(2016) 12 KL CK 0012

In the High Court Of Kerala

Case No : W.P.(C) No. 18137 of 2016 and connected cases

Sakariya Vazhayil APPELLANT

Vs

Village Officer, Kanjiramgad RESPONDENT

Date of Decision : 07-12-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Kerala Minor Mineral Concession Rules, 2015 — Rule 106, Rule 14(2)
Mines And Minerals (Development And Regulation) Act, 1957 — Section 2, Section 3, Section 4

Citation : (2017) 1 KLT 913

Hon'ble Judges : Mr. K. Vinod Chandran, J.

Bench : Single Bench

Advocate : S. Krishna Prasad, P. Sivaraj, G. Hariharan, Alexander George, K.N. Radhakrishnan, P.M. Ziraj, K.V. Anil Kumar, R. Sunil Kumar, Ajith Murali, K. Siju, O.D. Sivadas, M. Soniya, C. Rajendran, Mini Gangadharan, K.K. Unni, Abhilash S. Francis, Sajeevan Kurukk

Final Decision : Dismissed

Judgement

Mr. K. Vinod Chandran, J.—All the above Writ Petitions seek issuance of Form O(A) under R. 14 of the Kerala Minor Mineral Concession Rules, 2015 (hereinafter referred to as a KMMC Rules); transit passes for removing the excavated ordinary earth. The claim is raised on the basis of building permits issued by the Local Self Government Institutions (LSGI for brevity), with permission to construct building of less than 300 sq. mrs plinth area. The claim is that the petitioners would require extraction and removal of ordinary earth for carrying out such construction; which excavated earth can be transported out only with transit passes issued under The Kerala Minerals (Prevention of Illegal Mining, Storage and Transportation) Rules, 2015 (in short the Transportation Rules''). It is also submitted that the petitioners would pay the royalty demanded by the Geologist; which is a pre-condition for issuance of Form O(A) under R.11 of the KMMC Rules.

2. This Court had noticed various instances wherein gross misuse of the exemption granted by the State, was perpetrated resulting in razing down hills and levelling hillocks; changing the very terrain of the land, on the strength of building permits issued by the local authorities, thus rendering otiose the provisions of the Mines and Minerals (Development and Regulation) Act, 1957 (MMDR Act for short). This Court was faced with numerous instances where d large scale mining operations were carried out, on the basis of the exemption under R.14(2) and transit passes were sought to be issued, for commercial exploitation of the excavated ordinary earth. Often the building permits, issued by the local authority; which does not create any obligation on the land owner to make that construction having less than 300 sq. metres, was used only for the excavation; with no building being erected. This Court had in one of such cases in the above batch i.e., W.P.(C) 23251 of 2016 passed an interim order dated 19.08.2016 on the following lines:

"The above Writ Petition has been filed, seeking a further permit for carrying out excavation of red earth for the purpose of a building construction. The petitioner, on the basis of a building permit, the plan of which is produced at Ext.P3 for construction of a building having a total plinth area of 95.6 sq. metre, has sought for excavation, which has been granted as per Exts.P5 & P6. The photographs produced by the petitioner itself shows that an entire hill has been razed to the ground for the purpose of building a residential house of 95.6 sq. metre.

2. This is a gross misuse of the exemption provided under sub-rule (2) of R.14 of the Kerala Minor Mineral Concession Rules, 2015, wherein extraction of ordinary earth for construction of residential buildings, having a plinth area of less than 300 sq. metres, is exempted. The above provision, according to this Court, is only to grant exemption insofar as removing the earth, which is extracted for the purpose of building the foundation and not to change the terrain of the land itself.

3. This Court has come across a number of such petitions, in which claim for O(A) Forms for transport of ordinary earth is sought for, on the basis of the exemption, which as revealed herein has been grossly misused. It is also to be noticed that the exemption only requires a permit obtained from the Local Self Government Authority and it does not speak of any actual construction being undertaken or finished within a specified time. Hence, any person having land could seek for a permit, carry out extraction and then not carry out the construction at all, in which event, the extraction would have been permitted in contravention of the Rules.

4. The State of Kerala represented by the Chief Secretary, Government Secretariat, Trivandrum, the Law Secretary, Government Secretariat, Trivandrum and the Principal Secretary, Industries Department, Government Secretariat, Trivandrum are impleaded suo motu as addl. Respondents 5, 6 & 7.

5. The Geologist, who have issued Exts. P5 & P6 orders, M/s. Getha S.R. and Dr.Saji Kumar S. are impleaded as Addl. Respondents 8 & 9 and are directed to

file an affidavit, explaining the circumstances and the legal provisions under which Exts.P5 & P6 permits were respectively issued by them.

6. The learned Government Pleader is directed to take notice for the Addl. Respondents suo motu impleaded. The Addl. Respondents 5 to 7 shall file affidavit, specifically explaining the consequence of the exemption granted in the Rules within a period of two weeks from today and the Addl. Respondents 8 & 9 shall file their affidavit in explanation also within that time."

