

Neutral Citation No. - 2024:AHC:41623-DB

**A.F.R.**

**Court No. - 21**

**Case :-** WRIT - C No. - 39901 of 2018

**Petitioner :-** Om Prakash

**Respondent :-** State Of UP And 2 Others

**Counsel for Petitioner :-** Prateek Kumar

**Counsel for Respondent :-** C.S.C.

**Hon'ble Manoj Kumar Gupta,J.**

**Hon'ble Kshitij Shailendra,J.**

**(Per: Kshitij Shailendra,J.)**

1. Heard Shri Prateek Kumar, learned counsel for the petitioner, Shri Rajiv Gupta, learned Additional Chief Standing Counsel for all the respondents and perused the record.

2. Counter and rejoinder affidavits have been exchanged between the parties and, therefore, the writ petition is being finally decided.

3. The petitioner is aggrieved by the order impugned dated 15.11.2018 whereby the Additional District Magistrate (Finance & Revenue), Bulandshahr (respondent No. 2) has levied upon him a sum of Rs. 1,46,360/- (Royalty Rs. 21,060 + Mineral Value Rs. 1,05,300/- + compounding Fee Rs. 20,000/-) under Rules 3 and 70 of U.P. Minor Minerals (Concession) Rules, 1963 read with

Section 4 of Mines and Minerals (Development and Regulations) Act, 1957.

4. The facts of the case are that the petitioner claims to be joint tenure holder of Bhumindhari land covered by Khasra Plot No. 133 measuring 2.3040 hectares situated at village Fatehpur Buzurg, Pargana Baran, Tehsil and District Bulandshahr; copy of revenue records annexed. It is pleaded that in pursuance of an inquiry dated 15.06.2012 held behind the back of the petitioner, a report was prepared by the Tehsilder, Sadar, Bulandshahr recording that the petitioner had indulged in mining of soil to the volume of 2340 cubic meters. A notice was, thereafter, said to be issued to the petitioner on 25.06.2012, but it remained unserved upon him and, based thereupon, the respondent No. 2 passed an order dated 19.09.2012 issuing recovery against the petitioner to the tune of Rs. 1,46,360/-. The petitioner, having come to know about the order, challenged the same by filing Writ C No. 64507 of 2012 (Om Prakash vs State of U.P. and others), in which an interim order was passed by this Court on 18.12.2012 restraining coercive steps against him in pursuance of the order dated 19.09.2012. Later on, the writ petition was disposed of vide order dated 05.07.2018 setting aside the order dated 19.09.2012 on the

ground of violation of principles of natural justice, however, this Court permitted the authorities to pass fresh order after providing opportunity of hearing to the petitioner leaving it open to him to take all legal pleas permissible under the law. It appears that pending writ petition, a fresh inquiry was conducted culminating into a report dated 30.04.2018 prepared by the Tehsildar recording that the petitioner had indulged in mining of 2340 cubic meters of soil upto the depth of 1.30 meters. Relying upon the said inquiry report, the order dated 15.11.2018, impugned in the instant petition, has been passed levying the aforesaid sums upon the petitioner.

5. The case of the petitioner, in a nutshell, is that the Government of U.P. had issued a Government Order dated 24.12.2012 providing that if any manual excavation of ordinary earth takes place and the depth of mining site is not more than two meters, the action would not fall under 'mining operations' and, hence, the impugned levy is liable to be set aside.

6. A counter affidavit has been filed on behalf of all the respondents stating that the petitioner's case based upon the Government Order dated 24.12.2012 has no substance inasmuch as the proceedings had begun in furtherance of inquiry report

dated 15.06.2012, by which time, the Government Order dated 24.12.2012 had not come in existence. Further defence is that, even otherwise, the Government Order dated 24.12.2012 itself provides for payment of royalty for the excavation of soil for the purpose of brick-kiln and since the petitioner had admitted digging of soil by him, though it is less than two meters depth, but was done for commercial purpose, the levy upon him was justified as the activity undertaken by the petitioner would fall within the purview of 'mining operations'.

