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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 494 OF 2024

1. IKEA India Private Limited
a company incorporated under the
provisions of the Companies Act,
2013, having its registered office at
Unit No. 421, DLF Tower A, Jasola
District Centre, New Delhi 110025 **...Petitioner No.1**

2. Ms. Sandhya Prakash
an adult, Indian Inhabitant having
her office address at Survey No.12 & 13,
Behind Nagasandra Metro Station,
Nagasandra Village, Yeshwanthpur Hobli,
North Taluk, Bangalore – 560073. **...Petitioner No.2**

Versus

1. State of Maharashtra,
Through Revenue and Forest Department,
Mantralaya, Mumbai 400032.

2. Collector of Thane District,
Collector Office, Court Naka,
Thane (West) 400 601.

3. Tahsildar, Thane
Thane Station Road,
Thane (West) 400 601. **...Respondents**

Dr. Milind Sathe, Senior Advocate, *a/w Mr. Bhushan Deshmukh, Ms.Bhakti Mehta i/b Wadia Ghandy & Co., Advocates for Petitioners.*

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Mr. A.I. Patel, Addl. GP *a/w. Ms. M.S. Bane, AGP for Respondent Nos.1 to 3-State.*

Mr. Dyaneshwar Chaudhari, *Assistant, Revenue Department, is present in Court.*

CORAM : B. P. COLABAWALLA &
SOMASEKHAR SUNDARESAN, JJ.

Reserved on : April 01, 2024

Pronounced on : April 10, 2024

JUDGMENT: (Per, Somasekhar Sundaresan, J.):

1. Rule. By consent of parties, rule is made returnable forthwith, and taken up for final hearing and disposal.

2. This petition is essentially a challenge to the charge of royalty and consequential imposition of penalty by the State in respect of earth excavated by the Petitioners in the course of developing leasehold land to set up a large "IKEA Store" for retail of furniture and home furnishing, coupled with various support and ancillary facilities such as a restaurant, play-areas, captive warehousing, and over a thousand parking spaces. The royalty charged and penalty imposed aggregates to Rs. 5,77,96,338 towards

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allegedly unauthorised excavation of 5532 brass[1].

3. On account of non-application of mind to the law declared by the Hon'ble Supreme Court and perverse rejection of factual explanations provided by Petitioner No. 1, and indeed in view of recent judgements of this very Bench, we quash and set aside the royalty charged and the penalty imposed.

Factual Matrix:

4. Petitioner No.1 is IKEA India Private Limited, a company incorporated in India and Petitioner No.2 is the authorised officer of Petitioner No.1. The State of Maharashtra is Respondent No.1. The Collector of Thane District is Respondent No.2 while the Tahsildar of Thane is Respondent No.3.

5. A brief overview of the facts relevant to adjudicate this petition, may be summarized thus:

A) In the course of developing land leased by the Maharashtra Industrial Development Corporation ("***MIDC***"),

[1] *A "brass" is a unit of measure for volume of earth excavated – essentially, about 100 cubic feet, or 2.83 cubic metres, constitutes 1 "brass".*

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Petitioner No.1 was required to excavate earth from land admeasuring 96,250 square meters bearing Plot Nos. 15, 15A, 15B and 15C at Village-Turbhe and Village Pawana, TTC Industrial area in the Taluka and District Thane ("***Subject Land***");

B) On 24th October, 2017 and on 3rd January 2018, Petitioner No.1 obtained permissions for removal of excavated earth from the Subject Land to the tune of 25,000 brass and 7,100 brass respectively;

C) An inspection was conducted by the Circle Officer who issued a report dated 18th January, 2019 to Respondent No.3 giving an assessment that excavation to the tune of 37,632 brass had been effected by Petitioner No.1;

D) On 29th January, 2019, Respondent No.3 issued a Show Cause Notice ("***First Show Cause Notice***") alleging that the entire 37,632 brass excavated was unauthorised. Petitioner No.1 was asked to show cause as to why penal

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action under Section 48(7) of the *Maharashtra Land Revenue Code, 1966* ("***MLRC***") must not be taken, including charge of royalty, imposition of penalty, and recovery of the same as arrears of land revenue;

