

(2022) 07 KL CK 0168
In the High Court Of Kerala
Case No : Writ Petition (C) No. 13345 Of 2021

Joy Scaria

APPELLANT

Vs

Union Of India

RESPONDENT

Date of Decision : 19-07-2022

Acts Referred:

Mines and Minerals (Development and Regulations) Act, 1957 — Section 5, 14, 15
Citizenship Act, 1955 — Section 7B(1)
Companies Act, 2013 — Section 2(20)
Kerala Minor Minerals Concession Rules, 2015 — Rule 26

Citation : (2022) 07 KL CK 0168

Hon'ble Judges : P.V.Kunhikrishnan, J

Bench : Single Bench

Advocate : Tony George Thomas, Jyothy V.S., Appu T.S., C.Dinesh, Vidya Kuriakose

Final Decision : Allowed

Judgement

P.V.Kunhikrishnan, J.

1. Petitioner is an Overseas Citizen of India card holder (for short, OCI card holder). He is aggrieved by Ext.P7 order rejecting Ext.P3 application submitted by the petitioner under Rule 26 of the Kerala Minor Minerals Concession Rules, 2015 (for short, KMMC Rules). The petitioner is the absolute owner and in possession of landed properties having an extent of 3.5827 hectares comprised in Survey Nos.212/5A, 5, 6-1, 6-2, 6-3, and 215/1-1 of Poovarani Village, Meenachil Taluk, Kottayam District, which devolved upon him from his ancestors. It is the case of the petitioner that to carry out quarrying activities on his land, he obtained all statutory permissions after complying with all procedural requirements as contemplated by law and caused to register a duly executed quarrying lease dated 01.02.2012 before the Office of the Sub Registrar, Meenachil.

2. It is the case of the petitioner that when the quarrying operations were about

to begin, objections were raised by certain individuals, resulting in certain writ petitions before this Court. As per Ext.P1, common judgment in W.P.(C). Nos.33499/2016, 26397/2015, 24865/2015 and C.P.(C). No.1516/2015, this Court was pleased to set aside the quarrying licence granted to the petitioner on the ground that the petitioner is not an Indian citizen, and in view of specific embargo as per Section 5 of the Mines and Minerals (Development and Regulations) Act, 1957 (For short, MMDR Act). Ext.P1 judgment was challenged by filing a writ appeal and as per Ext.P2 judgment, the Division Bench, without interdicting the finding in Ext.P1 judgment, disposed of the Writ Appeal Nos.2271, 2272 and 2273 of 2017 by a common judgment dated 16.07.2018 clarifying that the petitioner can approach Central Government under proviso of Rule 26 of the KMMC Rules to obtain an approval and then he can get a quarrying lease from State Government. Pursuant to Ext.P2 judgment, the petitioner submitted Ext.P3 application before the competent authority. When there was a delay in disposing of Ext.P3, the petitioner again approached this Court by filing W.P.(C). No.12289/2020. This Court directed the competent authority among the Central Government to consider Ext.P3 application. Pursuant to Ext.P4 judgment, Ext.P5 order was passed by the 2nd respondent. Again Ext.P5 was challenged before this Court by filing W.P.(C). No.840/2021. This Court, as per Ext.P6 judgment, was pleased to set aside Ext.P5 order because it is not a speaking order. Thereafter the matter was again considered by the 2nd respondent, and Ext.P7 order was passed rejecting the prayer of the petitioner. Aggrieved by the same, this writ petition is filed.

