

(2023) 12 CAL CK 0007
In the Calcutta High Court
Case No : W.P.A. No. 9583 Of 2023

Radharaman Constructions And Marketing Private Limited & Anr. APPELLANT

Vs

State Of West Bengal & Ors. RESPONDENT

Date of Decision : 04-12-2023

Acts Referred:

Constitution Of India, 1950 — Article 226
Mines and Minerals (Development and Regulations) Act, 1957 — Section 3(d)

Citation : (2023) 12 CAL CK 0007

Hon'ble Judges : Suvra Ghosh, J

Bench : Single Bench

Advocate : Asoke Kr. Banerjee, Arijit Dey, Santanu Kr. Mitra, Amartya Pal, Sanjay Saha, Subhasish Bhattacharya

Final Decision : Allowed

Judgement

Suvra Ghosh, J

1. The order passed by the Assistant Secretary, Department of Industry, Commerce and Enterprises on 10th April, 2023 is assailed in the writ petition.
2. The first petitioner is a private limited company engaged in the business of sand mining and the second petitioner is the sole director of the company. Being the highest bidder in the e-auction for grant of mining lease of sand mineral in mouza- Mamudpur, J.L. No. 61, Police Station- Patrasayar (Sillya Ghat), District-Bankura, a letter of intent was issued in favour of the petitioner on 9th March, 2017 and upon compliance with requisite formalities, mining lease was executed in favour of the petitioner on 17th November, 2017. The petitioner was unable to carry on mining operation in view of a notification issued by the District Magistrate and Collector, Purba Bardhaman on 25th March, 2021 restricting movement of all kinds of heavy loaded goods vehicles through Galsi to Gohogram road via Adrahati which is the only route of the petitioner for communication to the leasehold area. The restriction was withdrawn by a notification issued on

22nd February, 2022. Since the petitioner was unable to carry on mining activities from 25th March, 2021 to 22nd February, 2022 due to restrictions imposed by the authority, he incurred huge financial loss.

3. Learned counsel for the petitioner has referred to clause 5 of part-IX of the deed of lease executed in favour of the petitioner which demonstrates that "failure on the part of the Lessee/Lessees to fulfill any of the terms and conditions of this lease shall not give the State Government any claim against the Lessee/Lessees or be deemed a breach of this lease, in so far as such failure is considered by the said Government to arise from force majeure, and if through force majeure the fulfillment by the Lessee/Lessees of any of the terms and conditions of this lease be delayed, the period of such delay shall be added to the period fixed by this lease. In this clause the expression Force Majeure means act of God, war, insurrection, riot, civil commotion, strike, earthquake, tide, storm, tidal wave, flood, lightning, explosion, fire, and other happenings, which the Lessee/Lessees could not reasonably prevent or control". Learned counsel submits that the petitioner was unable to carry on mining operation for the period of restriction due to no fault on his part since he was unable to transport the mining reserve through the only route in view of the restriction. The petitioner along with others apprised the authority of their plight by a letter issued on 7th December, 2021.

4. The District Magistrate, Bankura, by a letter issued on 18th November, 2022 to the Assistant Secretary, Government of West Bengal, Department of Industry, Commerce and Enterprises, Mines Branch and the Chairman, West Bengal Mineral Development and Trading Corporation Limited, stated that sand mining activities of the petitioner were genuinely affected from 25th March, 2021 to 22nd February, 2022 due to the restriction notification and this inability to carry on mining operation was beyond the control of the lessee/petitioner. The authority was requested to consider the matter sympathetically. The State in fact admitted the petitioner's claim and requested a favourable consideration by the concerned authority.

5. Learned counsel has taken this Court to annexure R-3 to the report in the form of affidavit submitted by the 4th respondent which is a note sheet of the motor vehicles inspector (non-technical) dated 16th June, 2023 which says that there is no connecting route through which the sand loaded vehicles can ply to SH-8 (the connecting road between Sonamukhi & Bankura More, Burdwan) within Bankura district.

6. Learned counsel points out that pursuant to an order passed on 19th September, 2022 in W.P.A. 21186 of 2022 directing the concerned authority to dispose of the representation submitted by the petitioners within six weeks from the date of communication of the order in terms of clause 5 of part-IX of the deed of lease as well as notifications issued on 25th March, 2021 and 22nd February, 2022 the District Magistrate, Bankura, by an order passed on 9th November, 2022, rejected the representation of the petitioner and directed

issuance of a letter to the Department of Industry, Commerce and Enterprise, Government of West Bengal/West Bengal Mineral Development and Trading Corporation Limited requesting consideration of the matter sympathetically as inability to carry out the mining operation was beyond the control of the lessee. The matter was placed before the Assistant Secretary to the Government of West Bengal who was directed to consider and dispose of the same within two weeks from the date of communication of the order passed by this Court on 4th January, 2023 in W.P.A. 27172 of 2022.