E) Petitioner No. 1 availed of an opportunity of a personal hearing on 8th March, 2019, and also filed a written reply to the First Show Cause Notice on the same date. Petitioner No. 1 submitted that the total excavation was, in fact, to the tune of 59,158 brass, out of which 31,945 brass had been removed from the Subject Land. The balance excavated earth of 27,213 brass was used or proposed to be used for back-filling and levelling the Subject Land and building internal roads and the IKEA Store;

F) Petitioner No.1 asserted that permission for removal of excavated earth to the tune of 32,100 brass had been obtained and royalty for the same had been paid. The earth taken out of the Subject Land, i.e., 31,945 brass was compliant with and covered by the scope of permission for

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removal of excavated earth. Petitioner No.1 also highlighted that in terms of Rule 46 of the *Maharashtra Minor Minerals Extraction (Development and Regulation) Rules 2013* ("***Extraction Rules***") made under the *Mines and Minerals (Development and Regulation) Act, 1957* ("***Mining Act***"), no royalty is payable on earth that is extracted while developing a plot of land and utilized on the very same plot of land for levelling of the land or any other work in the process of development of the same plot of land. Therefore, Petitioner No.1 contended that neither was any further royalty payable nor was any penalty attracted;

G) Subsequently, on 24th July, 2019 and on 13th October, 2020, Petitioner No.1 received two further permissions to remove 7,400 brass and 1,500 brass of excavated earth, respectively, from the Subject Land. Therefore, in all, the permissions to remove excavated earth obtained by Petitioner No.1 aggregated to 41,000 brass whereas the royalty paid under those four permissions aggregated to Rs.1,90,42,900;

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H) On 18th December, 2020 the IKEA Store at Turbhe was opened to the public.

I) Two and half years after the personal hearing on the First Show Cause Notice, i.e. on 27th September, 2021, Respondent No.3 issued another Show Cause Notice ("***Second Show Cause Notice*** ") which was identical to the First Show Cause Notice (of 29th January, 2019). The Second Show Cause Notice also alleged unauthorised excavation of 37,632 brass but made no reference to the First Show Cause Notice or to the reply by Petitioner No. 1. An opportunity of hearing was scheduled for 29th October, 2021 but was not attended by Petitioner No.1, which claims that the Second Show Cause Notice had been served on its head office in Bengaluru after the date scheduled for the personal hearing;

J) Be that as it may, on 6th June 2022, Petitioner No.1 provided a response to the Second Show Cause Notice stating that initially permission to remove excavated earth coupled with payment of requisite royalty had been secured in respect

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of 25,000 brass. When it was realised that more excavated earth would need to be removed, additional permission was taken for 7,100 brass, with requisite royalty being paid. At this stage, the permitted removal was to the tune of 32,100 brass. Finally, around the time of completion of the construction activity, additional excavated earth that was left over to the extent of 7,400 brass was to be removed and towards that end, permission was obtained with requisite royalty being paid. The reply enclosed the earlier permissions and proof of payment and requested that the matter be closed;

K) On 30th December, 2022, Respondent No.3 passed an order with a finding that the scale of unauthorised excavation was 5,532 brass and that towards this end an amount of Rs. 22,12,800 was payable by way of royalty and an amount of Rs. 5,53,20,000 was payable by way of penalty ("***December 2022 Order***"). The penalty was computed at the maximum level, i.e. five times the market value of the excavated earth. The aforesaid amounts, coupled with taxes,

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were aggregated to a demand of Rs.5,77,96,336 and this sum was ordered to be paid within 15 days from the receipt of the December 2022 Order, failing which, it would be recovered as arrears of land revenue under the MLRC;

L) On 17th April, 2023, Respondent No.3 issued a notice for recovery of the penalty and royalty amount, which was followed up by the next stage of recovery notice on 26th May, 2023, directing that the amount be paid within a further period of 15 days;

M) On 5th June, 2023, Petitioner No.1 once again wrote to Respondent No.3 requesting that the penalty be withdrawn for the reasons provided in its explanations and replies to the First Show Cause Notice and the Second Show Cause Notice;

N) On 21st July, 2023, Respondent No.3 passed an order of attachment of the Subject Land towards recovery of the penalty amount, as the first step towards enforcement of

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recovery of revenue under the rules governing recovery and enforcement made under the MLRC;

O) Petitioner No.1 continued to write to Respondent No.2 and Respondent No.3 including through its Advocates calling for the withdrawal of the aforesaid notices and the order imposing penalty and charging royalty. Upon receiving no response, and the attachment being continued, this writ petition is filed.