3. Heard the learned counsel for the petitioner and the learned Central Government Counsel Adv.C.Dinesh.

4. The learned counsel for the petitioner reiterated his contentions in the writ petition. The learned counsel submitted that this Court, as per Ext.P2 judgment, clearly stated that the petitioner could approach the Central Government under the proviso of Rule 26 to obtain approval. Without considering Ext.P2 judgment, Ext.P7 order was passed is the petitioner's contention. It is also the contention of the petitioner that in the exercise of the powers conferred under Section 7B(1) of the Citizenship Act, 1955, the 3rd respondent - Ministry of Home Affairs had issued Ext.P8 notification specifying the rights of OCI card holders. The learned counsel submitted that as per Ext.P8 notification, the OCI card holders are entitled to the right of parity with Non-Resident Indians (for short, NRI) in respect of all facilities available to them in economic, financial and educational fields except in matters relating to the acquisition of agricultural or plantation properties. It is also the contention of the petitioner that Clause 7.4 of the National Mineral Policy, 2008 states that mining contributes to the generation of wealth and creation of employment independently and should therefore be treated as an economic activity in its own right and not merely as an ancillary activity of manufacturing industry. The learned counsel for the petitioner also relied on the last sentence of Clause 6.7 of the National Mineral Policy, 2019, which provides that efforts shall be made to grant mining the status of an

industry. Therefore the contention of the petitioner is that the OCI card holders are entitled to the right of parity with NRI in respect of all facilities available to them in the economic, financial, and educational fields except in matters relating to the acquisition of agricultural or plantation properties. The learned counsel also submitted that the unfounded and unreasoned general comment made by the 3rd respondent, the Ministry of Home Affairs, that 'security agencies have recommended not to grant permission for obtaining quarrying lease to the foreigners' could not take away the statutory right of an OCI card holder of availing all facilities in financial, economical and educational fields in parity with NRIs. It is the case of the petitioner that he was born and brought up in India to his Indian parents, who had later secured citizenship in a foreign country. Therefore it is contended that the petitioner is entitled to parity with NRIs.

5. A counter affidavit is filed on behalf of respondents 1 to 3 in this case. In the counter affidavit, the contentions of the petitioner are denied. It is contended by the official respondents that on a co-joint reading of Sections 14 and 15 of the MMDR Act it is clear that the grant of quarry lease, mining lease and other connected matters with respect to minor minerals is the responsibility of the State Governments, as the rulemaking power qua the same has been conferred upon the State Government by the explicit provisions of the MMDR Act such that Central Government has no/minimal role to play in the same. It is also stated that in view of the above position, the proviso to Rule 26 of KMMC Rules requiring prior approval of the Central Government for grant of quarrying lease to a person, not an Indian National is inconsistent with the provisions of the MMDR Act. It is also contended that Clause 6.7 of the National Mineral Policy, 2019 does not apply to the case of the petitioner. As far as the contention of the petitioner, based on Ext.P8 notification, it is submitted that the same is superseded after the publication of the subsequent notification dated 04.03.2021, which is also issued by the 3rd respondent, in the exercise of the powers vested under Section 7B(1) of the Citizenship Act, 1955. The same is produced as Ext.R1(a). The other contentions in the writ petition are specifically denied in the counter affidavit.

6. A reply affidavit is also filed by the petitioner disputing the averments in the counter affidavit.

7. This Court considered the contentions of the petitioner and the respondents. Ext.P7 is the order impugned in this case. Ext.P7 order was passed in the light of the observations in Ext.P2 judgment and the directions in Ext.P4 judgment. It will be better to extract the relevant portion of Ext.P2 judgment:

"Section 14 of the MMDR Act thereafter makes it clear that the provisions of Sections 5 to 13 (inclusive) shall not apply to quarrying leases, mining leases or other mineral concessions in respect of minor minerals. Further, Section 15, which deals with the rule making powers of the State Government, clearly indicates that on the various matters enumerated thereunder, the power to make rules in respect of minor minerals is with the State Government. The KMMC Rules

