

(1980) 02 GUJ CK 0025
In the Gujarat High Court

Shah Minerals

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 13-02-1980

Acts Referred:

Bombay Police Act, 1951 — Section 33(1)(o)

Gujarat Minor Minerals Rules, 1966 — Rule 6(3), 9(2)

Mines and Minerals (Development and Regulation) Act, 1957 — Section 15, 15, 15(1)

Citation : (1981) 22 GLR 126

Hon'ble Judges : S.H. Sheth, J;A.M. Ahmadi, J

Bench : Division Bench

Judgement

S.H. Sheth, J.—The petitioner has been running a proprietary business at Bhuj in Kutch district. Between January 1975 and July 1975, he made as many as eight applications to the Collector of Kutch for obtaining a mining lease or a quarry lease for winning Bentonite which is a minor mineral. The area in respect of which he made applications was Lakhpat Taluka in Kutch District. Until 14th August 1975, the petitioner's applications were not processed and disposed of. According to the petitioner, if the Collector had disposed of his applications prior to 14th August 1975, they would have been granted under the order of priority incorporated in Sub-rule (2) of Rule 9 of the Gujarat Minor Mineral Rules, 1966. On 14th August 1975, the State Government issued notification under which areas bearing Bentonite in Kutch District were reserved for exploitation by a public sector undertaking. On 26th August 1975, all applications made by the petitioner were rejected because the area in respect of which he had applied for a mining lease had been reserved by the State Government for exploitation by a State public sector undertaking. The petitioner appealed against all those orders to the Director of Geology and Mining. On 1st of January 1976, all appeals were dismissed. He thereupon approached the State Government against those appellate orders and filed revision applications. On or about 30th of November 1978, the State Government dismissed all those applications.

2. It is on account of these facts that the petitioner filed this petition. On or

about 28th June 1978, the State Government issued a press note in which they declared the policy of de-reserving areas earlier reserved in Kutch district for exploitation of Bentonite. Even though the petitioner, pursuant to the declaration of policy of de-reservation, made applications to the competent authority for obtaining a mining lease in respect of Bentonite in Kutch district, he complains that the rejection of his applications made in 1975 has caused damage to him inasmuch as he has lost priority under Sub-rule (2) of Rule 9 of the Gujarat Minor Mineral Rules, 1966. According to him, if those applications were not rejected but were kept pending, he would have automatically obtained priority amongst the applicants belonging to the last category specified in Sub-rule (2) of Rule 9 because Sub-rule (2) contemplates, so far as the residuary category of applicants is concerned, the policy of "first come, first served" given all other things equal.

3. In this petition, Mr. I.M. Nanavaty, who appears on behalf of the petitioner has raised before us as many as five contentions. They are as follows:

(1) Rule 6(3) of Gujarat Minor Mineral Rules, 1966, is ultra vires Section 15 of Mines and Minerals (Regulation and Development) Act, 1957, inasmuch as whereas Section 15 empowers the State Government to make rules only to regulate the grant of prospective licences and mining leases in respect of minor minerals, the State Government has exceeded its authority by abolishing the grant of mining leases in respect of areas reserved for public sector undertakings or by prohibiting the grant of such leases in respect of such areas.

(2) The notification issued by the State Government on 14th August 1975 (hereinafter referred to as "the impugned notification") was in the nature of delegated legislation. Therefore, it could have only prospective operation and could not apply to or govern the applications made prior to the date of that notification.

(3) If the impugned notification is construed so as to apply to pending applications, it violates Article 14 of the Constitution because it introduces a discrimination based on classification which is purely dependant upon a fortuitous circumstance as to whether applications made prior to the reservation were disposed of or not disposed of before the date of reservation.

(4) Under the scheme of the Mines and Minerals (Regulation and Development) Act, 1957, and Gujarat Minor Mineral Rules, 1966, appeals and revision applications under Rule 38 are continuation of the proceedings relating to grant of or refusal to grant mining leases in respect of minor minerals. Therefore, the first respondent ought to have either kept the revision applications pending until the policy declaration made by press-note dated June 28, 1978, was implemented by a notification of de-reservation or should have sustained the priority intact while making the impugned orders at Annexure "F".

(5) In view of the notification of de-reservation, since the only ground on which the petitioner's applications for mining leases were rejected does not survive,

the first respondent should be directed to consider the petitioner's applications made between January 1975 and July, 1975 in accordance with the rules then prevailing on the basis that there was no reservation in vogue. This Court, it is contended on behalf of the petitioner, should grant to the petitioner substantive relief under Articles 226 and 227 of the Constitution.