6. In a nutshell, what the Petitioners request this Court to quash under this writ petition are :-

A) The First Show Cause Notice;

B) The Second Show Cause Notice;

C) The order dated 30th December, 2022 and the communication letter of the same date, imposing penalty and charging royalty;

D) The recovery-related notices dated 17th April, 2023 and 26th May, 2023; and

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E) The attachment order dated 21st July, 2023.

7. We have heard Dr. Milind Sathe, the learned Senior Counsel appearing on behalf of the Petitioners and Mr. A.I. Patel, the learned Additional Government Pleader on behalf of the State.

Law Governing Extraction of Earth:

8. Section 48(7) of the MLRC reads as under :

> *(7) **Any person who without lawful authority extracts**, removes, collects, replaces, **picks up or disposes of any mineral** from working or derelict mines, **quarries**, old dumps, **fields**, bandhas (whether on the plea of repairing or constructions of bund of the fields or an any other plea), nallas, creeks, river-beds, **or such other places** wherever situate, **the right to which vests in, and has not been assigned by the State Government**, shall, without prejudice to any other mode of action that may be taken against him, **be liable, on the order in writing** of the Collector, or any revenue officer not below the rank of Tahsildar authorised by the Collector in this behalf **to pay penalty on of an amount upto five times the market value of the minerals so extracted**, removed, collected, replaced, picked up or disposed of, as the case may be:*
>
> ***[Emphasis Supplied]***

9. In a nutshell, it is now trite law that for payment of royalty towards extraction of “minor mineral” under Section 48(7) of the MLRC, the earth extracted must be intended to be put to the use

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contemplated in a notification issued by the Government of India under Section 3(e) of the Mining Act, dated 3rd February, 2000. The said notification is extracted below:-

> *"GSR 95(E). — In exercise of the powers conferred by clause (e) of section 3 of the Mines and Minerals (Development and Regulation) Act, 1957 (67 of 1957), the Central Government hereby declared the 'ordinary earth' used for filling or levelling purposes in construction of embankments, roads, railways, buildings to be a minor mineral in addition to the minerals already declared as minor minerals hereinbefore under the said Clause."*
>
> *[Emphasis Supplied]*

10. The notification, essentially stipulated, that earth excavated towards filling and levelling purposes in construction of embankments, roads, railways, buildings etc. would constitute "minor mineral". After the said notification, various parties that had excavated earth in the course of developing land and re-deployed the earth on the same land, were charged with royalty and visited with penalty under Section 48(7) of the MLRC. The litigation over such imposition and charge travelled to this High Court in multiple matters, and eventually came to be considered by the Hon'ble Supreme Court of India. The Hon'ble Supreme Court in *Promoters*

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and Builders Association of Pune vs. State of Maharashtra[2] ("***Promoters and Builders***"), held that before determining whether royalty is payable on earth excavated, the State would need to examine the use to which the excavated earth is applied, since the State would first need to determine whether the excavated earth could even be regarded as "minor mineral" in order to attract the wrath of Section 48(7) of the MLRC.

11. The Hon'ble Supreme Court, in ***Promoters and Builders***, also disposed of another litigation initiated by the Nuclear Power Corporation, which was also charged with royalty and penalty for excavating earth during repair and widening of a water intake channel connected with its nuclear power plant in Maharashtra. Disposing of the two Appeals, the Hon'ble Supreme Court laid down the law in the following terms :

> *14. Though Section 2(1)(j) of the Mines Act, 1952 which defines "mine" and the expression "mining operations" appearing in Section 3(d) of the 1957 Act may contemplate a somewhat elaborate process of extraction of a mineral,* ***in view of the Notification dated 3-2-2000, insofar as ordinary earth is concerned, a simple process of excavation may also amount to a mining operation in any given situation****.*

[2] *(2015)12 SCC 736*

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*However, as seen, **the operation of the said notification has an inbuilt restriction. It is ordinary earth used only for the purposes enumerated therein, namely, filling or levelling purposes in construction** of embankments, roads, railways and buildings **which alone is a minor mineral**. **Excavation of ordinary earth for uses not contemplated in the aforesaid notification, therefore, would not amount to a mining activity so as to attract the wrath of the provisions of either the Code or the 1957 Act.***