7. In compliance with the said order, the Assistant Secretary, Department of Industry Commerce and Enterprises granted an opportunity of hearing to the petitioner and by the order impugned dated 10th April, 2023 turned down the representation submitted by the petitioner on the following grounds:- There was no restriction on excavation of sand from the sand mines from 25th March, 2021 to 22nd February, 2022 and the petitioner/lessee got almost nine months even after withdrawal of the prohibitory order. No prayer was made before the District Magistrate, Bankura for permitting transport of sand through a different route. The petitioner challenges the said order in the writ petition.

8. Vehemently opposing the Google map placed by the respondents indicating an alternative route for transportation of the mineral, learned counsel submits that the said map has no evidentiary value as the authority himself has admitted that mining operation of the petitioner was hampered due to restriction imposed by the District Magistrate, Bankura and also, no alternative route was indicated in the said notification. Such inability of the petitioners comprises force majeure and the petitioners are entitled to extension of the period of lease under the relevant clause of the deed. Learned counsel has placed reliance on the authorities in Comptroller and Auditor-General of India, Gian Prakash, New Delhi and Another v/s. K.S. Jagannathan and Another reported in (1986) 2 Supreme Court Cases 679 and Mohinder Singh Gill and Another v/s. The Chief Election Commissioner, New Delhi and Others reported in (1978) 1 Supreme Court Cases 405 in support of his contention.

9. Placing reliance on the Google map annexed to the report in the form of affidavit submitted by the second respondent, learned counsel appearing for the 7th respondent submits that there was an alternative route through Khandaghosh, which was not availed of by the petitioner. Learned counsel has referred to section 3(d) of the Mines and Minerals (Development and Regulations) Act, 1957 which defines "mining operations" as any operation undertaken for the purpose of winning any mineral. Learned counsel, in his usual fairness, has admitted that the West Bengal Sand Mining Policy, 2021 is not applicable to the present case. According to learned counsel, the petitioner failed to approach the authority for permission to stack the minerals excavated by him when the movement restriction was imposed, in terms of part-II (6) of Form D of the West Bengal Minor Minerals Concession Rules, 2016. The authority has passed a reasoned order upon consideration of the submission made on behalf of

the petitioner.

10. Learned counsel for the State respondents has adopted the submission made on behalf of the 7th respondent.

11. Lease was granted in favour of the petitioner vide deed of lease dated 17th November, 2017 for a period of five years. The notification issued on 25th March, 2021 imposed restriction on movement of all kinds of heavy loaded goods vehicles through Galsi to Gohogram road via Adrahati. The restriction was withdrawn by a notification issued on 22nd February, 2022. It is not in dispute that the petitioner was unable to carry on mining operation during the said period, i.e., from 25th March, 2021 to 22nd February, 2022. Such fact has been admitted/ acknowledged by the District Magistrate, Bankura in his letter issued on 18th November, 2022 in considering the representation submitted by the petitioner. The District Magistrate held that sand mining activities of the petitioner were genuinely affected from 25th March, 2021 to 22nd February, 2022 due to notification issued by the District Magistrate, Purba Bardhaman and inability to carry on mining operation was beyond the control of the petitioner/ lessee. The matter was referred to the Department of Industry, Commerce and Enterprise, Mines Branch and the Chairman, West Bengal Mineral Development and Trading Corporation Limited for consideration and necessary instructions. A note sheet of the motor vehicles inspector (non-technical) dated 16th June, 2023 also demonstrates that there is no connecting route through which the sand loaded vehicles can ply to SH-8 (the connecting route between Sonamukhi and Bankura More, Burdwan) within Bankura district. In other words, the note sheet confirms the fact that the road which was closed down in terms of the notification dated 25th March, 2021 was/is the only route available to the petitioner for transportation of the mining reserve.

12. The google map relied upon by the respondents does not clearly indicate any alternative route to the leasehold plot and in view of the admission made by the authority as recorded earlier, the map cannot be of any assistance to the respondents in this matter.

13. At this juncture, it is pertinent to refer to clause 5 of part-IX of the deed of lease which enumerates that if through force majeure, the fulfilment by the lessee of any of the terms and conditions of the lease be delayed, the period of such delay shall be added to the period fixed by the lease. The expression "force majeure" includes situation which the lessee cannot reasonably prevent or control.

