

IN THE HIGH COURT OF BOMBAY AT PANAJI, GOA.

Writ Petition No. 292/2014

M/s Cosme Costa and Sons ... Petitioner

Versus

State of Goa & Ors. ... Respondents

AFFIDAVIT-IN-REPLY ON BEHALF OF THE RESPONDENTS

I, Prasanna Acharya, aged about 37 years, son of Arvind Acharya, Indian National, resident of House No.73/H/1, Zorivado, Davorlim, Salcete, Goa - 403 707 do hereby solemnly state and affirm as under:

1. I state that I am the Director of Mines and I am authorised to file the present Affidavit. I state that I am filing the present Affidavit based on the records available with my Office and am able to depose thereto.
2. I state that I have read and understood the contents of the present Writ Petition. I state that I am filing the present Affidavit in order to oppose any Interim/Ad Interim Reliefs sought by the Petitioner therein. I state that I have not specifically traversed through each and every paragraph of the Petition and any averments made in the present Petition which have not specifically been dealt with by me, may therefore not be deemed to have been admitted by me as state by me

hereinabove. I state that this Reply may be treated as a Reply in all the connected matters.

3. I state that the petitions filed by the Petitioners herein, are not maintainable inasmuch as the prayers go completely contrary to the Judgment and Order of the Hon'ble Apex Court, delivered in Writ Petition No. 435 of 2012 by the Hon'ble Supreme Court.
4. I state that in the Judgement of the Hon'ble Supreme court of India, at paragraph 67 thereof, the Hon'ble Supreme Court of India has held that renewal of the deemed mining leases of the lessees in Goa expired on 22/11/1987 and the maximum period (20 years) of the renewal of the deemed mining leases in Goa has also expired on 22/11/2007. And therefore Mining by the lessees in Goa after 22/11/2007 is illegal.
5. I state that Supreme Court has held that all mining leases in Goa have expired on 22/11/2007. I state that therefore It does not in any way carve out any exception whatsoever with respect to mines for whom the alleged renewal was granted under section 8(2). I state that once that is the case, the Petitioners cannot file a Petition before this Hon'ble Court and contend that their leases were renewed, unless the same was indeed under section 8 (3) of MMRD Act.
6. I state that there is one more reason why this Petition should not be entertained. I state that the present Petitions are barred by constructive *Res Judicata*. I state that the Petitioners ought to have raised all these

issues before the Hon'ble Supreme Court in the transfer Petition which were filed before this Hon'ble Court and thereafter transferred to the Hon'ble Supreme Court. I state that the applications for renewal were filed in the year 2006 and it is the own contention of the Petitioner that these applications were pending decision before the State Government. I state that once that is the case it was incumbent upon the Petitioner that they ought to have raised these issues and argued these points before the Hon'ble Supreme Court. I state that the Petitioners could have raised these issues before the Hon'ble Supreme Court and therefore having failed to do so, the Petitioners cannot raise the same before this Hon'ble Court. The Petitions are therefore barred by the doctrine of constructive *Res Judicata*.

7. I respectfully state and submit that in the Writ Petition before the Hon'ble Supreme Court as well as in the Transfer Writ Petition, the Hon'ble Supreme Court has decided the matter as regards the fact that the lease as held by the mining lessees has expired.

8. I state that from paragraph 12 onwards the Hon'ble Supreme Court has dealt with this issue and after hearing the lessees and the contentions raised on behalf of them as well as the State Government, the Hon'ble Supreme Court has held as under:-

"In our view the deemed mining leases of the lessees in Goa expired on 22-11-

1997 under sub-section (1) of Section 5 of the Abolition Act and the maximum of 20 years renewal period of the deemed mining leases in Goa as provided in sub-section (2) of Section 8 of the MMDR Act r/w sub-section 8 of Section 9 of the MC Rules expired on 22-11-2007".

9. I state that It is also of importance to mention here that the power of renewal under sub-section (3) of Section 8 of the MMDR Act is a power of the State Government where if the State Government is of the opinion for reasons to be recorded in writing, that the renewal is in the interest of mineral development then the State Government can alone consider this. The Hon'ble Supreme Court has further held that the right of the renewal of a mining lease is dependent upon the State Government forming an opinion as regards interest of a mineral development.