*15. **As use can only follow extraction or excavation it is the purpose of the excavation that has to be seen**. The liability under Section 48(7) for excavation of ordinary earth would, therefore, **truly depend on a determination of the use/purpose for which the excavated earth had been put to**. **An excavation undertaken to lay the foundation of a building would not, ordinarily, carry the intention to use the excavated earth for the purpose of filling up or levelling**. A blanket determination of liability merely because ordinary earth was dug up, therefore, would not be justified; **what would be required is a more precise determination of the end use** of the excavated earth; **a finding on the correctness of the stand of the builders that the extracted earth was not used commercially but was redeployed in the building operations**. If the determination was to return a finding in favour of the claim made by the builders, **obviously, the Notification dated 3-2-2000 would have no application**; the excavated earth would not be a specie of minor mineral under Section 3(e) of the 1957 Act read with the Notification dated 3-2-2000.*

*16. **Insofar as the appeal filed by Nuclear Power Corporation is concerned, the purpose of excavation, ex facie, being relatable to the purpose of the grant of the land to the Corporation by the State Government, the extraction of ordinary earth was clearly not for the purposes spelt out by the said Notification dated 3-2-2000**. The process undertaken by the Corporation is to further the objects of the*

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grant in the course of which the excavation of earth is but coincidental. In this regard ***we must notice with approval the following views expressed by the Bombay High Court, in Rashtriya Chemicals and Fertilizers Ltd. v. State of Maharashtra while dealing with a somewhat similar question:*** *(1992 SCC OnLine Bom para 14)*

> *"14. If it were a mere question of the Mines and Minerals Act, 1957 covering the removal of earth, there cannot be possibly any doubt whatever, now, in view of the very wide definition of the term contained in the enactment itself, and as interpreted by the authoritative pronouncements of the Supreme Court.* ***As noted earlier, the question involved in the present case is not to be determined with reference to the Central enactment but with reference to the clauses in the grant and the provisions in the Code****. When it is noted that* ***the Company was given the land for the purpose of erecting massive structures as needed in setting up a chemical factory*** *of the designs and dimensions of the company,* ***the context would certainly rule out a reservation for the State Government of the earth that is found in the land****. That will very much defeat the purpose of the grant itself.* ***Every use of the sod, or piercing of the land with a pick-axe, would, in that eventuality, require sanction of the authorities****. The interpretation so placed, would frustrate the intention of the grant and lead to patently absurd results.* ***To equate the earth removed in the process of digging a foundation, or otherwise, as a mineral product, in that context, would be a murder of an alien but lovely language.*** *The reading of the entire grant, would certainly* ***rule out a proposition equating every pebble or particle of soil in the granted land as partaking the character of a mineral product****. In the light of the above conclusion, I am clearly of the*

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> *view that the orders of the authorities, are vitiated by errors of law apparent on the face of the record. They are liable to be quashed. I do so."*
>
> ***[Emphasis Supplied]***

12. After the ruling in ***Promoters and Builders***, the State (empowered under Section 15 of the Mining Act) amended Rule 46 of the Extraction Rules with effect from 11th May, 2015 to make a conscious distinction between earth extracted and used on the same land, and earth extracted and removed from that land for disposal or commercial usage outside. The amended Rule 46(i) of the Extraction Rule provides as follows:

> *"(i) The* ***lessee shall pay royalty on minor minerals removed from the leased area*** *at the rates specified in Schedule I:*
>
> *Provided that, such rates shall be revised once in every three years :*
>
> *Provided further that,* ***no royalty shall*** *be required to* ***be paid on earth which is extracted*** *while* ***developing a plot of land and utilized on the very same plot*** *for* ***land levelling*** *or* ***any work in the process of development of such plot****;*
>
> ***[Emphasis Supplied]***

13. In short, where the earth extracted when developing a plot of land is utilised on the very same plot of land for levelling or any

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work in the process of development of the land, no royalty would be payable. This very Bench had the occasion to consider the law declared in ***Promoters and Builders*** in connection with another writ petition in the case of *AIGP Developers (Pune) Private Limited Vs. The State of Maharashtra & 2 Ors.*[3] ("***AIGP Developers***"), where earth excavated by a developer for levelling and refilling of the very same plot of land had been visited with royalty and penalty by the State. Quashing the State's action, this Bench held the following :

