

(1998) 01 BOM CK 0052
In the Bombay High Court
Case No : Writ Petition No. 74 of 1988

Ramesh Jethalal Thakkar

APPELLANT

Vs

The Union of India and others

RESPONDENT

Date of Decision : 29-01-1998

Acts Referred:

Forest (Conservation) Act, 1980 — Section 2
Mines and Minerals (Development and Regulation) Act, 1957 — Section 4(2)
Mines and Minerals (Regulation and Development) Rules, 1987 — Rule 24(1), 54

Citation : (1998) 4 ALLMR 227 : (1998) 2 BomCR 554

Hon'ble Judges : R.M.S. Khandeparkar, J; N.J. Pandya, J

Bench : Division Bench

Advocate : S.K. Kakodkar, S.A. and L.V. Talaulikar, for the Appellant; V.B. Nadkarni, A.G., C.A. Ferreira, Additional Government Advocate, G.V. Tamba, Central Government Standing Counsel, for the Respondent

Judgement

N.J. Pandya, J.—The petitioner has filed the petition for getting Mining Concession within the State of Goa in respect of three mines situate at Tivim, Nadora and Pirna. The details thereof are given in the petition.

2. In fact, according to the petitioner, these Concessions were sought for by his father Shri Jethalal C. Thakker in the year 1962. On or about 7th May, 1962, notices came to be published, being the granting of Mining Concession. Requisite fees for issuing Mining Concession were also paid and therefore, according to the petitioner, all that the said authority had to do was to issue a concession in his favour.

3. Though the concession was not in the name of the father of the petitioner, later on, as per the say of the petitioner, the very father of the petitioner had transferred the claim in the name of the petitioner about which there is hardly any dispute raised by the respondents.

4. In the background of the aforesaid facts, it is required to be considered whether the request for Mining Concession was to be granted under the

provisions of the Mines and Minerals (Regulation and Development) Act, 1957, or under the then existing Portuguese Government Decree, Statute, or Rules, as the case may be.

5. The admitted position is that the said Mines and Minerals (Regulation and Development) Act, 1957, hereinafter referred to as "M.M.R. Act", came to be applied to the State of Goa on 1st October, 1963. Before that, few important dates in relation to the said question involved are required to be noted.

6. Right upto the time that Goa came to be liberated forming the Union Territory alongwith Daman and Diu, on or about 19th December, 1961, it was under Portuguese rule. On and from that date till 5th March, 1962, there remained what is known as interregnum, during which the Portuguese laws were not applying at ail. Afterwards, some of the laws did govern the rights of the parties in the Territory and possibly, the laws relating to mines and decrees passed by the Portuguese Government from time-to-time were holding the field till the said M.M.R. Act came to be applied on and from 1st October, 1963.

7. On behalf of the petitioner therefore, a strong case is sought to be made out on the basis that when notices came to be issued on 7th May, 1962, pursuant to an application dated 2nd February, 1962, submitted by the father of the petitioner and ultimately all fees came to be paid on 1st February, 1963, i.e. prior to the application of the said M.M.R. Act, the authorities of the State of Goa should have proceeded under the old Act because there was a right accruing in favour of the petitioner to get the mining concessions.

8. At a first brush this may appear to be the position, but as one analyses different views and ascertains the factual position, so far as the State authorities during the interregnum and thereafter are concerned, they have not at all been enthusiastic in entertaining the application and considering the same for grant of concession.

9. At the time of final hearing of the petition, certain documents came to be produced on behalf of the petitioner which, themselves, reveal that the amount of Rs. 10,721.15 deposited on 1st February, 1963, was as a result of an order of the Court and is treated as a judicial deposit as per the English translation of the original receipt in Portuguese submitted by the petitioner at pages 3 and 5 of the compilation so submitted. There is one more translation from Portuguese into English at page 11 of this compilation where there is a clear-cut reference to the fact that though the petitioner wanted to deposit the said sum of money, it was not accepted and challan was refused to be issued and therefore, he had secured orders to that effect under Article 453 of the Portuguese CPC and that is how a challan came to be issued.

10. No doubt the application has been received by the said authorities as submitted by the father of the petitioner and the notice also came to be issued as per page 43 onwards, on or about 7th February, 1962.

