

(2017) 02 MP CK 0085
In the Madhya Pradesh High Court
Case No : 3920 of 2011

Maheshwari Pragati Mandal	Vs	APPELLANT
State of M.P. and others		RESPONDENT

Date of Decision : 15-02-2017

Acts Referred:

Constitution Of India, 1950 — Article 227
Madhya Pradesh Land Revenue Code, 1959 — Section 57, 228(7), 247, 247(3), 247(7)
Madhya Pradesh Minor Mineral Rules, 1996 — Rule 68(5)

Citation : (2017) AIR(MP) 59 : (2017) 4 MPLJ 296

Hon'ble Judges : Vijay Kumar Shukla

Bench : Single Bench

Advocate : V.S. Shroti, Sourabh Soni, Ashutosh Tiwari

Final Decision : Allowed

Judgement

1. The instant petition has been preferred under Article 227 of the Constitution of India challenging the legal propriety of the order dated 26-8-2010 (Annexure-P/11) passed by the Board of Revenue, Gwalior, whereby the orders passed by the Collector (Mining), Bhopal and the Commissioner (Revenue), Bhopal Annexure-P/9 and Annexure-P/10 respectively, have been affirmed. By the impugned order the Collector imposed a penalty of Rs.26,06,100/- for illegal excavation on the plot owned by the petitioner under Section 247(7) of the M.P. Land Revenue Code [for short 'the Code']. The said order was affirmed in appeal by the Commissioner (Revenue) and eventually, both the orders were affirmed by the order passed by the Board of Revenue on 26-8- 2010, impugned in the present writ petition.

2. The facts lying in a narrow compass, succinctly stated are that the petitioner is a society registered under the Society Registrkaran Adhiniyam, 1973 [hereinafter referred to as 'the Act 1973'] with the Registrar, Firms and Society, Bhopal. The Society claims to be a social organization of Maheshwaris and the improvement of the Society to promote and preserve the culture of Masheshwari

Samaj in Bhopal. The petitioner-Society was allotted a land admeasuring 58805 Sq.ft., situate at Plot No.1 of Sheet No.36-37, M.P. Nagar, Zone-I, Bhopal, by order dated 04-03-2002. On the basis of the aforesaid allotment, the Revenue Department of the State Government executed a lease on 14-10-2002, vide Annexure-P/3.

3. The petitioner-Society decided to construct a building "Mahesh Bhawan" with civil amenities for the purpose of its being used by the public at large. Building permission was obtained from the Municipal Corporation, Bhopal. The Society for the purpose of construction on the said plot entered into a Memorandum of Understanding (MOU) with M/s Shanti Construction on 02-9-2004. It is submitted that the plot had an uneven surface and, therefore, for the purpose of levelling and constructing uniform basement there was certain excavation required to be done. Excavation involved - removal of certain stones also. Therefore, the contractor M/s Shanti Constructions appointed one sub-contractor, i.e. Shri Nagraj to excavate stones and boulders to make it a uniform basement.

4. From the pleadings, it is further revealed that the sub- contractor Shri Nagraj presented an application dated 22-03-2005 before the Mining Officer for getting the necessary permission for

excavation work on the said plot. On 11-7-2005 necessary permission was granted by the Mining Officer for excavation of 600 cub. mtrs. of rocks and boulders from the plot of the petitioner for the period 11-7-2005 to 10-10-2005. There is specific pleading in para 5.8 of the petition that the petitioner had no knowledge of this letter and the role of the sub-contractor because he had never been appointed with the consent of the petitioner.

5. On a complaint made by one Bhagwandas Maheshwari to the Collector, Bhopal an inspection was ordered to be conducted on the plot of the petitioner regarding excavation work on 03-9- 2007. A report was submitted by the Nazul Officer before the Collector alleging that the petitioner had excavated in excess of 13.030 cu. mts. of stones, rubble and minerals etc. from the spot which was in excess to the quantity, as provided in the permission order of excavation.