> *26 It will be seen that the penalty under Section 48(7) is linked to the market value of the mineral involved.* ***The inference we would draw from the articulation in Promoters and Builders by the Hon'ble Supreme Court is that commercial exploitation in the market (as distinguished from use for oneself) would be an important factor in determining whether the excavated earth would at all constitute "minor mineral".*** *This is why* ***Promoters and Builders*** *has placed emphasis on the need for the State to find out whether the excavated earth was re-deployed or was used commercially.*
>
> *27 As seen above, the State Government is empowered to make rules under Section 15 of the Mining Act. Using this power, the Extraction Rules have been made. After the ruling in* ***Promoters and Builders****, the State Government, explicitly amended Rule 46 of the Extraction Rules, which provides for royalty on minor minerals removed from the leased area.* ***With effect from 11th May, 2015, Rule 46 was amended to explicitly make a conscious distinction between***

[3] *2024 SCC OnLine Bom. 762*

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minor minerals extracted and used on the same land and minor minerals extracted and removed from that land. *The amended Rule 46(i) of the Extraction Rules provides as follows:-*

> *"(i) The **lessee shall pay royalty on minor minerals removed from the leased area** at the rates specified in Schedule I:*
> *Provided that, such rates shall be revised once in every three years :*
> *Provided further that, **no royalty shall** be required to **be paid on earth which is extracted** while **developing a plot of land and utilized on the very same plot** for **land levelling** or **any work in the process of development of such plot**;*

28 ***A plain reading of the foregoing provision would show that where earth is extracted in the course of development of a plot of land and is utilised on the very same plot of land for levelling or for any other work in the course of such development, no royalty is required to be paid***. *Since* **Promoters and Builders** *made it clear that* ***re-deployment on the very same land (as opposed to commercial use after its removal from the said land) is the key jurisdictional fact to determine if the the "wrath of Section 48(7)" would be attracted***, *the amended Rule 46(i) of the Extraction Rules has also done away with royalty being payable on the extracted earth, if it is re-deployed in the development of the same plot of land, for land levelling or any other work incidental to the process of developing the same plot of land.* ***Therefore, where the excavated earth is removed from the plot of land, royalty would be payable but where the excavated earth is re-deployed on the very same plot of land, there would be no charge of royalty***. ***If there was no charge of royalty, the extraction being incidental to levelling that very land or any work relating to the development of that very plot of land, would naturally***

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__not require any separate permission__. *As stated by the Learned Single Judge of this Court in the judgement in* ***Rashtriya Chemicals and Fertilizers Ltd. V. State of Maharashtra (supra)****, which is extracted and endorsed by the Hon'ble Supreme Court in* ***Promoters and Builders****,* ***__any other view would point to the need to get government approval for every piercing of the land with a pick-axe and equate every pebble or particle of soil as partaking the character of a minor mineral__***.

29 Therefore, Dr. Sathe is entirely right in stating that the law required payment of advance royalties in respect of such quantum of excavated earth that could not be utilised in development of the very same land (the 40,000 brass extracted and removed from the Subject Land), and the Petitioner indeed complied with such requirement. The excavated earth re-deployed in the development of the very same Subject Land (the 40,858 brass) would not attract an obligation to pay any royalty, and neither, would it require any additional authorisation.

30 The amendment to Rule 46 of the Extraction Rules was given effect on 11th May, 2015. The decision in ***Promoters and Builders*** *was delivered on 3rd December, 2014. The second proviso to Rule 46 squarely obviates any difficulty in discerning the state of the mind of the developer at the time the earth was excavated. It simply provides that if the earth excavated were to be utilised on the very same plot of land towards land levelling or any other work in the process of development of such plot, no royalty would need to be payable.*

31 Therefore, in our opinion, no royalty was payable by the Petitioner in respect of the 40,858 brass of excavated earth but also as a logical consequence, no penalty is capable of being imposed on the Petitioner in respect of such excavated earth– all because the said excavated earth

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> *was not a "minor mineral" because it was re-deployed and used in the development of the very same Subject Land.*
>
> *32 Multiple judgments by various other Division Benches of this Court have been cited to show the law declared on the very same issue. In the interest of brevity, each of these is not being cited. **BGR Energy** and **Paranjpe Scheme**, are judgements squarely on the point, and despite being cited, the Impugned Order does not even contain any reference to them. It is ironical that show cause notices continue to be issued, and penalty orders continue to be passed, in the teeth of such explicit legislation and such explicit declaration of the law, in interpreting the legislation.*
>
> ***[Emphasis Supplied]***

Application of the Law to Facts:

14. It will be seen that the controversy in these proceedings, is squarely covered by our ruling in ***AIGP Developers***, which, in turn applied the law declared in ***Promoters and Builders*** and articulated the implications of the same for proceedings under Section 48(7) of the MLRC.