7. The rejoinder affidavit filed by the petitioner states that reliance placed on the Government Order dated 24.12.2012 having the Subject: "In Relation to U.P. Minerals (Concession) (35<sup>th</sup> Amendment) Rules, 2012", is perfectly justified as the Government Order has already been interpreted by this Court in the case of **Ramvir Singh vs State of U.P. and 2 others, 2016 (5) AWC 5431**. It is further stated that since the impugned order has been passed on the basis of inquiry report dated 30.04.2018, by which time the Government Order dated 24.12.2012 had already come into existence, reliance placed by the petitioner on the said Government Order cannot be said to be misplaced.

8. We have heard the learned counsel for the parties and to appreciate the controversy involved in the instant case, it is first necessary to refer the aforesaid Government Order dated 24.12.2012, which reads as under:

"प्रेषक,

संख्या 3514/86-2012.235/2010  
विवेक वाष्णीय  
विशेष सचिव  
उत्तर प्रदेश शासन।

सेवा में,

1. निदेशक भूतत्व एवं खनिकर्म, उ०प्र०, लखनऊ ।
2. समस्त जिलाधिकारी।
3. समस्त मण्डलायुक्त।

भूतत्व एवं खनिकर्म अनुभाग: लखनऊ दिनांक 24 दिसम्बर, 2012

विषय: उत्तर प्रदेश खनिज परिहार पैंतीसवाँ संशोधन नियमावली, 2012 के सम्बन्ध में।

महोदय,

अवगत कराना है कि उपर्युक्त संशोधन के अन्तर्गत ईंट भट्टों के संचालन में पर्यावरण स्वच्छता प्रमाण पत्र की बाध्यता को समाप्त किये जाने के दृष्टिगत संशोधन नियमावली के नियम-3 में स्पष्टीकरण तथा नियम-21-1 के बाद उप नियम-1-क निम्नवत् जोड़ दिया गया है।

1. स्पष्टीकरण:- ईंट बनाने हेतु हस्तचालन से खुदायी द्वारा अथवा हस्तचालन से सामान्य मिट्टी को निकालने की क्रिया खनन संक्रियाओं के अंतर्गत नहीं आयेगी जब तक कि खनन स्थल की गहराई 02 मीटर से अधिक न हो।

2.1 - क नियम-3 में किसी बात के प्रतिकूल होते हुये भी ईंट भट्टा मालिकों को नियमावली की प्रथम अनुसूची में तत्समय विनिर्दिष्ट दरों पर स्वामित्व का भुगतान करना होगा।

इस संबंध में मुझे यह कहने का निर्देश हुआ है कि ईंट भट्टों के संचालन के संबंध में उपर्युक्तानुसार आवश्यक कार्यवाही करने का कष्ट करें।

भवदीय,

विवेक वाष्णेय  
विशेष सचिव

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From-

No. 3514/862012235/2010  
Vivek Varshney,  
Special Secretary, Government of Uttar  
Pradesh.

To-

1. The Director, Geology and Mining, U.P.
2. All District Magistrates,
3. All Divisional Commissioners

Geology and Mining Section Lucknow: Dated: 24th  
Dec, 2012

Sub: Uttar Pradesh Minerals (Concession)  
(Thirty Fifth Amendment) Rules, 2012 - Reg.

Sir,

It is to inform you that under the aforesaid amendment, in view of the essentiality of environment clearance certificate having been dispensed with for operation of brick kilns,

"Clarification" has been added to Rule 3, and Sub Rule (1A) to Rule 211 of the amendment rules as under:

1. Clarification: For brick making, the act of taking out the ordinary earth by way of manual digging or hand movements shall not fall under mining operations unless the depth of the mining site is more than 2 metres.

2. 1A: Notwithstanding anything contrary in Rule 3, the brick kiln owners shall be liable to pay for their titles at the rate specified for the time being in the first schedule of the Rules.

In this regard, I am directed to say that for operation of brick kilns, please take necessary action as mentioned above.

Sincerely,

(Vivek Varshney)  
Special Secretary"

(English translation by the  
Court)

9. A perusal of the aforesaid Government Order clearly reveals that if manual digging is done upto the depth of two meters, the activity shall not fall under 'mining operations' and, hence, no penal/fiscal action can be initiated against the person concerned.