14. In the case in hand, it is not in dispute that the situation which arose due to the notification dated 25th March, 2021 was beyond prevention or control of the petitioner, as also admitted by the District Magistrate, Bankura. This issue was not dealt with at all by the Assistant Secretary in the order impugned. In view of the fact that the petitioner was unable to carry on mining operation from 25th March, 2021 to 22nd February, 2022 due to reasons beyond his control and for

no fault on his part, he is entitled to the benefit accorded under clause 5 of part IX of the deed of lease. The situation of the petitioner is covered under the definition of "force majeure" and the petitioner is entitled to the additional period lost due to imposition of the restriction.

15. Learned counsel for the respondents has taken this Court to clause 3 (d) of the Act of 1957 which defines mining operation as any operation undertaken for the purpose of winning any mineral. At the same time, clause 1 of part -II of the lease deed is required to be looked into. The clause reads as follows: - "Liberty and power at all times during the term hereby demised to enter upon the said lands and to search for mine, bore, dig, drill for win, work dress, process, convert, carry away and dispose of the said mineral." Therefore the petitioner/ lessee is entitled to carry away and dispose of the mineral besides winning the same. Such liberty was curtailed in view of the notification issued by the authority.

16. Learned counsel for the 7th respondent has submitted that the petitioner did not seek permission for stacking of minerals during the period of restriction in terms of part II (6) of form D of the 2016 Rules. It appears that letters were sent to the authority requesting withdrawal of the restriction in order to enable the petitioner to continue mining operation. Unfortunately the said letters were not heeded to. So the contention of the petitioner cannot be brushed aside merely on the ground that the petitioner failed to use the liberty granted to him in terms of clause 6 of part II of form-D of the 2016 Rules.

17. The order impugned turns down the request of the petitioner on the following grounds:-

i. There was no restriction on excavation of sand from the sand mines from 25th March, 2021 to 22nd February, 2022;

ii. The petitioner got almost nine months even after withdrawal of the prohibitory order on movement of heavy loaded vehicles; and

iii. He did not make any prayer to the District Magistrate, Bankura to allow him to transport the sand through a different route for the period under restriction.

15. It is a fact that there was no restriction on excavation of sand during the period in question. But this Court fails to understand how the petitioner could have continued with mining operation during the said period when he was unable to transport the material. The said fact has in fact been admitted by the authority which recorded that sand mining activities of the petitioner were genuinely affected due to the restriction notification since the only connecting route for transportation of the mineral reserve was closed down due to the notification.

16. Admittedly residual period of the lease remained after withdrawal of the restriction. But that does not disentitle the petitioner from extension of the period of lease lost due to imposition of the restriction, in terms of clause 5 of

part IX of the deed itself. Also, since several requests were made before the authority for allowing the petitioner to transport the sand, it cannot be said that the petitioner sat silent over the issue and chose to agitate the same at a belated stage. The grounds assigned by the Assistant Secretary in rejecting the prayer of the petitioner for extension of the mining lease are not based on proper reasoning and are contrary to the terms of the lease deed.

17. The 4th respondent has in fact admitted the contention of the petitioner in his report in the form of affidavit submitted on 19th June, 2023 and has only expressed inability of the authority to extend or renew the lease in view of The West Bengal Sand Mining Policy, 2021.

18. Even at the cost of reiteration, it is necessary to record that the provision of the 2021 policy is admittedly not applicable to the present case, and as such, there is no restraint on the authority in extending the lease period in view of the said policy.

19. It has been held by the Hon'ble Supreme Court in the authority in Comptroller and Auditor General of India (supra) that "the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ in the nature of mandamus or to pass orders and give necessary directions where the government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion malafide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred".

20. In the present case, since the concerned authority has exercised discretion on irrelevant considerations by ignoring the relevant considerations and materials, the order impugned dated 10th April, 2023 is required to be set aside. It is held that the petitioner is entitled to extension of the lease for the lost period from 25th March, 2021 to 22nd February, 2022 during which he was unable to continue with mining operation.

21. In the light of the observation made hereinabove, the writ petition succeeds.

22. Accordingly, W.P.A. 9583 of 2023 is allowed.

23. The Assistant Secretary, Department of Industry, Commerce and Enterprises, being the second respondent herein, is directed to allow the representation submitted by the petitioner dated 18th August, 2022 and grant extension of the lease for the period during which the petitioner was unable to continue mining operation (25th March, 2021 to 22nd February, 2022). The entire exercise should be completed within six weeks from the date of communication of this judgment.

24. There shall however be no order as to costs.

25. Since no affidavit is invited, the allegations contained in the writ petition are

deemed not to be admitted.

26. Urgent certified website copies of this judgment, if applied for, be supplied to the parties expeditiously on compliance with the usual formalities.