgaon, the said bid was accepted by the respondent No. 3, the Collector, Jalna and sand spot at Indalgaon was allotted in favour of the petitioner. The upset price for this spot was fixed at Rs. 3,67,600/-. (Hereinafter, this sand spot will be referred to as the "said spot" in the body of this judgment).

c) Thereafter, the petitioner deposited the auction amount with the respondent No. 3 and then agreement was executed on 4.3.2009 between the petitioner and respondent No. 3/representative of respondent No. 3. On 5.3.2009, the respondent No. 5, Tahsildar, Ambad, handed over the possession of the said spot to the petitioner by issuing necessary possession receipt. It is alleged that as the said spot could not be allotted to the follower of the Guardian Minister, he has made false complaint to the respondent No. 1 and requested to stop the excavation of the sand from the said spot even before giving possession of the same, rather soon after acceptance of bid by the petitioner. It is alleged that the contents of the complaint dated 28.2.2009 are false and are made during the period of enforcement of the code of conduct. It is also contended that the respondent No. 1 directed the respondent No. 3 to stay the excavation of the said spot in view of the letter of the complaining Minister dated 28.2.2009, without verifying the factual position at the site and due to political pressure, respondent No. 3 passed the order dated 30.3.2009. It is further contended that respondent No. 3 passed the order on 31.3.2009 thereby staying the excavation of sand from the said sand "spot, without verifying the facts and without holding any enquiry as such. The revenue officers have stopped excavation of the sand from the said sand spot, prepared a Panchanama to that effect on 05.04.2009 and submitted a report to the respondent No. 5 on 6.4.2009. It is further alleged that sand spots from the Godavari river-bed, have been allotted to number of persons from Paithan to Nanded, however no such stay of excavation of sand is ordered in relation to any of those, which according to the petitioner is discriminatory. The petitioner has made a representation on 15.4.2009 for vacating the said stay order, however, it was orally informed to him that nothing can be done in the said matter and hence the present writ petition challenging

the orders mentioned in prayer Clause "C" on the grounds mentioned in para 13 (I) to (X) of the writ petition.

5. On notice to respondents, respondent No. 5 appeared and filed affidavit in reply of Subhash Keshvrao Kakade, Tahsildar, Ambad on 29.4.2009, inter alia stating that the petitioner has not disclosed true and correct facts before this Court. It is contended that after issuance of orders dated 30.3.2009 and 31.3.2009, the petitioner was found excavating and transporting sand illegally, without any authority in this regard. The petitioner was found illegally lifting and transporting the sand and hence the respondents imposed a fine of Rs. 37,000/- on him. The said fact of imposition of fine on the petitioner is not disclosed by him in the writ petition. The said fine amount is recovered from the petitioner on 4.4.2009 and the said fact is suppressed by him from this Court. According to this deponent, this fact is brought to the notice of this Court with a view to point out the conduct of the petitioner that the petitioner is disregarding the orders dated 30.3.2009 and 31.3.2009. According to this deponent, the complaint received from the Guardian Minister, was processed by the concerned Minister, and resulted into passing the stay order.

It is contended that as per Government Resolution dated 5.9.2003, a Committee headed by Collector and 4 senior officers, is formed and the Committee is conducting enquiry in the said matter. It will require at least 30 days to complete the enquiry and due to elections of the parliament, it is not possible to conclude the same at least before 28th May, 2009. It is contended that the petitioner has violated the conditions No. 41 and 42 of the agreement and hence the petitioner is prohibited from excavating the sand from the said spot. It is further contended that the petitioner has alternate efficacious remedy to challenge the order passed by the Hon'ble Minister, under the provisions of Government Resolution dated 5.9.2003. In substance, according to this deponent, there are no merits in the writ petition and hence the same is liable to be dismissed in limine.

6. At the time of hearing of arguments advanced by learned A.G.P., he referred certain documents, which were not on record and hence, at his request he was allowed to file additional affidavit, and the same is filed on 30.4.2009. In the said additional affidavit, it is contended that the auction of the sand from the said spot was for excavation of 3180 brass sand within the area of 300 meters long, 30 meters wide and 1 meter deep, specified in the river-bed of Godavari. It is contended that as per conditions No. 20 and 21, excavator should not damage any structure and should not disturb the ecology, and condition No. 25 gives liberty to the petitioner to claim refund in case of cancellation of contract by the State Government.