10. In the instant case, though the proceedings had initiated pursuant to the Tehsildar's report dated 15.06.2012, however, the order based thereupon was passed on 19.09.2012 and the action undertaken against the petitioner on that basis was initially stayed

by this Court by an interim order dated 18.12.2012 passed in Writ C No. 64507 of 2012 and, later on, the writ petition was disposed of setting aside the impugned order therein on 05.07.2018 and when the matter was left open to be decided by the authorities afresh, the action was taken based upon another inspection report dated 30.04.2018 that came in existence pending the writ petition. The said report records that digging was done upto the depth of 1.30 meters to the extent of 2340 cubic meters. Surprisingly, the report dated 30.04.2018 does not mention the date of inspection, however, figure 2340 cubic meters is the same, which was mentioned in the initial report dated 15.06.2012. Additionally, depth of 1.30 mts. has been mentioned in the report dated 30.04.2018 that was not mentioned in the previous report dated 15.06.2012. Therefore, in absence of any material contrary to the defence of the petitioner, the report dated 30.04.2018 would be referable to the same period of time when the first report had come into existence in June, 2012.

11. The order impugned takes note of the defence of the petitioner based upon the Government Order dated 24.12.2012, however, it mentions that since the proceedings against the petitioner had begun in June, 2012, by which time the



Government Order dated 24.12.2012 had not been issued, the petitioner would not get any benefit of the same. Additionally, the order impugned records as follows:

“उक्त के अतिरिक्त यह भी उल्लेखनीय है कि विपक्षी अथवा सहायक भू-वैज्ञानिक, बुलन्दशहर की ओर से ऐसा कोई शासनादेश प्रस्तुत नहीं किया कि शासनादेश दिनांक 24.12.2012 के प्रभावी होने से पूर्व मिट्टी खनन की गहराई का कोई मापदण्ड हो कि कितनी गहराई तक खनन अवैध खनन की श्रेणी में नहीं आयेगा। ऐसी स्थिति में उक्त शासनादेश प्रश्नगत प्रकरण पर प्रभावी न होने के कारण विपक्षी द्वारा किया गया मिट्टी का खनन मिट्टी खनन की श्रेणी में आता है।”

12. Learned counsel for the petitioner has urged that the issue raised through this petition is squarely covered by Division Bench judgment of this Court in the case of *Ramvir Singh* (supra), wherein this Court had dealt with identical case of a farmer having bhumidhari rights in an agricultural land and, after interpreting the aforesaid Government Order dated 24.12.2012, the action impugned before this Court was found to be illegal and, consequently, this Court set aside the impugned recovery by allowing the writ petition and also imposed cost upon the State-respondents. He further submits that the respondents, in their counter affidavit, have admitted the depth of digging to be less

than two metres and, therefore, the impugned levy is liable to be struck down.

13. On the other hand, Shri Rajiv Gupta, learned Additional Chief Standing Counsel, by referring to the counter affidavit, tried to distinguish the judgment in the case of *Ramvir Singh* (supra) on facts arguing that, in that case, digging had taken place in the year 2015 when the Government Order dated 24.12.2012 was in operation whereas, in the present case, the action had begun prior to issuance of the said Government Order and, therefore, the petitioner would not get any benefit of the said judgment or the Government Order itself. He further submits that, even otherwise, irrespective of the depth of digging, the Government Order does not save those who are involved in brick making.

14. Having heard the learned counsel for the parties, the Court finds that the initial action of respondents that commenced pursuant to the report dated 15.06.2012 was interfered with by this Court, firstly, by passing an interim order in the year 2012 and, thereafter, by setting aside the order impugned itself in 2018 and, though liberty was granted to the respondents to take a fresh decision, the subsequent report dated 30.04.2018 clearly mentions that the digging depth was 1.30 meters. The order impugned, in

fact, casts a 'negative burden' upon the petitioner to establish as to what was the permissible depth concerning digging activity prior to issuance of Government Order dated 24.12.2012 and it has been strangely observed in the order impugned that the petitioner has not brought anything to demonstrate that digging activity upto what extent would not fall within the meaning of "illegal mining operations".

(Emphasis Supplied)

15. The Court is not satisfied by the defence taken in the counter affidavit or the reasoning assigned in the order impugned for following multiple reasons.