6. The Collector passed the impugned order dated 10-7- 2008 whereby a penalty of Rs.26,06,100/- has been imposed on the petitioner for illegal excavation under the provisions of Section 247(7) of the Code. The said order was assailed in appeal before the Commissioner (Revenue) which also faced dismissal by order dated 20-04-2009. The order of the Commissioner was further challenged before the Board of Revenue and the same was dismissed by the Board of Revenue, vide order dated 26-8-2010, affirming the order passed by the Commissioner.

7. In the present petition the orders passed by the Collector, the Commissioner and the Board of Revenue imposing

penalty on the petitioner for illegal excavation of minerals have been challenged on the following contentions before this Court:

(i) The provisions of Sub-section (7) of Section 247 of the Code would not apply in the case of the petitioner, because the petitioner is not the person who had carried out the excavation work. (ii) The orders impugned have been passed on the basis of report submitted by the Mining Inspector, but in the said inspection neither any notice was given to the petitioner nor any opportunity of being heard was afforded to him. (iii) Without any measurement, the amount of penalty has been assessed by the authorities which is irrational and arbitrary. (iv) The alleged activities against the petitioner do not fall within the purview and sweep 'mining activities' as defined under the Rules.

It is contended that the orders based on a report which was based on the spot inspection in which the petitioner had not participated, are illegal, capricious and arbitrary. It is further contended by the learned Senior Counsel for the petitioner that the alleged activity against the petitioner does not amount to 'mining operation' as defined under the provisions of the M.P. Minor Mineral Rules, 1996 [hereinafter referred to 'the Rules 1996'].

8. Per contra, counsel for the State submits that there is no illegality in the impugned orders. It is asserted by him that the plot for which permission was granted by the Mining

Officer/Collector, Bhopal in favour of Shri Nagraj vide order dated 11-7-2005 (Annexure-P/7), belongs to the petitioner and being owner/lessee, he is liable irrespective of the fact that mining operation was carried out by any other person. Contention on behalf of the respondents is that since the allotment of the land was made in favour of the petitioner with specific condition and also for specific use, therefore, the petitioner is responsible, if any of the condition is infringed and the land is used for the purpose other than those stipulated in the letter of allotment. It is further asserted by the counsel for the State that pursuant to the allotment order, the petitioner started raising construction over the allotted land and for that purpose a contract was given to one Ajay Kumar Jain in order to complete the construction and develop the land, therefore, it is his liability for any illegal activity carried out by the contractor or sub-contractor. He submits that even otherwise the petitioner is under vicarious liability for the action of his contractor or sub-contractor. It is further submitted that on the basis of the report submitted by the Revenue Officer, Annexure-R/1, the Collector had directed the District Mining Officer, Bhopal to inspect the spot to ascertain the informations conveyed by the Revenue Officers. Accordingly, the inspection was carried out by the Mining Officer about the factual position, who submitted his report before the Collector on 12-9- 2007 (Annexure-R/2). On receipt of the report of the Mining Officer, a notice to show cause was issued to the petitioner seeking explanation as to why penalty of Rs.26,06,100/- be not imposed against him for illegal excavation. The petitioner was given an opportunity to show cause and reply on his behalf was filed vide Annexure-P/8. It is further stated that after the show cause notice, witnesses were examined in presence of the petitioner and thereafter by order dated 10-7-2008 the petitioner was found guilty of illegal

mining and excavation. The order of penalty was affirmed by the Commissioner in appeal. The order passed by the Commissioner was challenged before the Board of Revenue which also rejected the appeal affirming the orders passed by the Collector and Commissioner on the ground that there is no merit in the contentions raised on behalf of the petitioner that he is not liable, because he had not carried out the mining operation as the same was carried out by the third person, i.e., Shri Nagraj, and it was held that the petitioner being the owner/Bhumiswami is liable for illegal extraction irrespective of the fact that who had carried out illegal activities of excavation.

9. Before advertng to rival contentions raised at the Bar, it is apt to refer certain provisions of the Code. Section 247 of the Code is reproduced hereunder in extenso:

"247. Government's title to minerals (1) Unless it is otherwise expressly provided by the terms of a grant made by the Government, the right to all minerals, mines and quarters shall vest in the State Government which shall have all powers necessary for the proper enjoyment of such rights.