At this stage, we make it clear that neither the contract between the petitioner and the respondents was cancelled by the State Government nor such is the case of the respondents. It is also averred in the said additional affidavit that there is a stipulation in the contract that excavation should be done during day hours and during specified timings only, which condition is violated by the petitioner. In the

additional affidavit, the respondents came with another case that the order passed by the government barring lifting of sand dated 30.3.2009 was intimated to the petitioner on 2.4.2009 and Panchanama was drawn to that effect by the Circle Officer, Gond. In the said additional affidavit the deponent has given numbers of vehicles, which were apprehended by the police while carrying sand, alleged to be illegally, and penalty was recovered from the drivers of the said vehicles. Lastly, it is prayed that the complaint is based on the breach of tender conditions and illegal excavation and enquiry in the matter is necessary. The deponent has filed documents marked as Exhibit-R-1 and R-2 along with the said additional affidavit.

7. The petitioner has filed affidavit in rejoinder denying all the contentions raised by the respondents in their affidavit in reply as well as in additional affidavit.

8. The interveners have alleged that the petitioner has started excavation of the sand from the said sand spot immediately after his bid was accepted on 21.2.2009 and near about 200 to 300 trucks were lifting the sand daily from the said spot. It is further contended that the petitioner is using heavy machinery like JCB, Dresser etc. for lifting sand from the said spot. It is also contended that the said machinery was not only used in day time but also during the night time. It is alleged that the petitioner has dug more than 15 to 25 feet deep to lift the sand, by using machinery, from the said spot, which has affected percolation of water and caused environmental imbalance. It is specifically alleged that due to these acts of the petitioner, complaint was made to by the intervenors to the Guardian Minister. It is further alleged that due to plying of the trucks by the petitioner the environment is polluted and due to heavy traffic of trucks the village approach road got damaged. Due to the same now the villagers even can not travel on the said road. It is specifically stated that the petitioner started excavation of the sand from the said spot before delivery of possession and the acts of the petitioner have heavily affected the welfare of the villagers. In the premise, the intervenors requested dismissal of the writ petition with costs.

9. In the backdrop of the pleadings of the parties, affidavit in replies as well as rejoinder, heard submission of learned Counsel Mr. D.J. Chaudhari, appearing for the petitioner, followed by arguments of learned AGP Mr. K.B. Chaudhari, and learned Counsel Mr. R.J. Nirmal, appearing for the intervenors.

10. It appears from the documents on record that it is not under dispute by the parties that the auction of the said sand spot was held on 21.2.2009 and the alleged complaint by the Guardian Minister was dated 28.2.2009. A case is tried to be made out that the Guardian Minister has complained on the basis of complaints received from the villagers, which was supported by the resolution passed by the villagers on 25.2.2009, copy of which is on record. From bare perusal the said resolution it is clear that it does not support the contention of the learned Counsel for the intervenors or the learned A.G.P. that immediately after auction or on 22.2.2009, the petitioner started excavating the sand. We also do not find, from the said resolution, that during the excavation the

petitioner has used machinery like JCB or Dresser. We also do not find that there is any averment in the said resolution in respect of the contention that the sand excavation was going on during night time also by applying near about 200 to 300 trucks. The resolution does not indicate that it was resolved to forward a copy of the same to Guardian Minister nor there is any material to demonstrate that a copy was so forwarded to Guardian Minister. The resolution speaks about a representation submitted by villagers to Guardian Minister, but communication by Guardian Minister to Revenue Minister is silent about any such representation. Thus, the basis of the complaint of the Guardian Minister dated 28.2.2009 stands defused and falsifies the severeness of the complaint itself, as the allegations made in the complaint by the Guardian Minister do not find place in the resolution passed by the villagers.

11. One more aspect requires to be considered is that although the complaint is received on 28.02.2009 soon after the auction and initial deposit of 25% amount by petitioner on 24.2.2009 and even before handing over the possession of the said spot to the petitioner, the Revenue Minister has not acted upon it, till as late as 30.3.2009. In the meanwhile, all other formalities are allowed to be completed. Petitioner deposited 75% auction amount on 3.3.2009. Agreement between Collector and petitioner was executed on 04.03.2009 and officially, possession of the spot was delivered to petitioner on 5.3.2009. If the petitioner had started excavating the sand from the said spot, even before delivery of possession and thus in breach of conditions, then one does not know why later on paper possession of the said spot was handed over to the petitioner on 5.3.2009. The contract could have been cancelled as per term Nos. 41 and 42 of tender notice dated 31.1.2009 (Exhibit-P-1). All these points remain unanswered and invite adverse inference against the respondents that the action against the petitioner is ulteriorly motivated to deny the claim of the petitioner, who has deposited auction amount to the tune of Rs. 6,65,000/-.

