

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.11181 of 2021

Abhay Kumar, Son of Shri Om Prakash, Resident of Road No. 1F, Opposite Energy Park, Near Om Anand Vihar Apartment, Board Colony, Patel Nagar, District-Patna, Bihar-800023.

... .. Petitioner/s

Versus

1. The Union of India through the Secretary, Ministry of Environment, Forest and Climate Change, New Delhi.
2. Joint Secretary, Ministry of Environment, Forest and Climate Change, New Delhi.
3. Principal Secretary, Department of Mines and Geology, Government of Bihar, Patna.
4. Under Secretary, Department of Mines and Geology, Government of Bihar, Patna.
5. Member Secretary, Bihar State Pollution Control Board, Bihar, Patna.
6. Chairman, State Environment Impact Assessment Authority, Bihar, Patna.
7. General Secretary, Bihar Bricks Manufacturing Association, Shubham-Rohit Market, Rukanpura, District- Patna.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Abhinav Srivastava, Advocate Mr. Raushan Advocate Mr. Pushkar Bhardwaj, Advocate Mr. Atul Prakash, Advocate
For the UOI	:	Mr. Dr. K. N. Singh, ASG Mr. Kumar Priya Ranjan, CGC Mr. Sandeep Kumar, Advocate Mr. Vibhuti Kumar, Advocate
For the State	:	Mr. Gyan Prakash Ojha, GA-7 Mr. Ajit Kumar, AC to GA-7
For SEIAA	:	Mr. Kumar Ravish, Advocate Ms. Siddhi Aashna, Advocate
For Mines Department	:	Mr. Naresh Dixit, Spl. P.P. Mr. Sumit Shekhar Pandey, Advocate Ms. Kalpana, Advocate
For Pollution Board	:	Mr. Abhimanyu Singh, Advocate
For the Resp. No. 7	:	Mr. Manoj Kumar, Advocate

CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE HARISH KUMAR
CAV JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)



Date: 07-03-2024

The petitioner in the above case, which is filed as a public interest litigation, is aggrieved with the notification brought out at Annexure-2, by which quarrying for the purpose of brick-kiln was deemed to be a non-mining activity for the purpose of environmental clearance and also required that such clearance would be imperative only if the depth of quarry is not more than one and a half meters from the adjoining ground level.

2. Shri Abhinav Shrivastava, learned counsel for the petitioner, specifically pointed out Annexure-1 notification issued by the Ministry of Environment, Forest and Climate Change (For brevity 'MoEF&CC') dated 28.03.2020, wherein by Appendix-IX, a number of activities were held to be not requiring prior environmental clearance. Sl. No. 13 of the Appendix provided for activities which could be declared by the State Government under legislation or rules as a non-mining activity.

3. It is argued that primarily, it is beyond the power conferred on the executive government at the Centre and in any event, it results in excessive delegation. Further, it is argued that even if Sl. No. 13 is found to be in order, then,



necessarily the activities which are so declared by the State Government, can only be such activities as are covered by or similar to those described in Sl. Nos. 1 to 12. Sl. Nos. 1 to 12 are all activities which ensure preservation of a traditional occupation or a craft or skill and along with such preservation, sustenance of the livelihood of the marginalized groups in society who will be unable to procure an environmental clearance. There are absolutely no guidelines insofar as bringing in activities by the State as provided in Sl. No. 13. Specific reliance is made to Annexure-P/4 which has spoken of preservation of top soil, which is to maintain the fertility of the soil, which objective would be defeated and frustrated, if rampant brick-kilns are brought into operation.

4. Shri Abhimanyu Singh, learned Standing Counsel for the Bihar State Pollution Control Board, points out that despite absolving the brick-kilns from getting environmental clearance, they have to get a consent to establish and then a consent to operate from the Pollution Control Board, which is as per the Air (Prevention and Control of Pollution) Act, 1981.