15. In the case at hand, it is evident that Petitioner No.1 paid royalty for and obtained permission in respect of 25,000 brass (on 24th October, 2017) and 7,100 brass (on 3rd January, 2018), aggregating to 32,100 brass. Petitioner No.1 has explained, in its

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replies that its total excavation was to the tune of 59,158 brass, of which 31,945 brass had been removed from the Subject Land and was well covered by the permissions obtained in respect of 32,100 brass under the first two permissions. It is noteworthy that the Circle Officer's report is dated 18th January, 2019 which forms the basis of the First Show Cause Notice alleging that 37,632 brass had been excavated at the time of inspection. Excavation connected with development continued on site, and by the time, the reply dated 8th March, 2019 (to the First Show Cause Notice) was filed, Petitioner No.1 in fact voluntarily updated the scale of excavation as having been 59,158 brass. The response explicitly asserted that the remaining 27,213 brass was being redeployed on site towards back-filling and development of the Subject Land.

16. It is noteworthy that the response was filed proximate to the date of the First Show Cause Notice. It was always open to the Respondents to conduct another inspection at site to confront, verify and contest the validity of the reply of Petitioner No.1. In fact, no further proceedings were undertaken after the said reply and the personal hearing held on 8th March, 2019. The Second Show Cause

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Notice was issued two and half years later (on 27th September, 2021), well after all work was completed and the IKEA Store was fully operational i.e. well after all development of the Subject Land was complete. Meanwhile, two more permissions for 7,400 brass (on 24th July, 2019) and another for 1,500 brass (on 13th October, 2020) were also granted by Respondent No.2 to Petitioner No.1 for removal of the residual quantum of excavated earth.

17. The Second Show Cause Notice made no reference to either the First Show Cause Notice or to the reply of Petitioner No.1. The reply to the First Show Cause Notice had volunteered an enhanced quantum of excavation (59,158 brass of excavation as opposed to 37,632 brass as alleged). From the material on record, no inspection of the site appears to have been conducted to verify the factual position. Be that as it may, on 6th June, 2022, Petitioner No.1 explained the sequence of events in reply to the Second Show Cause Notice that as and when the volume of excavated earth to be removed from the Subject Land was crystallized, Petitioner No.1 paid royalty and secured permissions for removal in respect of such quantum of excavated earth. The response is reasonable and

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plausible. The reply ought to have been dealt with in the December 2022 Order. Instead, the December 2022 Order is a mere reiteration of the contents of the First Show Cause Notice, the conduct of the hearing, the reply to the Second Show Cause Notice, the missed personal hearing and a summary conclusion that the unauthorised excavation that attracts royalty and penalty is 5,532 brass.

18. The December 2022 Order reproduces the reply dated 6th June, 2022 *verbatim* but does not even purport to deal with it. The sequence of events and the end use to which the excavated earth was meant to be put and the explanation of the build-up and deployment of the inventory of excavated earth ought to have been dealt with. Such a determination of the jurisdictional fact is imperative, especially in view of the law declared in ***Promoters and Builders***. Instead, the December 2022 Order simply aggregates the three permits dated 24th October, 2017, 3rd January, 2018 and 24th July, 2019 to arrive at a quantum of 39,500 brass of permitted excavation. Even this quantum of permitted removal of excavated earth (39,500 brass), would be more than the alleged extraction of 37,632 brass. However, the December 2022 Order dismisses the permission for

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removal of 7,400 brass (granted on 24th July, 2019) on the ground that such permission had been taken after the Circle Officer's report dated 18th January, 2019. Therefore, effectively, Respondent No.3 has taken the excavation of 37,932 brass, alleged on 18th January, 2019 to be unauthorised, and subtracted from it the permissions obtained for 32,100 brass obtained prior to 18th January, 2019 to hold that the difference between the two, namely, 5,532 brass would axiomatically be regarded as the proven unauthorised excavation.