12. From the documents on record it appears that this stay order dated 30.3.2009 was received in the office of respondent No. 3 on 31.03.2009 and served on the petitioner on 5.4.2009. The contentions of the petitioner in para 10 of the writ petition that the orders dated 30.3.2009 and 31.3.2009 were served on petitioner on 5.4.2009 is not denied by the respondents, even in the additional affidavit. The Panchanama (Exhibit-P-9) shows that the said order was received in the office of respondent No. 5 on 2.4.2009 and was proclaimed on the spot on 5.4.2009 under panchanama (Page 44 of paper book) and accordingly report was submitted to the respondent No. 5 on 6.4.2009. There is nothing in the Panchanama to indicate that petitioner was present when the said Proclamation was made; although Exhibit-P-9 shows that copy of the communication dated 31.3.2009 was endorsed to petitioner. Panchanama indicates that on 5.4.2009 no excavation was going on, probably due to receipt of copy of communication dated 31.3.2009 by petitioner. In spite of such facts the respondents have come with a case that the petitioner, even after service of the stay orders, was illegally excavating sand from the said spot. It is surprising to

note that the entire reply affidavit is silent as to on which date this stay order was served on the petitioner and in what manner. In the additional affidavit it is contended in para 4 that these orders were served on the petitioner on 2.4.2009 and Panchanama (Exhibit-R-1) was drawn to that effect. After perusal of Exhibit-R-1 along with additional affidavit, we do not find any specific reference to presence of petitioner at the time of drawing of the said Panchanama because the same is silent in this respect. The said Panchanama is also silent as to on whom the stay order was served and appears to have been read over only to Panchas. In the premise, we are required to draw adverse inference that probably this document is created just to support the stand taken by the villagers in support of the Guardian Minister. Then the question arises, if till 5.4.2009 the alleged stay orders dated 30.3.2009 and 31.3.2009 were not served on the petitioner, then how can it be said that the petitioner violated the same and excavated sand from the said spot. Panchanama drawn by Circle officer, Gondi dated 5.4.2009 finds place at page 44. The contents of the same show that the orders were received in the office of respondent No. 5 on 2.4.2009 and were served on the petitioner. The said Panchanama speaks about absence of any truck at the said spot and any work of excavation going on. It speaks as if stay order is already served on the petitioner, but as already discussed, Panchanama dated 2.4.2009 does not speak about presence of petitioner, and no other document purporting to be acknowledgement of stay order by petitioner is filed on record.

13. Now, coming to the point about illegal transportation of the sand from the said sand spot by the petitioner, as alleged by the respondents as well as intervenors. In order to support contents of the additional affidavit of the respondent No. 5 in para 5, the zerox copy of the Panchanama drawn by PSI, Gondi dated 4.4.2009 handed over to respondent No. 5 and report by Circle Officer dated 5.4.2009 (at pages 68 and 69) filed along with the additional affidavit of respondent No. 5 are relied upon. In the report of the Circle Officer, to the respondent No. 5, there is description of 12 trucks with the allegation that out of the said trucks, 6 were pertaining to sand of the said spot while the remaining were pertaining to sand spots at Ghansawangi. Those trucks, whose numbers are at serial No. 7 to 12 were released as the concerned drivers were having valid receipts with them. From report of PSI dated 4.4.2009, it appears that all the trucks were having valid passes. At the same time, it is to be noted that the previous 6 trucks, which were allegedly found pertaining to sand from village Indalgaon, we do not find any reference that the transport passes which were verified to have been those issued to the petitioner, were found in possession of drivers, which falsifies the contention that the sand found in those trucks was lifted by the petitioner from disputed spot. Thus, the documents, tendered along with the affidavit as well as additional affidavit, do not establish any nexus between the petitioner and the sand found in the said trucks apprehended. Therefore, we cannot rule out the possibility that all this record is prepared and placed before us with intention to destroy and damage the claim of

the petitioner. That respondents have failed to prove precise time of service of stay order on petitioner, is another aspect.