10. I further state that the Hon'ble Supreme Court has directed the State Government in paragraph 67 as under:-

"67. As we have held that the deemed mining leases of the lessees in Goa expired on 22.11.1987 and the maximum period (20 years) of renewal of the deemed mining leases in Goa has also expired on 22.11.2007, mining by the lessees in Goa after 22.11.2007 was illegal. Hence, the

order dated 10.09.2012 of the Government of Goa suspending mining operations in the State of Goa and the order dated 14.09.2012 of the MoEF, Government of India, suspending the environmental clearances granted to the mines in the State of Goa, which have been impugned in the writ petitions in the Bombay High Court, Goa Bench (transferred to this Court and registered as transferred cases) cannot be quashed by this Court. The order dated 10.09.2012 of the Government of Goa and the order dated 14.09.2012 of the MoEF will have to continue till decisions are taken by the State Government to grant fresh leases and decisions are taken by the MoEF to grant fresh environmental clearances for mining projects”.

- 11.** I state that three things emerge from the said Judgment. (a) That the mining leases have expired in the year 2007. (b) That Order of grant / renewal can only be passed by the State Government ;(c) Once the Hon`ble Supreme Court has held that there is no deemed extension in a case under Section 8(3), the question of renewal of the existing leases in the manner sought by the Petitioner does not arise. It is

the State Government alone which can form a Policy and take a decision in the matter.

12. I respectfully state that the fact that these renewal applications are pending with the State Government it was known to the Hon'ble Supreme Court. I further state that in the case of Orissa, the Hon'ble Supreme Court has specifically directed the State Government to consider the application under Section 8(3), while there is no such direction granted in the case of Goa. Petitioners must therefore approach the Apex Court for a similar direction.

13. In these circumstances, I respectfully state and submit that the Writ Petition filed in this Hon'ble Court by the Petitioner herein will run completely counter to the Hon'ble Supreme Court as the law is laid down by the Hon'ble Supreme Court.

14. I further state that the Hon'ble Supreme Court has indeed recognized the fact that it is only the State Government which will as a matter of Policy decide in what manner the mining leases are to be granted in future.

15. I state that when the State Government forms a Policy it takes into account all relevant and material things. I state that it is within the powers of the State Government to consider the renewal applications under Section 8(3) and take a view on the same but there cannot be an obvious direction from this Hon'ble Court preempting the contents of the said Policy.

I respectfully state and submit that the so-called 28 leases which are alleged to be renewed, were all Renewals under Section 8 of the MMDR Act. The Hon'ble Supreme Court has already held that the Renewals under Section 8(2) are first renewals which expired in the year 2007. I further state that there cannot be any renewals under Section 8(2) which are matters of entitlement but in the present case renewals, if any, for the year 2007 ought to be under Section 8(3) of the MMDR Act. In case of Section 8(3), the position of law is completely different as enunciated by the Hon'ble Supreme Court in its Order. Under Section 8(3), the State is required to consider whether it is in the interest of the Mineral Development to grant second or subsequent renewal. There was no such consideration and hence, an application under Section 8(3) was not even filed as was required of the lease holders. Inasmuch as to what is in the interest of the Mineral Development had to be specifically shown and recorded and further considered by the State and, therefore, it was not a matter of mere change of Section or change of number of the Section but an exercise which ought to have been a full proof exercise to find out whether it was in the interest of the Mineral Development or not. These 28 leases were renewed after 2007 when indeed, the Hon'ble Supreme Court has held that Goa Mining leases have expired in the year 2007 and further these

leases were renewed under Section 8(2) which the Hon'ble Supreme Court held that the renewals had to be under Section 8(3). On both these counts, the question of the Petitioners relying upon 28 leases on the strength of the so-called renewals which are non est and a complete nullity.

Without prejudice to the aforesaid, I respectfully state and submit that that by itself it does not stop the State Government from taking an independent decision on the forming of a Policy as regards the pending application or application filed and even decided under Section 8(2) although wrongly to be corrected and decided in accordance with law. But these are matters strictly for the State Government to decide in its executive Policy and there cannot be any extraordinary dictation even by the lessees or any writ jurisdiction of the Constitution of India preempting the same before forming the Policy. Further State Government can also find out and decide as to which of the matters fall under Section 8(3) and which can be considered for further renewal in terms of law. It is possible that some cases are renewed under Section 8(3) of MMRD Act.