4. So far as the challenge to the vires of Sub-rule (3) of Rule 6 of Gujarat Minor Mineral Rules, 1966 is concerned, the argument which Mr. I.M. Nanavaty has canvassed before us is as follows. Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957, empowers the State Government to make rules in respect of minor minerals. Sub-section (1) of Section 15, inter alia, provides that the State Government may, by notification in the Official Gazette, make rules for regulating the grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals and for purposes connected therewith. According to Mr. I.M. Nanavaty, the State Government is empowered to make rules for regulating the grant, inter alia, of mining leases. According to him, the expression "regulating" used in Sub-section (1) of Section 15 does not empower the State Government to prohibit the grant of leases. Therefore, according to him, Sub-rule (3) of Rule 6 which inter alia, provides as follows is ultra vires Section 15(1) because it does not regulate the grant of mining leases but prohibits their grant. The principal part of Sub-rule (3) of Rule 6 reads as follows:

No quarry lease shall be granted in respect of lands notified by Government as reserved for use of Government, local authorities or for any other public or special purposes.

Proviso to Sub-rule (3) is not material for the purposes of the present case. Placing Sub-section (1) of Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957, in juxtaposition with the principal part of Sub-rule (3) of Rule 6 of Gujarat Minor Mineral Rules, 1966, Mr. I.M. Nanavaty has argued that whereas the State Government has been empowered under Sub-section (1) of Section 15 to regulate the grant, inter alia, of mining leases, the State Government under Sub-rule (3) of Rule 6 has prohibited the grant of mining leases. In other words, according to Mr. Nanavaty, the State Government has exceeded the statutory authority conferred upon it by Parliament under Sub-section (1) of Section 15. According to him, regulation cannot be stretched to mean prohibition.

5. Mr. Nanavaty has invited our attention to a couple of decisions. The first decision is in *Valley Noor Mohamad and Anr. v. State of Gujarat* 14 GLR 10. In that decision, it has been observed by this Court that while judging whether a particular provision is regulatory in character, what is necessary to be considered is the effect and substance of such a provision and not its form. The second decision to which he has invited our attention is in *Himatlal K. Shah v. Commissioner of Police, Ahmedabad and Anr.* 14 GLR 461. It is a decision of the Supreme Court in which the Supreme Court was considering the expression

"regulating" used in Section 33(1)(o) of the Bombay Police Act, 1951. Reliance has been placed upon the dissenting view of Mr. Justice Mathew in which it has been stated that the power to regulate does not normally include a power to prohibit. A power to regulate implies the continued existence of that which is to be regulated. Mr. Nanavaty has argued that in the majority judgment there is nothing contrary to the aforesaid principle laid down by Mr. Justice Mathew in his dissenting judgment and that, therefore, we should accept it as a binding principle of law. We are unable to accede to the argument raised by Mr. Nanavaty. A dissenting view is not a binding view irrespective of whether a particular observation made in the dissenting view has been controverted by the majority in its judgment or not.

6. In *Corpus Juris Sscundum*, Volume 76, pages 610 to 614, it has been stated that the word "regulate" ordinarily indicates not so much the creation or establishment of a new thing as the arranging in proper order and controlling that which already exists. It has been held to contemplate or imply the continued existence of the subject matter to be regulated.

7. Relying upon the principles laid down in the decisions referred to above, Mr. I.M. Nanavaty has argued that the power to regulate the grant of mining leases conferred upon the State Government by Sub-section (1) of Section 15 cannot be exercised so as to prohibit the grant of such leases. According to him, regulation of the grant of mining leases presupposes the existence of circumstances under which mining leases can be granted and further contemplates their regulation. The argument which Mr. I. M. Naoavaty has raised is ex-facie attractive. But, what the State Government has done by Sub-rule (3) of Rule 6 of Gujarat Minor Mineral Rules, 1966, is not to prohibit the grant of mining leases in respect of reserved areas but it has laid down the consequence of the exercise of the right to ownership of the minor minerals which vest in it.