19. Such an analysis flies in the face of the law declared in ***Promoters and Builders*** and ***AIGP Developers***. The excavation of earth in the course of development would not automatically attract royalty. To the extent that such earth is redeployed in development of the very same plot of land, no royalty whatsoever would be attracted. Therefore, there is no question of there being any scope for alleging the need for a permit to extract earth. Consequently, there is no question of imposing penalty for non-payment of royalty. However, any quantum of excavated earth that is in excess of the redeployed earth that is required to be removed from that plot of

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land i.e. gets disposed in the market, would attract royalty under the MLRC.

20. A party developing a plot of land would have to estimate and reassess the quantum that may be required for redeployment and the quantum required to be removed. For the quantum redeployed, no royalty, and therefore, no authorisation would be required. For the quantum removed, royalty would be payable and permission for removal would be required. The explanation provided by Petitioner No.1 in response to the Second Show Cause Notice (which is reproduced in the December 2022 Order), sets out the sequence of such estimation and determination of the quantum of earth for which permissions and royalty became necessary. It is apparent that Petitioner No. 1 sought approvals from time to time in conformity with its intended removal of excavated earth. In line with the law declared in ***Promoters and Builders***, and indeed in the evidently-consequential amendment to Rule 46(i) of the Extraction Rules, Petitioner No. 1 did not seek any permission for that quantum of excavated earth that was redeployed on the same plot of land.

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21. None of this is dealt with in December 2022 Order. Instead, the State has simply stuck to its original assessment of excavation to the tune of 37,632 brass and subtracted from it the quantum of permission that had been provided prior to the date of such estimation of excavation. The scale of extraction is based on measurement of the cavity in the land at the time of inspection. Neither of the two show cause notices considers the fact that the size of the cavity was smaller than the admitted excavation of land and that this could have been a factor of re-filling that had taken place, as also stock-piling of excavated earth that awaited subsequent redeployment on site in the course of developing the same land.

22. In less than two months of the Circle Officer's report dated 8th March 2019, Petitioner No.1 volunteered information on the total excavation being 59,158 brass. It would logically follow that on an ongoing basis, excavation of earth, redeployment of excavated earth, and removal of surplus excavated earth was being effected from time to time in the course of development of the Subject Land. In such course of development, excavated earth would obviously be retained on the Subject Land for potential future deployment or potential

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future removal as and when the exigencies of the development so demanded. Therefore, the rejection of the approval for removal of 7,400 brass secured by Petitioner No. 1 on 24th July, 2019 on the ground that it was secured after the 18th January, 2019 is arbitrary and unreasonable, vitiating the December 2022 Order.

23. The December 2022 Order acknowledges that removal of 7,400 brass had been subjected to royalty payment and permission towards the same had been given on 29th July, 2019. However, such permission is dismissed as irrelevant on the ground that it was secured subsequent to the site inspection made by the Circle Officer. The reasoning in the December 2022 Order, that Petitioner No. 1 resorted to securing such approval for removal on 29th July, 2019 upon becoming conscious that there had been a finding of the scale of extraction on 18th January, 2019, is perverse, not only because the very import of ***Promoter and Builders*** (which is the declared law governing excavation since 2014) has been ignored, but also because Petitioner No. 1 had submitted that it had excavated 59,158 brass i.e. far in excess of the extraction of 37,632 brass alleged in the First Show Cause Notice.

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24. Therefore, in our opinion, the December 2022 Order suffers from non-application of mind to the facts at hand and is vitiated by not applying the law declared by the Hon'ble Supreme Court to such facts. Worse, the IKEA Store had opened to the public on 18th December, 2020 i.e. two years before December 2022. Even prior to that, the occupation certificate had been issued by MIDC (on 3rd September, 2020). Therefore, should the State have had doubts about the veracity of the response, it eminently had the ability to verify and re-assess the situation. The Second Show Cause Notice simply repeated the contents of the First Show Cause Notice, ignoring all intervening submissions and developments. The December 2022 Order simply deducted the quantum of earth permitted to be removed from the earth alleged to be extracted to return a finding that 5,532 brass was illegally extracted without permissions.