11. These notices were issued pursuant to the Portuguese Colonial Mining Laws approved by the Decree of 20th September, 1906. The English translation thereof given in odd numbers of the pages of the book submitted by advocate Shri G.V. Tamba, is of great help and from page 7 onwards to 9, 11 and so on, we get useful information about the procedure to be followed by the parties while considering a request for granting a request for mining concession.

12. The definition is to be found in section I at page 7 and a "mining licence" is defined to mean, among other things, a document granted to whomsoever that demands the same in compliance with the terms of the law. The petitioner is relying mainly on Articles 55 and well as 49 of the said Mining Laws at pages 39 and 35, respectively. Article 55 refers to 90 days' notice which, according to the petitioner, is the same as those notices produced on pages 43, 44 and 45. Article 49 at page 35 provides that priority of a mineral concession shall be determined by priority of prosecution guaranteed by prospecting notice of discovery and manifest. Further, it provides that a manifest secures the right to concession when no previous rights exist.

13. In our opinion, this very Article 49 which in the last portion provides for an exception of previous rights existing, would make out the basis and the reason for issuing a notice contemplated by Article 55. By very nature, therefore, this exercise is at a preliminary stage of grant of what would be understood as a mining concession. One may come back to the definition portion of the said mining law as it appears at page 9 and refer to Clauses (n) to (u). Clause (n) is proceeded by Clause (k) "Mining Manifest". Clause (m) refers to notice of manifest which may mean the result of the said notices under Article 55. Even if it were to be independent of the notices under Article 55, the fact remains that from Clause (n) onwards, the important part of title, starting point of the manifestoes desires as to preliminary demarcation, definite demarcation, mining works and operations, mining rights recognition and mining concession resulting finally into a title of concession follow one after the other from Clauses (n) to (v).

14. At best therefore, so far as the petitioner is concerned under the said mining laws it could be said that he has reached upto the stage of manifest having been registered and a notice having been issued. Whether this would amount to vesting of a right in him under the Portuguese law is obviously a question required to be considered, but which could promptly be answered in the negative for the following reasons.

15. Firstly, the application itself that was given by the father of the petitioner was during the said interregnum. The fees were not accepted voluntarily by the concerned department, but it was pursuant to an order of the Court as seen earlier. In this background a very erudite and illuminating order of the learned Additional Judicial Commissioner of Goa as reported in AIR 1968 Goa 85 in the case of Ramnath Narayan Mauzo of Margao v. Union Government of India & others, is of great help. The learned Additional Judicial Commissioner has dealt with a case under the Mineral Concession Rules, 1960 as well as the Portuguese

Colonial Mining Laws that were admittedly applicable to that case.

16. As one turns to the facts enumerated in para 2 of the petition before the learned Additional Judicial Commissioner was on a much better footing. His manifest bearing No. 412 was dated 14th April, 1958, when undisputably, the mining laws were applying to the Territory. The formalities required of surveying, demarcation, etc. everything had been carried out and as required under the then provisions, the matter was to be placed before the Governor General in Council where final decision was to be taken. This happened just before the said event of liberation of the Territory. In this background the said petition before the learned Additional Judicial Commissioner considered the question whether any right had accrued to the petitioner before him and as a corollary to it whether the successor Government of the Territory which was till the date of liberation a part of the Portuguese holding, had nothing else to do but grant the concession. Considering the situation from the point of view of the Portuguese Regulation and with reference to other provisions under the Portuguese regime that will have to be borne in mind, in para 5 of the judgment, after referring to Base LXXV of Law No. 2076 and section 21 of the Decree No. 43216, it was held that section 96 of the Portuguese regulation is directory and not mandatory. The true position according to the respondent of the matter before the learned Additional Judicial Commissioner was that on petitioner's request the relevant file after completion of all formalities, was sent on 24th November, 1961, to the Governor General in Council's office for his approval. Before the approval was granted liberation came in and the matter fell through.

17. In other words, the stand taken by the respondents was that even under the old Portuguese dispensation the placement of the matter before the Governor General in Council was not an empty formality. After completion of all the requirements if the Council felt, the application for prospective mining could well have been rejected.