were framed in exercise of the power by the State Government under Section 15 of the MMDR Act. Rule 26 of the said Rules [erstwhile Rule 16 of the KMMC Rules, 1967] indicates that quarrying leases under the KMMC Rules can be granted only to Indian Nationals. A proviso to the said Rule however clarifies that a quarrying lease may be granted by the Government to a person who is not an Indian National with the previous approval of the Central Government. On a perusal of the provisions of the MMDR Act and the KMMC Rules, we are clear that the provisions of Rule 26 of the KMMC Rules, which deal with the grant of quarrying leases in respect of minor minerals, has to be seen as carving out an exception to the general prohibition against grant of leases to persons other than Indian nationals, that is contemplated in Section 5 of the MMDR Act, 1957. In fact, this is in conformity with the general scheme of distribution of regulatory powers between the Central Government and the State Government under the MMDR Act, 1957. The regulation of minor minerals having been left to the State Government, the regulation of quarrying leases in respect of minor minerals must be in accordance with the provisions of Rule 26 of the KMMC Rules, 2015. Thus, we find that, in the event an applicant for quarrying lease obtains the previous approval of the Central Government, then, notwithstanding that he is not an Indian National, the prior approval of the Central Government would enable the said applicant to apply for a quarrying lease in respect of minor minerals from the State Government. We deem it necessary to clarify the observations of the learned Single Judge in the impugned judgment to this limited extent and the judgment shall stand modified to such extent. As already noted, it is not the case of the appellant before us that, as of today, he has such a prior approval of the Central Government so as to enable him to carry on his quarrying activities on the strength of the quarrying lease that was obtained by him. Thus, save for the clarification of the impugned judgment of the learned Single Judge, to the extent it finds that any approval granted by the Central Government under Rule 26 would be ultra vires the MMDR Act, we see no reason to otherwise interfere with the findings of the learned Single Judge on the merits of the case.

The writ appeals are therefore disposed as above."

8. Based on the observation in Ext.P2 judgment, Ext.P3 was submitted by the petitioner. When there was delay in disposing Ext.P3 the petitioner approached this Court by filing WP(C) No.12289 of 2020. This Court by Ext.P4 judgment disposed of the above writ petition directing the competent authority among the respondents to consider Ext.P3. It will be better to extract the relevant portion of Ext.P4 judgment.

"8. However, without resolving that issue as to who is the competent authority of the Union Government, this Court feels that the said aspect of the matter may also be considered by the 2nd respondent, while he examines the matters in Ext.P13 application dated 5.11.2019. Accordingly, the following directions and orders are passed:

(1) The 2nd respondent, who is the official concerned in the Union Ministry of External Affairs will take up the matters in Ext.P13 representation dated 5.11.2019 for examination and may ascertain as to whether the competent authority to consider the plea of the petitioner for grant of prior approval of the Union Government in terms of the proviso to Rule 26 of the Kerala Minor Mineral Concession Rules, 2015 is the Union Ministry in the Home Affairs or the Ministry of External Affairs or some other Ministry etc. If it is found that the competence to take a decision on merits on the matters in Ext.P13 representation is vested with another Ministry etc. then it shall be ensured that the 2nd respondent should duly forward Ext.P13 representation dated 5.11.2019 with their remarks to the competent official of such competent Ministry of the Union Government for their consideration of the request of the petitioner on merits. In case, the 2nd respondent thus forwards the matter to the competent Union Ministry concerned, then the same shall also be informed to the petitioner and as to before which Ministry of the Union Government the matter has been placed for decision on merits. Needless to say that if on the other hand, it is found that the officials concerned of the Union Government in the Ministry of External Affairs is having the competence to take a decision on Ext.P13 representation on merits, then certainly the competent officials among respondents 1 to 3 should take necessary steps in that regard.

(2) Subject to the above directions, it shall be ensured that the competent authority of the Union Government in the Ministry concerned should take up the matters raised by the petitioner in Ext.P13 representation dated 5.11.2019 and after affording reasonable opportunity of being heard to the petitioner and after due consideration of the same, will take appropriate decision on the request of the petitioner in Ext.P13 application so as to decide whether prior approval of the Union Government in terms of the proviso to Rule 26 of the Kerala Minor Mineral Concession Rules is to be granted to the petitioner as sought for by him. The entire process in this regard should be duly completed without much delay, preferably within an outer time limit of 2 months from the date of production of a certified copy of this judgment.

9. The petitioner will produce certified a copy of this judgment along with a copy of the memorandum of this W.P.(C.) before the 2nd respondent-Union Secretary for necessary information and further action.

With these observations and directions, the above Writ Petition will stand disposed of."

9. Thereafter Ext.P5 order was passed, which is not a speaking order and hence the same was set aside by this Court in Ext.P6 judgment and directed to reconsider the matter by the 2nd respondent. Thereafter Ext.P7 order is passed by the 2nd respondent.