8. Mr. J.R. Nanavaty who appears on behalf of the respondents has invited our attention to the decision of the Supreme Court in *Amritlal Nathubhai Shah and Others Vs. Union Government of India and Another*, It was a case under Mines and Minerals (Regulation and Development) Act, 1957. In that case, question arose under Rules 58, 59 and 60 of Mineral Concession Rules, 1960, made by the Central Government in respect of minerals other than minor minerals. There also, an application for granting of a mining lease in respect of a reserved area which contained Bauxite mineral was rejected. Whilst considering the contention raised on behalf of the petitioner in that case, reference was made to the order of the Central Government which was under challenge in that case and to the contention raised by the Central Government that the minerals vest in the State Government which is the "owner of minerals" and that the Government has the inherent right to "reserve" any particular area for exploitation in the public sector. Once a notification is issued by the State Government for the reservation of any particular area, no party can claim any right of concession in the reserved area. It was urged in that case that the State Government had no authority to

reserve any area and that the refusal to grant a mining lease was based on a ground which was altogether extraneous and irrelevant and could not be supported with reference to the Mines and Minerals (Regulation and Development) Act, 1957. The view which the Central Government had expressed in the order under challenge in that case and the contention which it had raised were upheld by the Supreme Court and it was held that the State is the "owner of minerals" within its territory and that, therefore, the minerals vest in the State. There is nothing in the Act or the Rules made there under to detract from this basic fact. This is what the Supreme Court has stated in that behalf in paragraph 6 of the report: "As has been stated, the authority to order reservation flows from the fact that the State is the owner of the mines and the minerals within its territory, which vest in it." As laid down by the Supreme Court in that decision which arose from the decision of this Court in *Amritlal Na 'hubhai Shah and Ors. v. Union Government of India* and Anr. 13 GLR 1006, the State Government is the owner of all minerals within its territory. Therefore, in exercise of its right of ownership, it has the power to reserve any area in respect of which no mining or prospecting leases shall be granted. Such a prohibition may be temporary or permanent.

9. Sub-rule (3) of Rule 6 of Gujarat Minor Mineral Rules, 1966, does not empower the State Government to issue a notification reserving a certain area for mining operations by a State Public Sector undertaking. It merely lays down the consequence of such a reservation. In other words, the power to reserve a certain area in respect of which no mining lease shall be granted flows from the ownership of the minerals vesting in the State Government. Having exercised its right of ownership by reserving a particular area for mining operations by a public sector undertaking under Sub-rule (3) of Rule 6 what the State Government or the rule-making authority directs is that in respect of such a reserved area no lease shall be granted. The reservation of an area in exercise of its right of ownership may be for the use of the Government or local authorities or for any other public or special purposes. When viewed in this light, it becomes very clear that Sub-rule (3) of Rule 6 applies to those areas in respect of which there is reservation and in respect of which quarry leases or mining leases cannot be granted. Sub-section (1) of Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957, in our opinion, empowers the State Government to make rules for regulating the mining leases or quarry leases in respect of those areas which are unreserved or which have not been reserved by the State Government in exercise of its right of ownership. In respect of such areas, the grant of mining or quarry leases is regulated by the Gujarat Minor Mineral Rules, 1966. In respect of reserved areas, the question of regulating the grant of mining or quarry leases does not arise because there is nothing which is to be regulated there. To repeat, Sub-rule (3) of Rule 6 lays down the consequence which necessarily flows from the reservation of a particular area by the State Government for its own use or for the use of a public sector undertaking or a local authority or for any other public or special purpose. Since

Sub-section (1) of Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957, and the Gujarat Minor Mineral Rules, 1966, come into play only in respect of unreserved areas or areas in respect of which quarry or mining leases are to be granted, we do not find anything inconsistent between Sub-section (1) of Section 15 and Sub-rule (3) of Rule 6. So far as the "regulation" is concerned, there is no inconsistency between the section and the rule. Sub-rule (3) of Rule 6 merely lay down, out of abundant caution, a rule which regulates the conduct of the officers of the State in respect of reserved areas which are not the subject-matter of Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957. The first contention raised by Mr. Nanavaty, therefore, must fail and is rejected.