14. With the facts, which we have demonstrated herein above, we do not find any force in the averments and arguments advanced by the learned A.G.P. as well as learned advocate appearing on behalf of the intervenors and the documents tendered by them during the course of arguments in support of their arguments. On the contrary, we cannot rule out the possibility that these documents are created to support the complaint of the Guardian Minister or the action of the concerned Minister in passing the said orders to restrain the petitioner from lifting and excavating sand from the said spot, without following the due process.

15. To sum up, it is difficult to accept as true and reliable the contentions raised in defence of the action of stay taken by the respondents. The gram panchayat resolution does not indicate that it was desired to be forwarded to the Minister or that it was so forwarded. The complaints of the villagers, which are referred to in the gram panchayat resolution are not referred in the communication by Guardian Minister to the Revenue Minister. The respondents have not been able to bring on record any evidence as to when the stay was served upon the petitioner. On the contrary, panckanamas and reports indicate that on 4.4.2009 and 5.4.2009, no excavation work was in progress. The vehicles seized, allegedly carrying the sand excavated from the disputed spot, are not so linked by proof that passes recovered from those truck drivers were the passes issued to the petitioner, although such a course was possible. The contention that the petitioner had started excavation soon after the bid was accepted and even before possession of the spot was handed over to him, can not be swallowed, because there is no such allegation either in the resolution of the gram panchayat or in the communication by the Guardian Minister. More over, had the petitioner started excavation even before formal agreement with respondent No. 3, the respondent No. 3 could have terminated the contract at that time itself, the excavation being in breach of terms and conditions of the tender notice. Viewed thus, the documents produced before us and tried to be relied upon can not be free from suspicion that those are manufactured for the purpose of supporting the stay order under challenge.

16. Learned A.G.P. has placed reliance upon Government resolution dated 5.9.2003 for advancing twofold submission. According to him, para 1 (12) provides alternative remedy to the petitioner and, therefore, writ petition ought not to be entertained. According to learned A.G.P., the committee constituted in accordance with para 1 (11) is seized of the inquiry, which will be completed within a period of one month and, therefore, the petition need not be entertained.

So far as sub-para 12 of para 1 is concerned, the relevant Government resolution states that in case there is opposition to effecting auction of the sand spots, a subcommittee of the Minister can be constituted for taking final decision. In the matter at hands, there was no objection raised for effecting auction of the

subject spot and, therefore, this Clause 12 certainly does not provide alternative remedy.

No doubt, sub-para 11 of para 1 indicates constitution of a committee presided by Collector as the Chairman and constituted of Chief Executive Officer, Zilla Parishad; Executive Engineer of P.W. D; Senior Officer of Ground Water Survey Department and Senior Geologist as the Members. This is a committee constituted for the purpose of enquiring into the grievances or complaints against the excavation after the auction in accordance with the procedure prescribed. Upon receipt of the complaint, the committee is expected to enquire into the matter and the inquiry includes visit to the spot, fresh survey of the spot and local inquiry.

During the course of the arguments, it was submitted that on the basis of complaints of the villagers, the Minister, as a citizen of Jalna District, has forwarded complaint whereupon Revenue Minister was pleased to issue the stay order. Eventually, upon reading para 1(11) of Government Resolution dated 5.9.2003, it must be observed that neither the Guardian Minister in his capacity as a responsible citizen, has approached competent authority nor the stay order is issued by an authority, which is competent to so order. Stay order issued by the committee constituted could have been termed as interim stay by the constituted committee, but stay order issued by the Revenue Minister is certainly an order without jurisdiction and, therefore, arbitrary exercise of powers not vested in the authority. This committee referred in sub-para 11 also can not be said to be alternative remedy available to the petitioner thereby denying him an opportunity to approach this Court under Article 226 of the Constitution. This is because if the stay is ordered by the Minister, its difficult to swallow that a committee constituted of five officers of District level would record observations against the order of the Minister or vacate the stay. In fact, if there were complaints, the Guardian Minister ought to have directed the villagers to approach the constituted committee and then left the matter to the discretion of the committee.

17. In the result, writ petition deserves to be allowed. We allow the writ petition by making Rule absolute in terms of prayer Clause (c).

It is evident that the petitioner could not excavate from 5.4.2009 to the date of this order i.e. for 31 days and consequently as prayed by Advocate Shri D.J. Choudhary for the petitioner, the period of excavation will have to be extended by 31 days from the stipulated date 31.7.2009, provided excavation of 3180 brass sand is not completed by the petitioner earlier.