(2) The right to all mines and quarries includes the right of access to land for the purpose of mining and quarrying and the right to occupy such other land as may be necessary for purpose subsidiary thereto, including the "erection of offices, workmen's dwellings and machinery, the stacking of mineral s and deposit of refuse, the construction of roads, railways or tram-lines, and any other purposes which the State Government may declare to be subsidiary to mining and quarrying.

(3) If the Government has assigned to any per son its right over any minerals, mines or quarries, and if for the proper enjoyment of such right, it is necessary that all or any of the powers specified in sub-sections (1) and (2) should be exercised, and the Collector may, by an order in writing, subject to such conditions and reservations as he may specify, delegate such powers to the per son to whom the right has been as signed.

Provided that no such delegation shall be made until notice has been duly served on all persons having rights in the land affected, and their objections have been heard and considered.

(4) If, in the exercise of the right herein referred to over any land, the rights of any per son are infringed by the occupation or disturbance of the surface of such land, the Government or its assignee shall pay to such persons compensation for such infringement and the amount of such compensation shall be calculated by the Sub-Divisional Officer or, if his award is not accepted, by the Civil Court, as nearly as may be, in accordance with the provisions of the Land Acquisition Act, 1894 (I of 1894) .

(5) No assignee of the Government shall enter on or occupy the surface of any land without the previous sanction of the Collector, and unless the compensation

has been determined and tendered to the persons whose rights are infringed.

(6) If an assignee of the Government fails to pay compensation as provided in sub-section (4), the Collector may recover such compensation from him on behalf of the persons entitled to it, as if it were an arrear of land revenue.

(7) Any person who without lawful authority extracts or removes minerals from any mine or quarry, the right to which vests in, and has not been assigned by, the Government shall, without prejudice to any other action that may be taken against him be liable, on the order in writing of the Collector, to pay penalty not exceeding a sum calculated at [four times] the market value of the minerals so extracted or removed. [Proviso Omitted.]

(8) Without prejudice to the provisions in sub-section (7) the Collector may seize and confiscate any mineral extracted or removed from any mine or quarry the right to which vests in, and has not been assigned by the Government.

Explanation.-- In this section, "minerals" include any sand or clay which the State Government may declare to have a commercial value or to be required for any public purpose."

10. From a bare reading of the aforesaid provision it is luminous from the language employed in sub-section (1) that the rights to all minerals, mines and quarries shall vest in the State Government and the State Government shall have all powers necessary for the proper enjoyment of such rights, unless it is otherwise expressly provided by the terms of a grant made by the State Government. Sub-section (2) further confers power on the State Government that the right to all mines and quarries includes rights of access to land for the purpose of mining and quarrying and the right to occupy such other land as may be necessary for the purpose subsidiary thereto. The rights further includes erection of offices workmen's dwellings and machinery, the stacking of minerals and deposit of refuse, the construction of roads, railways or

tram-lines, and any other purposes which the State Government may declare to be subsidiary to mining and quarries.

11. At this juncture it is seemly to refer the provision of Section 57 of the Code. It reads thus:

"57. State ownership in all lands- (1) All lands belong to the State Government and it is hereby declared that all such lands, including standing and flowing water, mines, quarries, minerals and forests reserved or not, and all rights in the sub-soil of any land and the property of the State Government. Provided that nothing in this section shall, save as otherwise provided in this Code, be deemed to affect any rights of any person subsisting at the coming into force of this Code in any such property. (2) Where a dispute arises between the State Government and any person in respect of any right under sub-section (1) such dispute shall be decided by the State Government."

Section 57 of the Code provides ownership of all lands to the State Government. It states that all the lands belong to the State Government and it further declares that these lands include standing and flowing water, mines, quarries, minerals and forest reserves or not, and all rights in the sub-soil of any land, are the property of the State Government.