16. It is well settled that the penal and fiscal provisions must be strictly construed and since the order impugned is fiscal in nature, the burden to establish the guilt or wrong of the petitioner, if any, lay upon the respondents and it cannot be shifted to or fastened upon the petitioner to prove negatively; that is to say that, in case, the respondents wanted to saddle the petitioner with levy of royalty and other penal charges, it was for them to establish, beyond reasonable doubt, that the activity done by the petitioner, though in the June, 2012 and prior to issuance of Government

Order dated 24.12.2012, would fall within the meaning and import of 'illegal mining operation'.

17. In a catena of decisions, the Supreme Court has held that in the fiscal matters, the burden to establish levy or any financial charge lay upon the revenue and it is not for the assessee to lead negative evidence to evade the liability. The Court may refer to the judgment of the Supreme Court in the case of **Bharat Barrel and Drum Manufacturing Company vs Amin Chand Payrelal**, AIR 1999 SC 1008 wherein the Apex Court, while dealing with a case arising out of Negotiable Instruments Act, 1881, in paragraph No. 12 of the report, held that "The Court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as existence of negative evidence is neither possible nor contemplated and, even if led, is to be seen with a doubt".

(Emphasis Supplied)

18. In the instant case, neither the counter affidavit states anything specific as to what is the evidence to establish illegal mining being carried by the petitioner nor could the learned Additional Chief Standing Counsel place before this Court any other material to demonstrate that manual digging activity carried

out by the petitioner in his own agricultural field below two meters depth would fall under 'illegal mining operation' or that it would be in teeth of any statutory provision.

19. As far as the argument of learned Additional Chief Standing Counsel regarding brick-kiln based upon the Government Order dated 24.12.2012, the Court finds that the said Government Order contains clarification to the effect that for brick making, the act of taking out the ordinary earth by way of manual digging or hand movements shall not fall under mining operations unless the depth of the mining site is more than 2 metres. Even otherwise, there is no material on record to presume that the petitioner was engaged in brick making activity. Neither any report of the respondents nor even the order impugned speaks so. Hence, the Court cannot decide the case merely on hypothesis, presumption, conjecture and surmises that the petitioner was allegedly involved in brick-making activity. Therefore, this argument of the State side also does not have any force.

20. As regards interpretation of a penal or fiscal statute, it is well settled that if two views or constructions are possible, the Court must lean towards that view/construction which exempts the subject from penalty rather than the one which imposes penalty. It

is also well settled that if there is a reasonable doubt or ambiguity, the principle to be applied in construing a penal provision is that such doubt or ambiguity should be resolved in favour of the person who would be subjected to penalty. Reference in this regard can be made to the following authorities:

(i) **Tolaram Relumal and another vs State of Bombay**, AIR 1954 SC 496

(ii) **M/s Virtual Soft System Ltd. vs. Commissioner of Income Tax**, 2007 (9) SCC 665

(iii) **Abhiram Singh vs C.D. Commachen (Dead) by L.Rs. and others**, 2017 (2) SCC 629.

(iv) **Excel Crop Care Ltd. Vs Competition Commission of India and others**, 2017 (8) SCC 47

(v) **Isher Das vs. State of Punjab**, AIR 1972 SC 1295

(vi) **Assistant Commissioner vs Velliappa Textiles**, (2003) 132 Taxman 165

(vii) **Krishi Utpadan Mandi Samiti and others vs Pilibhit Pantnagar Beej Ltd. and another**, AIR 2003 SCW 6696.

21. Having considered the entire material placed before this Court and the submissions advanced, this Court is of the view that the petitioner is entitled to get the benefit of Government Order dated 24.12.2012 and his case is covered by the principle of law laid down by this Court in the case of **Ramvir Singh** (supra).

22. Consequently, the writ petition succeeds and is **allowed**.
23. The order impugned dated 15.11.2018 passed by the Additional District Magistrate (Finance & Revenue), Bulandshahr (respondent No. 2) is hereby **quashed**.
24. No order as to costs.

**Order Date :- 7.3.2024**  
Sazia

**(Kshitij Shailendra,J.)**

**(Manoj Kumar Gupta, J.)**