18. That exactly is the position under the new dispensation.

19. The learned Senior Counsel, Shri Kakodkar placed reliance on section 4 of the Goa, Daman and Diu (Laws) Regulation, 1962. It is this Regulation which provides for the application of the said M.M.R. Act with effect from 1st October, 1963. According to us therefore, section 4(3)(1) and particularly sub-section (2) of Clause (b) shall be saved. However, again with regard to this there is a Supreme Court pronouncement in the case of Vinodkumar Shantilal Gosalia Vs. Gangadhar Narsingdas Agarwal and Others, , which hardly leaves anything in doubt. That also was relating to Mining Concession and specially considering the fact of section 4(2) of the said Regulation. Their Lordships have in no uncertain terms held that the provisions of sub-section (2) did not extend any protection to the rights which had accrued prior to December 20, 1961, but had invested the rights which came into being after March 5, 1962. During the interregnum if something has happened obviously it is in the twilight zone, there being neither old laws in operation, nor any new laws governing the field.

20. As seen above, the application was filed by the petitioner's father after simple inspection of the area which is sought to be acquired for Mining Concession on or about 2nd February, 1962, It is definitely during the interregnum. What followed was nothing else but different stages at which the State authorities as well as the petitioner were required to do something under the said Mining Laws. It is therefore not possible to hold that the petitioner had accrued right saved by section 4 of sub-section (2).

21. In fact, because of the said decision of the learned Additional Judicial Commissioner, it was the petitioner who had decided, no doubt unwillingly, to file an application under the said M.M.R. Act, which he did do on or about 5th June, 1980, that was received by the concerned Department of the respondents on 16th June, 1980. This application was required to be considered as per the said M.M.R. Act and the rules framed thereunder within a period of one year. This having not been done, it was deemed to have been rejected under the then Rule 24(1) framed under the M.M.R. Act. The petitioner therefore, moved the Central Government under Rule 54 by way of revision on 17th July, 1981, which came to be decided in his favour on 20th August, 1981, as per page 72. By the said order on page 72, the Joint Secretary of the Central Government directed the said authorities to consider the application dated 16th June, 1980, within a period of 200 days. It was further stated in the said order at page 72 that if within the said period of 200 days the Government failed to decide the application, it shall be open to the petitioner to take remedy available to him under the law.

22. Apparently, the petitioner patiently waited but strictly speaking, he had no alternative but to wait because in the meantime there started a dispute between him and another party, apparently relating to this very mining area and it finally culminated into a Civil Suit No. 782/68 in the High Court of Judicature at Bombay in its Original Side. Interestingly enough, this litigation clearly reveals the understanding of this very petitioner as to the implication of the efforts made by him before the Goa Government. He has approached the plaintiffs of that litigation with a representation that he having contacts which will enable the petitioner to get the documents of mining lease, entered into an arrangement with them. Obviously therefore, he very well knew that the efforts made so far by him were not enough and they have yet to culminate into an authorization which would permit him to carry out the actual mining operation. In other words, he knew very well that he does not have a mining lease in his favour as is understood under the laws of mining. The petitioner who is party defendant No. 1 in the said suit finally filed his written statement in the said suit on or about 3rd September, 1974. In fact, the solicitors of the petitioner have conveyed to the respondent State authorities that in view of the interim orders passed by Hon"ble Bombay High Court, not to allot the lease of the said mines to any party till the matter was finally decided. This letter is produced at Exh. B-2 at page 46 and it is dated 31st December, 1979.

23. Thus, on one hand there is litigation initiated in the year 1978 and, on the

other, the said decision of the learned Additional Judicial Commissioner which had prompted the petitioner, no doubt reluctantly, to file application on 16th June, 1980, the matter finally came to be decided against him on 8th JANUARY, 1988, which is impugned at page 84. The decision of the learned Additional Judicial Commissioner is referred categorically in the second compilation produced on 6th November, 1997, in the course of the hearing at page 4 and it is dated 29th February, 1990. At page 5 para (e) AIR 1968 Goa 85 is clearly referred to and, in fact, based on it a grievance is made that though the learned Additional Judicial Commissioner had directed the State authorities to inform all the parties whose applications were pending to apply under the M.M.R. Act, the petitioner was never informed and while maintaining that his case should be considered under the old Portuguese laws reluctantly finally, the application came to be tiled.