5. The learned Government Advocate specifically points to the notification issued by the MoEF&CC,



prior to Annexure-4, wherein Sl. No. 13 had required an approval from the Central Government before the State declares any activity to be one not requiring prior environmental clearance. The said rigor has been removed in Annexure-4 notification, which clearly indicates the mind of the Central Government. The intention is only to promote such activity by the State, which are considered to be imperative and expedient in development, while at the same time ensuring no environmental depredation is occasioned, as in a mining activity.

6. By Section 4 of the Mines and Mineral (Development and Regulation) Act, 1957 (For brevity 'MMDR Act), any person undertaking reconnaissance, prospecting or mining operation in any area shall do so only with a reconnaissance permit, a prospecting license or a mining lease granted under the Act and the Rules made there under. Section 15 of the MMDR Act confers power on the State Government to make Rules with respect to the grant of quarry leases/mining leases and other mineral concessions. It is also pertinent that Section 14 of the MMDR Act as it earlier stood excluded Sections 4 to 13 from application to minor minerals and the same was amended with effect from 1986 by excluding only



Sections 5 to 13. Hence Section 4 would be applicable even for minor minerals.

7. The Mines Act, 1952 and the MMDR Act are complementary enactments and one does not exclude the other. Any activity carried on involving underground excavation, including an open cast working, is brought under the Mines Act, as a 'mine' and there is no separate definition of 'mine' under the MMDR Act. *Bhagwan Dass v. State of Uttar Pradesh & Others; (1976) 3 SCC 784, Sri Tarkeshwar Sio Thakur Jiu v. Dar Dass Dey & Co. and Others; (1979) 3 SCC 106* are authorities for the proposition that despite no activities being carried on underground even an open cast working is defined under the Mines Act.

8. *Bhagwan Dass* (supra) held that the Act of 1957 and the Rules of 1963 (UP State rules) "shows that minerals need not be subterranean and that mining operations cover every operation undertaken for the purpose of 'winning' any mineral. 'Winning' does not imply a hazardous or perilous activity. The word simply means 'extracting a mineral' and is used to generally indicate any activity by which a mineral is secured. 'Extracting' in turn, means drawing out or obtaining. A tooth is 'extracted', as much as is fruit juice and as much as a



mineral. Only, that the effort varies from tooth to tooth from fruit or fruit and from mineral to mineral" (sic paragraph 13).

9. *Tarkeshwar Sio Thakur Jiu* held so: "It is true that in the definition of 'mine the term 'excavation' in the ordinary sense, means 'hole' 'hollow' or 'cavity' made by digging out. But the word 'any' prefixed to 'excavation' in the context of the phrase 'for the purpose of searching for or obtaining mineral' gives it a much more extensive connotation, so that every 'excavation' be it in the shape of an open cast cavity or a subterranean tunneling, will fall within the definition of mine. Similarly, it is not a requirement of the definition of 'mining operation' that the activity for winning the mineral must necessarily be an underground activity. The essence of 'mining operations is that it must be an activity for winning a mineral, whether on the surface or beneath the surface of earth.' (sic paragraph 16).

10. In *(1987) 3 SCC 208; Joint Director of Mines Safety v. M/s. Tandur and Nayandgi Stone Quarries (P) Ltd.* held that the legislation as manifested by the scheme of the Mines Act, is primarily to ensure the safety of the workmen. The preamble of the Mines Act professes its intention to consolidate the law relating to the regulation of labour and



safety in mines while that of the MMDR Act provides for the development and regulation of mines and minerals under the control of the Union.

11. Section 4 of the MMDR Act, as we found, 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. 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.