10. The second contention which Mr. I.M. Nanavaty has raised is that the, impugned notification issued on 14th August 1975 was in the nature of a delegated legislation and that, therefore, it could only have prospective operation and could not apply to applications made prior to the date of reservation. This contention is founded upon the misconception of the rights of the State in the minerals. Since the minerals vest in the State and since it is open to the State to reserve any mineral bearing area excluding it from the field of granting or mining or prospecting leases, the question which Mr. I.M. Nanavaty has tried to raise does not arise. It is open to the State Government at any time exercise its right of ownership and to reserve a particular area and exclude it from the field of mining or prospecting leases. Such a reservation is not in pursuance of any statutory authority delegated by the Parliament to the State Government. If such a reservation could be justified only on the basis of the statutory authority derived by the State Government from Parliament, it could have probably been said with some justification that the State Government, as a delegate, could not make delegated legislation with retrospective effect unless Parliament itself had authorised the delegate to do so. In order to fortify the contention which Mr. Nanavaty has raised, he has invited our attention to two decisions to which we make a bare reference. The first decision is in *Garikapatti Veeraya Vs. N. Subbiah Choudhury*, . The second decision is in *Hukam Chand etc. Vs. Union of India (UOI) and Others*, . Since the reservation of a particular area and its consequent exclusion from the field of granting mining or quarry leases are the incidents which flow from the right of ownership which the State has in the minerals, it is open to the State to reserve a particular area at a particular time and to de-reserve it at any other time. In this view of the matter, it cannot be justifiably said that the State is bound to consider on merits the applications made by seekers of leases prior to the reservation of a particular area for the use of the State or for the use by a public sector undertaking. All applications pending at the date when reservation of a particular area was notified must, in our opinion, lapse because the reservation excludes the reserved area from the field of granting mining or quarry leases. Such a notification is neither a delegated legislation nor is it retrospective. It is not a delegated legislation because it is not issued in exercise of any power conferred upon the State by the parliamentary

legislation. The question whether a delegated legislation must be regarded as prospective and cannot be made with retrospective effect unless the law empowers the delegate to do so arises from two facts. There must be a legislation and there must be delegation of some authority by the legislature to its delegate to do a certain thing. The question of delegate having exceeded the statutory authority conferred upon it does not arise where the act complained of neither flows from legislation nor has it been done or committed as the delegate. In the matter of reservation of mineral-bearing areas for its own use or for the use of the public sector undertaking the State Government is not acting as a delegate of Parliament but it acts as the sovereign or absolute owner. The power of reservation in a case of this type is not an off-shoot or an incident of legislation. It is an incident forming an integral part of the ownership or the sovereignty which the State exercises over the minerals. Since the power of reservation is not traceable to the parliamentary legislation, the act of reservation is not a legislation. Since it is not traceable to any legislation, the reservation ordered by the State Government is not an act of the delegate. Therefore, we are of the opinion that the second contention which Mr. I.M. Nanavaty has framed is based on a total misconception of the position of the State in respect of the minerals. We are unable to uphold it. It is, therefore, rejected.

11. The third contention which Mr. I.M. Nanavaty has raised poses Constitutional challenge to the validity of the impugned notification. According to him, it suffers from the vice of arbitrariness and introduces unjustifiable discrimination on account of a fortuitous circumstance whether an application made prior to 14th August 1975 was granted before that date or was rejected after that date. The proposition which Mr. I.M. Nanavaty has canvassed does not, in our opinion, attract the application of Article 14 of Constitution. We say so because Article 14 does not require an owner of a property to behave in a particular manner. The State Government is the owner of all minerals. When it makes a declaration that it shall not grant mining or prospective leases in respect of a certain area, it does not do so, as stated earlier, under the provision of any law but it does so on account of its ownership of the minerals. Therefore, the question of subsequent application having been granted earlier and the earlier application having been rejected later does not arise. The moment the reservation comes into force, all pending applications must necessarily lapse because the reservation, being incidental to the ownership of the minerals vesting in the State is not a product of any legislation.

12. Assuming that we are wrong in this reasoning of ours, even then, we do not think the impugned notification suffers from the vice of unconstitutionality under Article 14, firstly because all applications pending at the date of reservation must necessarily lapse and no question of granting a particular application and rejecting another shall arise. All applications which are pending at the date of reservation must ipso facto lapse. Therefore, there is no discrimination-much less unjustified-which the impugned notification introduces in the matter of granting

mining leases.

13. Mr. I.M. Nanavaty has further tried to argue that it is quite probable that some of the applications may have been granted earlier and some may have been pending which would lapse on the reservation coming into force. Such a situation may develop. Let us now consider different situations which are likely to arise in this context. Applicants for mining or prospecting leases in respect of different areas bearing the same mineral cannot be said to be similarly situated. Let us now take the case of Bentonite mineral. If all Bentonite-bearing areas in the State of Gujarat are reserved, the question of undue discrimination which Mr. I. M. Nanavaty complains of will not arise. If some of Bentonite areas are reserved, it is probable that the applications made in respect of those areas shall lapse but application made in respect of other areas shall be considered on merits and granted or rejected. Even in such a case, no vice of unconstitutionality is discernible to us because applicants for mining leases in respect of Bentonite in respect of different areas cannot be said to be similarly situated. The difference in territory makes them unequal and militates against their being bracketed in the same group.