24. Now, coming back to the impugned order at page 84, the following two reasons are given as set out at page 85:--

"(a) that the applicant has not submitted any evidence to show that the area for which the lease is applied for has been prospected earlier and the existence of mineral contents therein has been established;

(b) that the applicant has not submitted any mining plan duly approved by Central Government for the development of mineral deposits in the area concerned."

25. According to the petitioner, none of these grounds are available to the respondents because so far as the requirement of prospecting being done earlier and requirement of mineral concession being established, that was already done in the month of February, 1982. Admittedly, the application is under M.M.R. Act and the Rules framed thereunder submitted in the year 1980, which was not open to the petitioner to fall back upon so far as fulfilment of the requirement. When mineral concessions are required to be established under the rules, there has to be a proof of that fact. Simple inspection referred to in application dated 2nd February, 1962, cannot be equated with establishment of mineral concession on the site sought to be applied for mineral concession and prospecting. Obviously therefore, there is a lacuna in the application.

26. Now, it is another thing when it is pointed out by the petitioner that when he applied in the year 1980 there was no such requirement as to mining concession being established and that came to be incorporated in the rules in the year 1987 only. Maintaining that his application should have been considered as on the date when it was submitted, the learned Senior Counsel, Mr. Kakodkar, strongly urged that such changes made subsequently cannot be given retrospective effect.

27. Alternatively, he suggested that even if it were applied for, the least that was expected of the respondent authorities was to bring it to the notice of the petitioner that this requirement is to be fulfilled and he may be called upon to do so. However, no such opportunity admittedly, has been granted to him.

28. While disagreeing with the submission made on behalf of the petitioner that the said amendment will apply retrospectively, we are inclined to consider the said alternative submission of grant of opportunity for which discussion will be made hereafter.

29. The second ground of rejection is that the mining plan duly approved by the Central Government has not been produced. An attempt was made to make out a case that such plans have been produced by referring to the fact that the petitioner had obtained certain copies of survey plans from page 48 Exh. "C" on or about 17th May, 1980 and they were produced. However, it is a letter written by the Director of Land Survey, Panaji, to the solicitors of the petitioner wherein the copies of the plans that were supplied are referred to and the account for the sum of Rs. 187/- that was received has also been set out.

30. It is one thing to obtain certified copies of survey maps and it is another to submit plans and that too mining plans duly approved by the Central Government for the development of mineral deposits in the area concerned. Clearly again, this requirement is not fulfilled by the petitioner.

31. There is one more hurdle in the way of the petitioner now and it is in the form of provisions of the Forest (Conservation) Act, 1980, section 2. Starting with non obstante clause, the section provides that no State Government or any authority thereof except with the prior approval of the Central Government shall, allow forest land or any portion thereof to be used for any non-forest purposes.

32. Learned Senior Counsel, Mr. Kakodkar is right that neither in the said Forest (Conservation) Act, 1980, nor in the Indian Forest Act, 1927, there is any definition as to the word "forest". The Hon'ble Supreme Court therefore, had occasion to deal with a similar situation in the case of T.N. Godavarman Thirumulkpad Vs. Union of India and others, , where in para 4 Their Lordships have held that the dictionary meaning has to be given to the word "forest". The dictionary meaning would certainly mean the one that is to be found in a recognized lexicographical work like the Shorter Oxford ENGLISH Dictionary, which was relied on by the said learned Senior Counsel. Going by the meaning given therein, it is to be found that it can be "an extensive tract of land covered with trees and undergrowth sometimes intermingled with pasture". The second meaning appearing at the end of the entry at page 789 of the famous work in its Third Edition, Volume 1, also gives a meaning, "a wild uncultivated waste".

33. The learned Senior Counsel is right in pointing out that so far as this stand taken in the affidavit in reply by the respondent No. 2 is concerned, it is not at all made out whether the area where the concession is sought in fact is a forest or not. To that, extent, the submission of the petitioner has to be accepted. All that the respondent No. 1 could fall back upon was a letter produced at Exh. R. 1 on page 98 where the Administrative Officer of the Conservator of Forests, Panaji, has intimated to the Director of Industries and Mines, Panaji, on 25th July, 1981, that no N.O.C. could be granted for mining lease as prior approval of the Central

Government is required.