12. The power of the respective legislatures, was considered by the Hon'ble Supreme Court in **(2012) 11 SCC 1; Monnet Ispat & Energy Ltd. v. Union of India**. Entry 54 of List I and Entry 23 of List II was looked into, to find that the States power to regulate mines and mineral development is taken away to the extent of regulations made by the Union Parliament. It was held so in Paragraph 130:

The same philosophy is reflected in our Constitution. The management of the mineral resources has been left with both the Central Government and the State Governments in terms of List I Entry 54 and List II Entry 23. In the scheme of our Constitution, the State Legislatures enjoy



the power to enact legislation on the topics of "mines and minerals development". The only fetter imposed on the State Legislatures under Entry 23 is by the latter part of the said entry which says, "subject to the provisions of List I with respect to regulation and development under the control of the Union". In other words, the State Legislature loses its jurisdiction to the extent to which the Union Government had taken over control, the regulation of mines and development of minerals as manifested by legislation incorporating the declaration and no more. If Parliament by its law has declared that regulation of mines and development of minerals should in the public interest be under the control of the Union, which it did by making declaration in Section 2 of the 1957 Act, to the extent of such legislation incorporating the declaration, the power of the State Legislature is excluded. The requisite declaration has the effect of taking out regulation of mines and development of minerals from List II Entry 23 to that extent. It needs no elaboration that to the extent to which the Central Government had taken under "its control" "the regulation of mines and development of minerals" under the 1957 Act, the States had lost their legislative competence. By the presence of the expression "to the extent hereinafter provided" in Section 2, the Union has assumed control to the extent provided in the 1957 Act. The 1957 Act prescribes the extent of control and specifies it. We must bear in mind that as the declaration made in Section 2 trenches upon the State legislative power, it has to be construed strictly. Any legislation by the State after such declaration, trespassing the field occupied in the declaration cannot constitutionally stand. To find out what is left within the competence of the State Legislature on the declaration having been made in Section 2 of the 1957 Act, one does not have to look outside the provisions of the 1957 Act but as observed in *Baijnath Kadio*, "have to work it out from the terms of that Act". In order that the declaration made by Parliament should be effective, the making of rules or enforcement of rules so made is not decisive.

13. 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 Sections 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 cannot altogether exempt a mining activity from being carried out without permit, license or lease.

14. The State has under Section-15 of the MMDR Act brought out the Bihar Minor Mineral Concession Rules, 1972 and the Bihar Bricks Supplies and Price Control Act, 1984 along with other rules which regulate the policy of mining within the State; which cannot and do not provide for an exemption from the rigours of the MMDR Act. The subject notifications brought in by the Union Government and the State are not under the MMDR Act and we dealt with the said enactment only to emphasize that the MMDR Act read with the Mines Act require a permit even in the case of brick-kilns, where there is extraction of clay.

15. Now, we look at the notification brought out by the Central Government at Annexure-1, which specifically



affirms the Mineral Laws (Amendment) Act, 2020, amending the MMDR Act and introducing *inter alia* a new Section 8B in the MMDR Act. Sub-section (1) of Section-8B provides that notwithstanding anything contained in the Act or any other law for the time being in force, a successful bidder of mining leases, expiring under the provisions of Sub-sections (5) and (6) of Section-8A of the MMDR Act and selected through auction, shall be deemed to have acquired all valid rights, approvals, clearances, licences and the like, vested with the previous lessee for a period of two years. Sub-section (2) again a *non obstante* clause, provides that it shall be lawful for the new lessee to continue mining operations on the land for a period of two years as done by the previous lessee.

16. It is to further the object of the aforesaid amendment to the MMDR Act, that the Central Government brought out the notification dated 28.03.2020. to align the relevant provisions of the earlier notification; S.O. 1533 (E) dated 14.09.2006, with the provisions of the MMDR Act with the Environmental Impact Assessment (EIA) Notification, 2006. The notification also refers to the representations received by the MoEF&CC for waiver of prior environmental clearance for burrowing ordinary earth for roads, manual extraction of lime



shells, shrines etc., within inter tidal zones by the traditional community. Prior environment clearance is a measure brought in to preserve the environment.

17. The notification was brought out exercising the powers conferred by Section 3 (i) (ii) and (v) read with Rule-5 (iv) of the Environmental (Protection) Rules 1986, after dispensing with the requirement of notice under Rule-5(3)(a). Here, we have to immediately refer to the provisions of the Environmental (Protection) Act 1986 and the rules framed thereunder. Section-3(1) confers the Central Government with the power to take all measures, deemed necessary or expedient, to protect and improve the quality of the environment, aimed at preventing, controlling and abating environmental pollution. Clause-(5) of sub-section (2) also specifies prescription of areas in which any industry, operation or process or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards.