14. The last aspect which Mr. I.M. Nanavaty has canvassed in this behalf is that in respect of the same area, there may be several applications. Such a situation is fairly conceivable. Mr. I.M. Nanavaty has, therefore, argued that some of the applications in respect of a particular area may be granted earlier and some may be kept pending inviting their lapse at the date of the reservation. Such a situation is inconceivable in light of the scheme of Sub-rule (2) of Rule 9. Different persons who apply for mining or prospecting leases in respect of a particular area at different points of time cannot be said to be similarly situated. Different points of time which mark their applications introduce in our opinion, a situation which unquestionably distinguishes one from the other. In such a case, therefore, if an earlier application was granted and if a subsequent application lapse on account of the issuance of the notification of reservation, no vice of unconstitutionality under Article 14 would vitiate the notification because if a subsequent applicant wanted to avail himself of the mining lease, he could as well have applied for a mining lease earlier. If he applies later, his application is bound to be affected by the subsequent policy of the Government. It is for this reason that we say that the applicants who made their applications at different points of time can not be bracketed together and can not be said to be similarly situated. Can it, however, be said that some of the applications made on the same day would remain pending and hit by the subsequent policy of reservation while others would be granted prior to the declaration of the policy of reservation? This contingent cannot be contemplated in light of the scheme of Sub-rule (2) of Rule 9 of Gujarat Minor Mineral Rules, 1966, because, under Sub-rule (2) of Rule 9, all applications made on the same day must be decided in order of priority. It is this rule of priority which ensured fair and equitable treatment to all applicants. The principle which the rule-making authority has introduced in Sub-rule (2) of Rule 9 is "first come-first served." It cannot be said that the rule of

"first come-first served" is an unconstitutional rule or a rule which suffers from any constitutional vice. The third contention which Mr. I.M Nanavaty has raised, therefore, fails and is rejected.

15. The fourth contention which Mr. I.M. Nanavaty has raised is based upon the assumption that an application made for a mining lease must be decided according to law in force at the date of the application and cannot be affected by a subsequent law. Since the reservation of an area for its own use or for the use of a public sector undertaking is not traceable to any legislation but is traceable only to ownership rights of the State over the minerals, the question of deciding such applications in terms of the law which was in force at the date when the applications were made does not arise. Even otherwise also, in a matter of this type, it is difficult to imagine that the subsequent change in the policy of the Government cannot be taken into account in order to decide the fate of an application. The declaration of policy of reservation may not have been made with expressly retrospective effect. But, it is certainly retroactive in the sense that it affects all pending transactions inasmuch as power which is not available at the date when it is required to be exercised cannot be exercised. By a declaration of policy of reservation, the State tells its officers not to grant leases in respect of areas. The officers are bound to implement those instructions because the State in exercise of its ownership rights has withdrawn, a reserved area from the field of granting or refusing to grant the mining leases. The fourth contention raised by Mr. I.M. Nanavaty, therefore, is without any substance and is rejected.

16. The last contention which Mr. I.M. Nanavaty has raised wants us to grant the petitioner substantive relief in this petition and not to direct the concerned authorities to grant it. He has indeed cited a decision of the Supreme Court to show that we have such a power. That decision is recorded in Civil Appeals Nos. 1212 of 1978 and 2237 of 1978, decided on 19th November 1979. We assume for the time being that we have such a power. However, the question of exercising that power does not arise in the instant case because the petitioner does not succeed in this case. If we had upheld the challenge raised by the petitioner to the impugned notification, we would have certainly considered on merits whether we should grant substantive relief here and now.

17. In the result, since all the contentions raised by Mr. I.M. Nanavaty fail, the petition fails and is dismissed. Rule is discharged with no order to costs. Mr. I.M. Nanavaty who appears on behalf of the petitioner applies for certificate of fitness under Article 133(1) of the Constitution to appeal against this decision to the Supreme Court. We see no substantial question of law which is required to be decided by the Supreme Court. Therefore, the oral application made by Mr. I.M. Nanavaty in this respect is rejected.

18. Mr. I.M. Nanavaty applies for an interim injunction restraining the respondents for a period of three weeks for recording any final order on the applications received on 4th of September 1979 or thereafter in respect of

Bentonite mineral in Kutch District, Mr. J.R. Nanavaty who appears on behalf of the respondents states that neither the State Government nor its officers shall make any final orders on these applications for a period of three weeks from to-day. This statement made by Mr. J.R. Nanavaty protects the interests of the petitioner sufficiently. It is, therefore, not necessary to issue an interim injunction.