34. It may be noted that it is not the reason stated in the impugned order. It was therefore, further requested on behalf of the petitioner that if this requirement is also to be imposed upon the petitioner while considering the said alternative request of granting opportunity to the petitioner, if the Court so agrees, an opportunity of getting approval of the Central Government should also be given to him.

35. . No doubt the learned Senior Counsel had heavily attacked this attempt on the part of the respondents to add new ground to the order which is not contemplated by the M.M.R. Act or the rules and had therefore, relied on two Supreme Court authorities in the cases of Commissioner of Police, Bombay Vs. Gordhandas Bhanji, and Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, and had submitted that by filing an affidavit the respondent cannot be permitted to add something to the impugned order which is not there and more so when the additional material is de hors the Act and the rules which apply to the facts of a given case. In the aforesaid circumstances, therefore, the decision may be a decision in a given matter.

36. However, when writ jurisdiction of the High Court is invoked, statutory provisions like Forest (Conservation) Act, 1980 cannot be ignored by the High Court. The requirement is therefore a must. We therefore do not want to enter into this larger controversy as to whether this fact could be relied on by the respondents or not and therefore, the aforesaid two decisions of the Supreme Court are not discussed at length.

37. Coming back to the matter again, the aforesaid fact situation makes out clearly that the reliance sought to be placed by the petitioner on his so-called vested right under the Portuguese laws is totally misplaced. The Supreme Court decision as well as the Additional Judicial Commissioner's decision referred to above are at clear ends. This would lead us to the consideration of the alternative submission.

38. We are inclined to grant this request because on one hand the respondents have admittedly not decided the application till the period of twelve months available to them starting from 16th June, 1980 and belatedly, when they started action they carried out joint survey, etc. after the time limit of one year was over as could be seen from page 99 onwards, Exhibit R-2 colly.

39. As if this is not enough, though categorically in the revision order the Central Government has directed the State authorities to decide the application of the petitioner within 200 days, it has taken almost seven years for them to decide the application. While doing so, they made use of statutory material which has been brought in by way of amended rules without affording any opportunity to the petitioner. The learned Senior Counsel Shri Kakodkar had submitted that the implied effect of the order given by the Central Government on the revision application of the petitioner will be that in all other respects the application was

in order and deserved to be allowed is mentioned for being rejected.

40. In this background, we are inclined to allow the petition to a limited extent of directing the respondent authorities to re-consider the application of the petitioner for that reason by them on 16th June, 1980, and giving an opportunity to the petitioner of fulfilling the requirements as to the two grounds set out in the impugned order as well as with regard to the requirement of Forest (Conservation) Act, 1980. If there be any other requirement starting from 1988 when the impugned order came to be passed till the date when the matter is being decided, the same shall be communicated to the petitioner within a period of one month from today. Failing such communication, the petitioner will take it that he is to meet the aforesaid three requirements only within a period of one month. After the expiry of the said first period of one month, the petitioner shall fulfil all these requirements and for that purpose he may start making necessary applications before the appropriate authorities from the date of this very order.

41. It was first understood that when the application was being considered under these orders and opportunity is being granted to the petitioner, as requested on his behalf, in the alternative, the authorities shall be considering the same keeping in mind too factual as well as the legal position as is available on the date of this order. If there be any interest created in the mining area in question, of course on interim order of the Court in this matter the same shall be given due weightage, importance and effect.

42. The petitioner is therefore allowed to the aforesaid limited extent only.

43. After the pronouncement of judgment a request was made on behalf of the petitioner that the interim relief which continued till the disposal of this petition be continued further for eight weeks as the petitioner wants to pursue the matter at a higher forum.

44. The interim relief in terms of prayer (c) which operated during the pendency of the petition is obviously on the basis that the petitioner had vested interest in the area that he claims for mining purposes. By our judgment delivered today we have directed the State Government to reconsider his claim while rejecting the contention of the petitioner that he has a vested right in it. Under the circumstances, we are not inclined to accept this request. Hence, it is rejected.

45. Petition partly allowed.