12. Thus, on a conjoint reading of both the provisions, i.e. sections 57 and 247 of the Code, it can safely be concluded that all lands belong to the State Government including mines, minerals and quarries etc. Section 247 of the Code confers Government's title to the minerals. An exception has been carved out in sub-section (1) of Section 247 of the Code that the rights of the State Government can be assigned to any other person by a grant which is further evident from sub-section (3) of Section 247 which provides that if the Government has assigned to any person its right over any minerals, mines or quarries and for the proper enjoyment of such rights by grant, the Collector has to pass an order in writing wherein he can prescribe, the conditions and reservations in that regard. The only proviso/cavil is that no such delegation shall be made unless notice has been duly served on a person having right in the land affected and their objections have been heard and considered.

13. From the aforesaid provisions of Section 247 of the Code, it can easily be inferred that an assignee is a person in whose favour rights over the minerals, mines or quarries have been transferred by the Government and he is not the person necessary to be the owner or lessee of the land. Thus, the provision makes a distinction between assignee and owner. The owner may be an assignee but the assignee may be a person other than owner also. The only requirement under Section 247(7) of the Code is that the objection has to be heard and considered of a person having rights in the land affected. As already held, the owner (Bhumiswami) or a lessee are not necessary to the assignee. The assignee is the person in whose favour the order has been passed under Section 247(3) of the Code transferring the rights over the minerals, mines and

quarries and conferring him power to enjoy to carry out mining operation. From sub-section (5) of Section 247 of the Code it is apparent that even after getting the grant of rights on minerals, still assignee of the Government before entering into or occupying surface of any land, has to obtain the prior sanction of the Collector and the compensation has to be paid which is determined by the Collector to the person whose rights are infringed. Sub-section (7) of Section 247 of the Code which is relevant for the present purpose provides that any person who without lawful authority extracts or removes minerals from any mine or quarry, the right to which vests in, and has not been assigned by the Government, shall be liable to pay penalty by an order which is to be passed by the Collector and the rider is that the amount of penalty would not exceed to a sum calculated at four times double the market value of the minerals so extracted or removed.

14. Thus, from the above discussion it can safely be concluded that penalty is

imposed for an unlawful activity of extraction or removal of minerals from any mine or quarry by any person whether he is an assignee or other than the assignee.

15. In the present case, the centripodal issue which has been raised by the petitioner is, that he is the lessee of the land wherein it is alleged that illegal excavation or removal of minerals had taken place but there is no allegation against him that he had carried out illegal excavation or removal of the minerals. The authorities have taken an erroneous view that being an owner or lessee of the plot he is liable for the penalty as the said activity had been carried out on his plot. It is contended by learned Senior Counsel that the liability of a person employed as an independent contractor by the petitioner,

the petitioner could not have been held liable for the faults of the contractor. The doctrine of vicarious liability would not apply in the case of such nature where the alleged action and punishment is of quasi criminal nature. He placed reliance on the judgments passed by a Division Bench of this Court in the case of Govind Prasad Sharma, Mining Contractor, Katni vs. Board of Revenue M.P., Gwalior and others, 1965 MPLJ 179 and Kailash Auto Builders Co. Pvt. Ltd., Udaipur vs. State of M.P. and another, (2003) 1 MPLJ 610.

Further, in order to substantiate his contention that the activities carried out at the plot of the petitioner does not amount to mining operation, the learned senior counsel appearing for the petitioner-society relied upon the judgment of this court rendered in the case of Union of India vs. State of Madhya Pradesh and another, 1994 MPLJ 942.

16. Before delving into the legal submissions, it is apt to refer certain documents relied upon by the petitioner. Annexure-P/2 is the order passed by the Department of Revenue, State of M.P., whereby the petitioner was allotted a plot for construction of "Mahesh Bhawan" on the conditions enumerated in the order. On the basis of the aforesaid allotment order a lease-deed was executed, vide Annexure-P/3, between the petitioner and the Collector (Mining) as well as the authorities of the State Government. The petitioner had obtained permission/certificate from the Municipal Corporation, Bhopal, vide Annexure-P/4. For the purpose of construction of the aforesaid building, the petitioner-society engaged and entered into an agreement and MOU, Annexure-P/5 with M/s Shanti Construction. Since the plot in question had uneven surface, therefore, for the purpose of levelling the same and constructing a

uniform basement, excavation work was required to be done for removal of stones and rubble. M/s Shanti Constructions appointed a sub-contractor, Shri Nagraj to excavate stones and boulders to make it a uniform surface basement. The sub-contractor Shri Nagraj applied before the Collector (Mining) for getting necessary permission for excavation work on the said plot and by order dated 11-7-2005 (Annexure-P/7) the Collector (Mining), Bhopal granted permission for removal of mines and minerals under Rule 68(5) of the Rules 1996.