3. While so another Writ Petition; W.P.(C) No.16763/2016 (Annamma Poulose v. District Collector) (2017 (1) KLT 143 = 2017 (1) KHC 751), in which there was a complaint about widespread excavation being carried on in the adjacent property; based on three building permits issued by the local authority came up for hearing and was allowed today. This Court had elaborately considered the issue and found that the exemption under R.14(2) of the KMMC Rule is ultra vires the MMDR Act. In para 16 & 17 it was found so;

16. An exemption is provided under sub-rule (2) of R.14 for extraction of ordinary earth for construction of residential buildings including flats or commercial buildings having a plinth area of 300 sq. metres, on the owner of the land obtaining a building permit from the local authority. The proviso to the sub-rule also speaks of mineral transit passes to be issued when transportation of ordinary earth is required.

17. Section 4 of the Mines and Minerals (Development and Regulation) Act, 1957 (for brevity MMDR Act) provides that no person shall undertake any reconnaissance, prospecting or mining operations except under and in accordance with the terms and conditions of the reconnaissance permit, a prospecting license or a mining lease. The State Government has been conferred with the power to make rules in respect of minor minerals under Section 15 of the Act which power has been invoked to frame the KMMC Rules of 2015. Section 15 does not grant any power to the State Government to exempt any activity which involves minor mineral quarrying; from the requirement of a permit, license or lease.

4. Relying on (2012) 11 SCC 1 (Monnet Ispat & Energy Ltd v. Union of India) it was held so:

19. Hence the power of the State is taken away to the extent provided in the MMDR Act, as declared in Section 2 of the said Act. Section 4 is a prohibition from undertaking any reconnaissance, prospecting or mining without a permit, license or Lease. Section 14 as it originally stood exempted minor minerals from Section 4 to 13; which stood amended with effect from 10.02.1987 (Act 37 of 1986); making inapplicable only Sections 5 to 13, to minor minerals. In the teeth of Section 4, the State framing rules under Section 15 of the MMDR Act could not have altogether exempted a mining activity from being carried out without permit, license or lease.

20. Digging of trenches for foundation of buildings cannot strictly come within the meaning of mining operation, which definition under the MMDR Act, postulates ''winning'' of minerals. Especially when small buildings are constructed, the ordinary earth excavated would also be not commercially exploited since it is spread around the construction made, if the nature of land permits a foundation without piling. But when large scale excavation is necessitated and the excavated earth or clay has to be transported out, then there follows a commercial exploitation of the minor mineral in which case the same has to follow the procedure under the MMDR Act and the Rules. The State could hence regulate the grant of quarry leases, mining leases or other mineral concession under Section 15 of the MMDR Act, in specific instances but cannot altogether exempt the requirement of a permit, made mandatory under Section 4 of the MMDR Act. The State could all the same exempt payment of royalty when trenches for foundation are dug and the earth excavated is spread over the very same property: which would not involve any winning of a mineral.

21. In this context, the notification brought out by the Ministry of Environment, Forest and Climate Change (MoEF & CC) dated 15/01/2016 (SO 141(E)) is also relevant. The said notification amended the EIA notification of 2006 (SO 1533 EE) dated 14.09.2006 brought out in exercise of the powers conferred under the Environment (Protection) Act, 1986. The same is also an enactment of the Union Parliament, and the regulations prescribed there under would have the same effect on the States power under Entry 23 List II. It speaks of exemption of certain cases from requirement of Environmental Clearance'' (for short "EC" only) under Appendix-IX. It provides exemption as SI. No.9 "for digging of foundation for buildings not requiring prior environmental clearance". Hence a mere digging for construction of a building would not require an EC: if there is no commercial exploitation of the excavated earth carried out.

22. The State Government could hence bring in regulations with respect to digging of foundations for buildings where the ordinary earth extracted as in the case of buildings having a plinth area of 300 square metres, would not require an "EC". However, when Form O(A) is to be issued under the Transportation Rules, to commercially exploit the minor mineral, as explicit from the word "winning any mineral" in the definition clause under the Act; there should be a proper permit applied for with EC.

23. The anomaly is also insofar as the exemption being used to carry out large scale quarrying of ordinary earth on the strength of the building permits, which buildings are often not constructed. What is intended by the Central Government is very clear in the notification, i.e., the digging of foundation for the buildings. It only speaks of earth removed when trenches for such foundation are dug, which often is spread around the building constructed.

24. The facts as noticed above, would reveal that an entire area is levelled by large scale extraction of ordinary earth, thus changing the very terrain of the land itself and mutilating the face of the earth. Constructions made in hilly

terrains are to be architecturally designed to suit the topography of the land and hills and hillocks cannot be razed to the ground so as to construct buildings of less than 300 square metres. Large scale excavations changing the topography and mutilating the nature of the land is not exempted under the MMDR Act, which as of now, regulates the exploitation of mines, minerals and its development. The reports produced herein indicate that entire hills and hillocks are erased from the face of earth altering the very topography and land terrain of the region. The exemption claimed is also to make small constructions which construction also does not materialise, especially there being no mandate in putting up a structure for which building permit has been issued.