I respectfully state and submit that the Petitioners ought to have approached the Hon'ble Supreme Court and got similar Orders as passed by the Hon'ble Supreme Court in the case of Orissa State Mining. Until and unless the Petitioners get similar Orders as

granted in the case of Orissa State Mining, the question of entertaining the Petitioners Writ Petition does not arise at all.

I, respectfully state and submit that in view of the Supreme Court Judgement if the exercise is not performed as required under Section 8(3) of the Mines and Minerals Regulation Development Act, but the order are passed under Section 8(2), the said Order will be considered as a nullity and of no effect. I further state and submit that it is for the State Government while framing the Policy to take view of this matter including whether renewal was under Section 8(2) or (3) of the MMRD Act.

I, further state and submit that the earlier Mineral Policy tendered before the Hon'ble Supreme Court did not cover certain issues which by virtue of the Hon'ble Supreme Court Judgement will now have to be dealt by the State Government and this includes taking a view of giving of fresh grants, renewals or the other mode of granting etc etc.

I respectfully state and submit that the Writ Petitions filed by the Petitioners are all devoid of merit and entertaining these Writ Petitions would mean that the Petitioners are attempting to overreach the Judgment and Order of the Hon'ble Supreme Court of India.

16. I state that the policy to be framed pursuant to the Hon'ble Supreme Court Judgment is a Policy of the State and only its validity or otherwise can be called in question in a manner known to law but before such a Policy is framed, it is not open to a litigant to approach the Constitutional Court and preempt the framing of Policy or in any manner interfere with the Policy framing.

17. I further respectfully state that it is within the realm of the State Policy that the State Government can take a decision on whether the mining leases should be renewed or not or whether fresh leases should be executed or not and if fresh leases are to be executed, then with whom the same should be executed and how such leases should be granted. I state that these are entirely matters for the State Government to decide its Policy and this cannot be a subject matter for the Courts to intervene.

18. I respectfully state that in paragraph 66 it is material here to rely upon paragraphs 64, 65 and 66.

"64. Mr. Prashant Bhushan, learned counsel for Goa Foundation, submitted that in Article 39(b) of the Constitution of India, it is provided that the ownership and control of the material resources of the community should be so distributed so as to best subserve the common good and, therefore, the State cannot distribute the material resource of the

community in any way it likes. He submitted that in *Centre for Public Interest Litigation & Ors. v. Union of India & Ors.* [(2012) 3 SCC 1], a two-Judge Bench of this Court has held relying on Article 39(b) of the Constitution that the State is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the constitutional principles including the doctrine of equality and larger public good. He submitted that in the aforesaid case, the two Judge Bench has further held that a duly publicized auction conducted fairly and impartially is perhaps the best method for discharging this burden and methods like 'first-come-first-served' when used for alienation of natural resources/public property are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for the constitutional ethos and values. He relied on the conclusion of the two Judge Bench of this Court in the aforesaid case that while transferring or alienating the natural resources, the State is duty-bound to adopt the method of auction by giving wide publicity so that all eligible persons can

participate in the process. He submitted that as the MMDR Act does not prohibit the State from holding auction of the mining leases, this Court should direct that in future the mining leases must be auctioned by the State Government.

65. *Learned counsel for the lessees and the learned Advocate General, on the other hand, submitted that the MMDR Act and the MC Rules have made specific provisions regarding the manner in which the State is to grant mining leases and it is for the State to take decisions on grant of mining leases in accordance with the policy and the provisions of the MMDR Act and the MC Rules. They cited the opinion of the Constitution Bench of this Court in Natural Resources Allocation, In Re, Special Reference No.1 of 2012 [(2012) 10 SCC 1] that auction despite being a more preferable method of alienation/allotment of natural resources, cannot be held to be a constitutional requirement or limitation for alienation of all natural resources and, therefore, every method other than auction cannot be struck down as ultra vires the constitutional mandate.*

66. *We are of the considered opinion that it is for the State Government to decide as a*

matter of policy in what manner the leases of these mineral resources would be granted, but this decision has to be taken in accordance with the provisions of the MMDR Act and the Rules made thereunder and in consonance with the constitutional provisions and the decision taken by the State of Goa to grant a mining lease in a particular manner or to a particular party can be examined by way of judicial review by the Court. To quote the opinion of four Judges out of five Judges expressed by D.K. Jain J. in *Natural Resources Allocation, In Re, Special Reference No.1 of 2012 (supra)*:

“Alienation of natural resources is a policy decision, and the means adopted for the same are thus, executive prerogatives. However, when such a policy decision is not backed by a social or welfare purpose, and precious and scarce natural resources are alienated for commercial pursuits of profit maximising private entrepreneurs, adoption of means other than those that are competitive and maximize revenue may be arbitrary and face the wrath of Article 14 of the Constitution. Hence, rather than prescribing or proscribing a method, we believe, a judicial scrutiny of methods of disposal of natural resources should depend

on the facts and circumstances of each case, in consonance with the principles which we have culled out above. Failing which, the Court, in exercise of power of judicial review, shall term the executive action as arbitrary, unfair, unreasonable and capricious due to its antimony with Article 14 of the Constitution.”

19. I state that the Hon'ble Supreme Court has declared the law of the land, namely it is for the State Government to decide the State Policy in what manner the leases would be granted and this decision has to be taken in accordance with the provisions of the MMDR Act, 1957 and the Rules and in consonance with the Constitutional provisions, all of which decisions would be thereafter open to a judicial review. There cannot be an attempt to preempt the same as it is sought to be done in these Petitions.

20. I respectfully state that the State Government may also have to consider certain observations in the Report of Hon'ble Justice Shah Inquiry, the Public Committee Report tendered by the then leader of Opposition and the present Hon'ble Chief Minister, the CEC Report but as assured before the Hon'ble Supreme Court if any action is taken it shall be done only after an opportunity of hearing is given to the affected parties.

21. I respectfully state and submit that the Writ Petition filed by the Petitioner herein ought not to be

entertained. I state that, in the first place the reliefs prayed for therein are completely outside the purview as they are covered by the Hon'ble Supreme Court Judgment and secondly, they preempt a Policy to be framed by the sovereign which would mean an interference by framing of the Policy which is permissible in law, more particularly held by the Hon'ble Supreme Court that a decision taken in a particular case can only be challenged and examined by a Judgment which means there cannot be any preemption and interference and Policy taken decision.

22. I state that the Petitioners are also seeking a disposal of their renewal application filed in the year 2006. The Petition has been filed in the year 2014 after a lapse of almost 8 years without any explanation whatsoever as regards laches.

23. I further state that the Hon'ble Supreme Court in-between in the year 2014 has delivered a Judgment holding that the leases have expired in view of the same even the renewals which were granted post 2007, also fall into an area whose validity becomes doubtful; nonetheless the State Government is entitled to and will take a view on the same in the policy.

24. Whether or not such renewals which have taken place, were lawful, whether such renewals were

permissible and what happens to such alleged renewals when indeed the Hon'ble Supreme Court has held that the leases have expired in 2007 is in issue which has to be decided by a State Government and not in writ jurisdiction. These are matters to be decided by the Hon'ble Supreme Court and not the law.

25. I further state that the Hon'ble Supreme Court has held that the renewals ought to be under Section 8(3) in the year 2007. The renewals granted if were found to be under sub-section (2) of Section 8 which was an exercise impermissible in law. That being the legal position, the earlier so-called renewals proceeded on an erroneous assumption that it was a matter of first renewal which the Hon'ble Supreme Court had now pronounced as not being first renewal and the first renewal had come to an end; on this premise itself the said so-called renewals are non est in the eyes of law; unless the State after examination finds them to be under Section 8 (3) of the MMRD Act.

26. I respectfully state and submit that there cannot be an external dictation in the State Government in the formation of State Policy.

27. I respectfully state and submit that a Writ at this stage would only mean that the Hon'ble High Court is preempting with the sovereign functions of taking a Policy decision pursuant to the Hon'ble

Supreme Court's order which exercise is impermissible for the Hon'ble High Court in its writ jurisdiction under Section 226 of the Constitution of India.

28. In the light of the facts and circumstances stated hereinabove, I humbly pray that the present petition be dismissed with costs.

Solemnly affirmed at Panaji, Goa }

this 25th day of June, 2014 } **DEPONENT**

Identified by me:-