25. In fact, by reason of Rule 46(1) of the Extraction Rules, the State ought to have dealt with the vital element of quantum of redeployment in order to assess what the charge of royalty should be. Abandoning this due process, Respondent No.3 has simply indulged

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in a mathematical computation of the difference between the Circle Officer's report and the permissions for removal obtained until the date of the report, rejecting approval for removal after that date. The State ought to have considered whether there was even a plausible rationale to any developer holding on to excavated earth in the course of development of land until the project nears completion so that the developer can finally decide what quantum of excavated earth would need to be removed, and therefore, what quantum of removal should be visited with royalty, and permission for removal. None of such factual analysis having been done, the Impugned Order cannot be sustained and deserves to be quashed and set aside.

Quantum of Penalty:

26. At this juncture, we may also mention that the highest possible penalty multiplier under Section 48(7) of the MLRC has been applied in the December 2022 Order, i.e. five times the market value of the earth allegedly extracted without paying royalty. In fact, prior to 5th January, 2017, Section 48(7) had provided for a penalty "equal to five times the market value" of minor minerals. Such a formula being a hide-bound straightjacket formula, was replaced by

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a reasonable standard of enabling a discretion to impose penalty of up to five times the market value. Such an amendment facilitated a reasonable play in the joints to the revenue authorities to factor in the gravity of the violation, the conduct of the parties (assessing whether the violation was inadvertent or deliberate), and to make the penalty proportionate to these factors.

27. The December 2022 Order is completely silent on the consideration of any such factors. Such silence on the choice of severity in inflicting punishment, renders penalty orders vulnerable to further attack, and therefore must be avoided. The choice of severity must be proportionate to the nature of conduct by the actionee i.e. whether the violation is deliberate, wilful inadvertent or a *bona fide* interpretation of applicable law must be considered, bearing in mind the principle of 'doubtful penalisation'.

28. However, since we have held that earth excavated in the course of developing a plot of land, being redeployed in the very same plot of land would not constitute a "minor mineral", and since Rule 46(1) of the Extraction Rules explicitly provides that there shall

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be no royalty payable, we say nothing more about the absence of reasons for choice of the highest scale of penalty in this case.

Directions Issued:

29. In the result, we issue the following directions:-

A) The December 2022 Order is hereby quashed and set aside;

B) All consequential actions towards recovery of the royalty charged and penalty imposed pursuant to the December 2022 Order are also hereby quashed and set aside;

C) Consequently, the recovery notices dated 17th April, 2023 and 26th May, 2023, as indeed the attachment order dated 21st July 2023, too deserve to be quashed and set aside;

D) In issuance of show cause notices for proceedings initiated under Section 48(7) of the MLRC, the State must first establish a *prima facie* case to show the existence of

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the jurisdictional fact i.e. whether the earth extracted constitutes a "minor mineral" before charging any royalty and/or imposing any penalty under Section 48(7). In other words, the State must conform to the legal standards declared in ***Promoters and Builders*** and ***AIGP Developers***; and

E) The onus of bringing home a charge of removal or commercial usage of excavated earth in order to charge royalty would be on the revenue officials alleging such usage. After the show cause notice shows a *prima facie* case to demonstrate that the excavated earth constitutes a "minor mineral" (applying ***Promoters and Builders***), the orders disposing of show cause notices issued under Section 48(7) of the MLRC must necessarily deal with the evidence on record, the replies filed by the noticees, and return findings of fact on the purpose of the excavation and the end-use to which the excavated earth was put, and thereby conclude if royalty is payable and if penalty is attracted; and

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F) Orders imposing penalty under Section 48(7) of the MLRC must articulate why a certain multiple of the market value is being adopted in the facts of the case, particularly because the provision enables a penalty of up to five times the market value. The degree of severity in the penalty imposed must be proportionate to the nature of conduct i.e. whether the violation is deliberate, wilful, inadvertent or based on a *bona fide* interpretation of the law.

30. Rule is made absolute in the aforesaid terms and the writ petition is also disposed of in terms thereof. In the circumstances, we are persuaded that there shall be no order as to costs.

31. This judgment/order will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this judgment/ order.

[SOMASEKHAR SUNDARESAN, J.] **[B.P.COLABAWALLA, J.]**

Shraddha Talekar PS

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