25. Quarrying operations so carried on; on the strength of building permits is not by reason only of the exemption under sub-rule (2), but more by reason of the proviso which permits transportation of ordinary earth from the site in which exemption under sub-rule (2) of R.14 is claimed. Similar is the exemption available in R.106 of the KMMC Rules (Sic MMDR Act), and the issuance of special transit passes. This leads to commercial exploitation of the minor mineral, of course with payment of royalty. But such commercial exploitation brings the activity under the definition of ''mining operations'' as defined in Section 3(d) (''winning'' of any mineral) of the MMDR Act, which mandates a permit, license or lease under Section 4 of the Act. The State could bring in regulations to liberalize grant of permits for digging of trenches for foundation and transportation of excavated minor mineral, but there cannot be any exemption as such and issuance of Form 0(A) for the asking. Sub-rule (2) of R.14 and the provisos, of the KMMC Rules hence has to be found to be ultra vires the MMDR Act. Sub-rule (1) to (4) of R.106, on the same reasoning, also are ultra vires the MMDR Act. The exemption granted with a condition of payment of royalty, reveals an undue anxiety to ensure revenue; without any concern as to the preservation of natural wealth; which is alien to the regulatory regime of the MMDR Act. It exceeds the rule making authority conceded to the State, with respect to minor minerals, under Section 15 of the Act.

26. The transportation on payment of royalty can only be effected when there is a valid permit/lease/license and not otherwise. The State in its anxiety to ensure payment of royalty had overlooked the object sought to be achieved by the Union Parliament in providing for regulatory measures for mining operations, which earlier resulted in indiscriminate removal of mineral resources. The State exceeded its power in providing for exemption and issuance of transit passes under the KMMC Rules for excavation carried on without a permit. It is hence declared that sub-rule (2) of R.14 and sub-rules (1), (2), (3) and (4) of R.106 of the KMMC Rules are ultra vires the MMDR Act.

5. In such circumstances, none can claim issuance of transit passes (Form O(A)) on the basis of a building permit issued by the LSGI''s. The exemption clause is no more available in the statutory rule. In answer to the query raised in W P.(C) No. 23251/2016 by interim order dated 19.08.2016, extracted herein above, the

Government has filed an affidavit dated 03.09.2016, through respondents 5 to 7; paragraph 5 of which is relevant and extracted herein below:

"5. In fact the aforesaid Rules were framed by the Government bonafidely for meeting the requirement of a common people in our State. For giving flexibility in connection with the construction of residential building the aforesaid rules were framed by the Government. Moreover the Government always take serious action against the person who misused rules stipulated in Kerala Minerals (Prevention of illegal Mining, Storage and Transportation) Rules, 2015. Considering the gravity of the illegal action, the Government now decided to amend the R.14 by incorporating certain additional measures like building plan, building permit and land development permit etc. Apart from that, a certificate of demarcation of the boundaries of the area proposed for removal of ordinary earth for constructing the proposed building, its courtyard proportional to the plinth area of the building and access road issued by an officer of the Department of Land Revenue not below the rank of Village Officer, who has jurisdiction over the area will also be incorporated. In the event of extraction of ordinary earth outside the demarcated area, the permission granted for extraction will be canceled and an amount equal to 6 times of royalty will be penalized for the illegal extraction. These provisions will also be incorporated in the amendment. This amendment will be published through press release for creating awareness among public."

6. The State is also hence, considering the introduction of stricter norms to prevent abuse of the provisions and at the same time mitigate the hardship caused to the common people to obtain mining permits, just to dig trenches to construct foundation of buildings, which earth excavated is also merely spread around the property. This Court had also noticed that though exemption from obtaining a permit is beyond the powers of the State Government; it is well within its powers to exempt payment of royalty; especially when there is no commercial exploitation of the mineral excavated, by removal and sale. There should definitely be a balance achieved in providing easy measures for the common man to carry out small constructions; but ensuring that, on the ground of such construction of small buildings the entire terrain of the land is not converted or mutilated. It is for the Government to decide on how the same has to be incorporated in the Rules for which Section 15 of the MMDR Act confers ample power on the State. It is also submitted by the learned Additional Advocate General that the amendments would be brought in with expediency. In such circumstances, the petitioners would have to wait for such amendments or obtain a proper permit under the MMDR Act and the KMMC Rules; in which event the permit should specify the quantity to be excavated to carry on the construction without any disturbance or mutilation caused to the topography and terrain of the land as has been provided for in W.P.(C) No.16763 of 2016 (2017 (1) KLT 143) by judgment dated 07.12.2016.

7. The Writ Petitions would stand dismissed with the above reservation. No Costs.