10. This Court perused Ext.P7 order. I am surprised to see the way in which the 2nd respondent passes Ext.P7 order. In Ext.P2 judgment, this Court clearly

stated that in the event an applicant for quarrying lease obtains previous approval of the Central Government under the provisions of Rule 26 of the KMMC Rules notwithstanding that he is not an Indian National, the prior approval of the Central Government would enable the said applicant to apply for a quarrying lease in respect of minor minerals from the State Government. Therefore, this Court clarified and modified Ext.P1 judgment to that extent. The Division Bench also observed that save for the clarification of the impugned judgment of the learned Single Judge, to the extent it finds that any approval granted by the Central Government under Rule 26 would be ultra vires the MMDR Act, there is no reason otherwise to interfere with the learned Single Judge on the merits of the case. So this Court clearly stated that the petitioner, an OCI Cardholder, is entitled to apply before the Central Government to get approval to grant quarry lease in his favour by the State Government. But even after the clarification, the 2nd respondent started to interpret the proviso to Rule 26 and observed that it is repugnant to the MMDR Act. It will be better to extract the relevant portion of Ext.P7 order.

"15. The above proviso in rule, in a manner of speaking, appears to be inconsistent with the very heart and soul of provisions of the MMDR Act in several ways. Whereas the discretion with respect to formulation of the Rules governing the grant of quarry lease, mining lease and other connected matters with respect to Minor Minerals falls within the ambit of the State Governments, to frame and provide for a proviso whereby prior approval of the Central Government is required is unfounded. Especially in light of the fact that the Central Government as per the provisions of Section 5 of the MMDR Act (replicated above) grants mining lease with respect to Major Minerals only to Indian Nationals and Companies incorporated as per the provisions of the Companies Act as defined in clause (20) of Section 2 of the Companies Act, 2013.

16. Further, where as per the provisions of Section 15 of the MMDR Act, a duty has been cast upon the State Governments to frame rules governing the grant of lease and other connected issues with respect to Minor Minerals, to frame a rider clause requiring the prior approval of the Central Government for an isolated category of grant seems to be misguided. Thus in this respect, all the available records of the Ministry were scrutinized to ascertain whether the above mentioned Rule 26 of Rules, 2015 or Rule 16 of Kerala Minor Mineral Concession Rules, 1967, which is worded exactly as the Rule 26, were framed by the State Government after due consultation with the Central Government or whether the concurrence of the Central Government was sought by the State Government before formulating the said rules. However, despite thorough inspection of records and diligence of officers of the Ministry, no such permission or concurrence was located in any correspondence."

11. After the above observation and after going through the facts of the case, the 2nd respondent concluded in Ext P7 by saying like this:

"22. With regard to the written submissions filed by the applicant, it has been

asserted that, Central Government is not powerless under the MMDR Act to give permission for license to an individual, even one who is not an Indian Citizen. The only condition is that the applicant should obtain prior permission from the Central Government. As stated above, with respect to minor minerals, under the MMDR Act, the Central Government has no authority to grant license/lease and the said power vests entirely with the State Government.

23. It has also been asserted by the applicant that the MMDR Act, or Kerala Minor Mineral Concession Rules nowhere restrict or prohibit the grant of lease for quarrying to an individual who is not a Citizen of India especially in light of the specific provisions of Rule 26 of Rules, 2015. This assertion of the applicant stands refuted as Section 5 of the MMDR Act mandates that a mining lease shall not be granted to a person other than an Indian National. However, a company incorporated as per the provisions of the Companies Act of which the shareholders are Foreign Nationals may be granted a mining lease in its favour but a Foreign National as an individual is not so entitled.

24. It may be noted that a State Government has no authority to direct Central Government to act in a particular manner or as in this case grant approval for a specific purpose by framing rules especially when the said rules have been formulated without taking the Central Government into confidence or without its concurrence.

25. Applicant has also asserted that Central Government has ultimate power to issue the permission to any person irrespective of his citizenship. Further a Foreign Company can obtain a license or lease; as such an individual is also entitled to get the lease. This submission of the applicant stands refuted in light of the law that governs the grant of mining lease which has already been discussed above.