17. Thus, from the above facts, it is limpid clear that the petitioner had engaged a contractor, namely, M/s Shanti Constructions for construction of building i.e. Mahesh Bhawan owned by Ajay Kumar Jain. It is also borne out from the facts that the contractor further engaged a sub-contractor, Shri Nagraj for excavation work at the plot in question, who obtained permission for excavation under the provisions of the Rules 1996.

18. This fact is further established from the statement of Shri Ajay Kumar Jain filed as Annexure-R-J/5 along with rejoinder, who had admitted that the construction work was to be carried out by him as per contract with the petitioner and the extraction work was assigned by them to Shri Nagraj. The statement of Ajay Kumar Jain is extracted hereunder:

"VERNACULAR MATTER OMITTED"

19. It is also established from the record and as per statement of the In-charge, District Mining Officer, Pradeep Kumar Khanna (Annexure-R/J-4) filed along with rejoinder that no notice was given to the petitioner before the spot inspection and no case was pending before him in the Mining Branch. He treated the

permission granted in favour of Shri Nagraj, as if the permission was sought on behalf of the petitioner. Deposit of royalty by Shri Nagraj has been treated by him as deposited by the petitioner. The relevant portion of the cross-examination of Shri Pradeep Kumar Khanna is extracted hereunder:

"VERNACULAR MATTER OMITTED" 20. At this stage it is condign to survey the authority proponent on the legal issue raised in the present case. In the case of Govind Prasad Sharma, Mining Contractor, Katni (supra) almost a similar issue arose for consideration where the petitioner was imposed a fine under the provisions of Section 228(7) of the M.P. Land Revenue Code, 1954 parimateria to the provision with Section 247(7) of the Code. The Division Bench of this Court

decided the case after commencement of the 1959 Code and, therefore, they had taken into consideration the provisions of Section 247(7) of the 1959 Code also. The question arose for consideration before the Court that whether liability of fine can be imposed on a leaseholder for the fault committed by an independent contractor employed by the lessee. The question of vicarious liability for offence was also considered. In such cases the Division Bench of this Court after an elaborate and extensive considerations of the provisions of the Indian Contract Act and the M.P.L.R. Code held that an employer of an independent contractor cannot be held liable for the faults of the contractor. He can be held liable only in the following circumstances:

(a) If he employs a contractor to do an unlawful act; (b) if the employment of a contractor is improper or negligent, for example, where a person entrusts a work to an incompetent contractor; (c) if he has under the common law or statute a duty which is personal to him. If such a duty is cast on him, he cannot escape liability for it by delegating it to a contractor.

21. In the present case, the contract entered into between the petitioner and M/s Shanti Constructions cannot be held to be a contract for an unlawful act, as it was a contract for construction of the building for which necessary permission was obtained from the Municipal Corporation, Bhopal. In the obtaining factual scenario, it can also not be said that the employment of the contractor was improper or negligent on the part of the petitioner. Further, it is also not established from the oral or documentary evidence that the

petitioner himself was under the statutory duty to carry out excavation work. The construction work was assigned to M/s Shanti Constructions which had further appointed a sub-contractor, Shri Nagraj for excavation work. It is also not borne out either in the pleadings or in record that Shri Nagraj was carrying out the excavation work as an agency of the petitioner-society and, therefore, there is no question of vicarious liability in the present case.

22. From the facts and the evidence brought on record it is manifest that Shri Nagraj was employed by M/s Shanti Constructions for excavation work. The petitioner had engaged M/s Shanti Constructions for construction of the building. There was no relationship of master and servant between the petitioner and Shri Nagraj.