18. We have to specifically emphasize that the provisions of the Environment Act is to bring in measures to prevent, control and abate environmental pollution. Rule-5 of the Environment (Protection) Rules, 1986, has the nominal heading of *'Prohibition and restriction on the location of*



industries and the carrying on processes and operations in different areas' (sic) and Sub-rule (4) of rule 5 speaks of dispensing with the requirement of notice, if it appears to the Central Government to be in public interest. The notification while providing for specific environmental clearance in furtherance of the object to Environment Protection Act also provides for certain exemptions, which was the specific concern of the Central Government, while bringing out the notification dated 28.03.2020. Indubitably the power to restrict industries, brings with it the power to exempt the restrictive measures for certain activities; which should be either on the ground of such exempted industries not leading to depredation of environment or there existing any expedient circumstance akin to protection of traditional industries, protecting the masses from natural calamities or in furtherance of developmental activities.

19. We have to again emphasize that the exemption sought by the representations was insofar as extracting ordinary earth for roads, manual extraction within inter tidal zone by the traditional community and so on. Clauses-1, 2, 8 and 9 are to protect the traditional communities like the potters, earthen tile makers, Banjaras & Oads in Gujarat and traditional communities within inter tidal zones. Clauses-3,



4, 5, 7 and 12 are provisions to protect farm lands from natural calamities like floods, customary extractions for community work, community works, dredging and desilting of water bodies and plugging any breach in the natural or man-made water bodies; which could lead to a disaster. Clause-6 refers to burrowing of ordinary earth for linear projects such as roads, pipelines etc. Clause-10 refers to irrigation or drinking water purpose and Clause-11 refers to digging of foundation for buildings, not requiring prior environmental clearance. Clause-13 is the objectionable clause which speaks of activities declared by the State Government under legislation or rules as non-mining activity.

20. We have to specifically notice at this juncture that earlier such notifications or legislations required the concurrence of the MoEF&CC, Government of India which has been taken away, providing *carta blanche* insofar as the State being conferred with the power of exempting mining activities. This would inherently be a further delegation of the power conferred by the Parliament on the Central Government by the Union Legislation. We have already noticed the rule making power of the Central Government, which is aimed at preserving and protecting the environment for which appropriate measures



could be taken. While taking such appropriate measures, the Central Government, as we found, is quite competent to reckon the activities (i) carried out traditionally, (ii) for development; confined to roads, pipelines etc.; which are public utility services, (iii) protection of the masses from natural calamities, and (iv) provision of basic necessities of life, like drinking water and irrigation. Brick manufacturing does not come under any of the exempted categories as specified from the various exemptions granted under Appendix-IX or from the power sourced to the Environment Protection Act. The ‘other activity’, which is capable of being exempted, referred to in Clause-13 of Appendix-IX has to be akin to and take its colour and texture from the other activities mentioned under Appendix-IX as exempted activities, going by the principle of *ejusdem generis*.

21. It has also to be emphasized that the State has not been conferred with any such power of exemption by the statute; neither the MMDR Act nor the Environment Protection Act. In that circumstance the power delegated to the Union Government cannot further be delegated to the State Government on the principle of “*deligatus non protest delegare*”.

22. Hence, both on the principle of *ejusdem*



generis and more so on the principle of a delegate being prevented from further delegation, Annexure-2 notification of the State Government has to be interfered with. The amendment to Rule-38(3) of the Bihar Minerals (Concession, Prevention of Illegal Mining, Transportation & Storage) Rules, 2019 has to be set aside. We do so. The EIA Notification of 2006 to the extent it delegates the power to exempt, to the State by Clause-13 of Appendix-IX also is bad and the same stands set aside. The writ petition stands allowed.

(K. Vinod Chandran, CJ)

I agree.
Harish Kumar, J:

(Harish Kumar, J)

Sujit/Ranjan

AFR/NAFR	AFR
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