26. The last and final submission of the applicant is that his case is the first of its kind under Kerala Minor Minerals Concession Rules and thus much weight must be given to his application. On the contrary, the fact that the applicant's case is first of its kind is because it is not common practice to grant quarry lease to a person who is not an Indian National. Also on inspection of the Ministry's record it was observed that this Ministry has not, even in the past, ever acceded to such a request of any Foreign National.

27. Thus as it is the responsibility of the State Government to regulate the grant of quarry lease and other connected matters with respect to Minor Minerals as per the provisions of the MMDR Act and on inspection of the records of the Ministry no concurrence or consultation with respect to formulation of Rule 26 or Rule 16 was located and in light of the explicit provisions of Section 5 of the MMDR Act, the Ministry is unable to identify any provision either in the Act or any other Rule from which authority may be derived by to grant approval to the applicant.

28. In view of the above, the prayer of the applicant has not been acceded to."

12. According to me, these observations by the 2nd respondent are without considering the clarification/ modification of Ext.P1 judgment by the Division Bench in Ext.P2 judgment. If the 2nd respondent is aggrieved by the observation of the Division Bench in Ext.P2 judgment, the remedy of the 2nd respondent is to challenge the same or to file a review petition. The 2nd respondent has no authority to go to the extent of checking the vires of the proviso to Rule 226 of the KMMC Rules. That is the duty of the Constitutional Court. If the clarification/ modification made by the Division Bench in Ext.P2 is not acceptable to the 2nd respondent, the remedy is to challenge that judgment and not to interpret the rules and to declare that the proviso to Rule 26 of the KMMC Rule is repugnant to the provisions of MMDR Act. Therefore, in my opinion, Ext.P7 is not an order taking into consideration Ext.P2 judgment. Similarly, in Ext.P4 judgment also, this Court considered the matter in detail. At that stage also, the 2nd respondent has no case that the proviso to Rule 26 is repugnant to the MMDR Act. This Court, after considering all the relevant provisions of MMDR Act and KMMC Rules, directed the 2nd respondent to consider Ext.P3 representation after examining whether the competent authority to consider the plea of the petitioner for grant of prior approval of the Union Government in terms of proviso to Rule 26 of the KMMC Rules, is the Union Ministry in the Home Affairs or the Ministry of External Affairs or some other Ministry, etc. It is also observed that if it is found that the competence to take the decision on merits on Ext.P3, is vested with another Ministry, then the 2nd respondent shall be ensured that the same is forwarded with their remarks to the competent official of such competent Ministry of the Union Government for their consideration of the request of the petitioner on merits. In Ext.P4 judgment, this Court clearly directed that it shall be ensured that the competent authority of the Union Government in the Ministry concerned should take up the matters raised by the petitioner in Ext.P3 representation, after affording reasonable opportunity of being heard to the petitioner and after due consideration of the same and thereafter, will take appropriate decision on the request of the petitioner in Ext.P3 application so as to decide whether prior approval of the Union Government in terms of proviso to Rule 26 of the KMMC Rule is to be granted to the petitioner as sought for by him. After this direction, the 2nd respondent observed in Ext P7 that proviso to Rule 26 is repugnant to MMDR Act. This is not the direction issued by this Court in Ext.P2 and P4 judgment. In my opinion, Ext.P7 order is without considering the clarification/ modification made in Ext.P2 judgment and without following the directions in Ext.P4 judgment.

13. In such circumstances, without considering the other points raised by the petitioner and the respondents, I think Ext.P7 can be set aside and the matter can be remanded to the 2nd respondent for reconsideration.

Therefore, this writ petition is allowed in the following manner:

1. Ext.P7 is set aside.
2. The 2nd respondent or the competent among the respondents, is directed to

reconsider Ext.P3 in the light of the observation in Ext.P2 judgment and also in the light of the observations in Ext.P4 judgment, as expeditiously as possible, at any rate, within three months from the date of receipt of a copy of this judgment.

3. Before passing orders as directed above, an opportunity of hearing should be given to the petitioner by the 2nd respondent or the competent authority.