23. This Court in Kailash Auto Builders Co. Pvt. Ltd., Udaipur (supra) has taken similar view in respect of liability of penalty under Section 247(7) of the Code, where the work of excavation of minerals was carried out by some other person and not by the employees of M/s Kailash Auto Builders. Therefore, this Court held that the excavation work carried by some third person in his own independent right, would not make the petitioner liable for the penalty under Section 247(7) of the Code. So far as reliance placed by the learned senior counsel for the petitioner on the decision of this Court pronounced in Union of India vs. State of Madhya Pradesh and another (supra) is concerned, the ratio laid down in the said case, would not apply in the present case. In the said case the Union of India was carrying out lifting of earth from one place and dumping the same to another place to rise levelling,

this Court held that the said activity would not amount to "mining operation" as defined under the Rules 1996.

24. In the case of Shyam Bihari singh vs. State of M.P. And others, 2008(4) MPLJ 255 a Division Bench of this Court had an occasion to refer the provisions of Section 247 of the Code vis-a-vis the provisions of the Mines and Minerals (Development and Regulations) Act, 1957 where they answered the questions that whether under Section 247 of the Code for assignment of the right of the Government, a common person in respect of a land of which surface rights vest in the third person, the consent of the land-owner (Bhumiswami) is necessary and whether any grant without such a consent is sustainable under the law. As regards correctness of the case the Division Bench also considered the judgment rendered by this Court in the case of Premchand vs. State, 1965 MPLJ 307,

wherein it was held that for assignment of rights in respect of minerals, mines and quarries by the Government to a third person under Section 247 of the Code an opportunity of hearing or consent of the Bhumiswami is not required and further held that under the provisions of Section 247 of the Code and the 1957 Act, the consent of the Bhumiswami is not required for grant of mining lease, even in respect of a private land. The lessee is only obliged to pay compensation for any loss or damage to the owner of the private land. Thus, there is distinction between the "assignee" under Section 247(3) who has been conferred rights by the Government over the minerals and the "owner (Bhumiswami)" or "lessee" of the Government.

25. In the present case, the petitioner was granted a lease as the land belongs to the State Government under Section 57 of the

Code, but the right regarding excavation of minerals was assigned to Shri Nagraj, who was engaged for the said work by M/s Shanti Constructions. The petitioner had never applied for any permission for the purpose of excavation. The permission was granted to Shri Nagraj by the Collector (Mining), vide Annexure-P/7.

26. The penalty under Section 247(7) of the Code has the element of "quasi criminal nature" for alleged illegal extraction or removal of minerals from any mine or quarry without any authority of law. In the case in hand, there was no allegation or charge against the petitioner regarding illegal extraction or removal of minerals. In para 9 of the order the Collector held that the petitioner being the bhumiswami and lessee of the plot, is responsible for the extraction of minerals from his plot irrespective of the fact that who had carried out illegal excavation or removal of mineral. It is pertinent to refer para 9 of the order passed by the Collector for ready reference:

"VERNACULAR MATTER OMITTED"

27. Thus, the finding ascribed by Collector is palpably erroneous and contrary to the provisions enshrined in Section 247(7) of the Code and the law laid down by this Court, and the same has been erroneously affirmed by the Commissioner (Revenue) and the Board of Revenue. The authorities have failed to consider the provisions of Section 247(7) of the Code in proper perspective and they could not make a distinction between the an "assignee" and a "lessee/owner".

28. For the above reasons, the writ petition is allowed and the orders passed by the Collector (Mining), Bhopal, dated 10-7- 2008 (Annexure-P/9); by the Commissioner, Bhopal, dated 20-4- 2009 (Annexure-P/10); and by the Board of Revenue, Gwalior,

dated 26-8-2010 are quashed. However, this would not mean that the competent authorities are precluded from drawing proceedings in accordance with law against the person who is liable for illegal and unauthorized excavation/removal of minerals.

29. Exconsequenti, the writ petition is allowed with the liberty indicated hereinabove. No order as to costs.