

(2003) 10 CAL CK 0002
In the Calcutta High Court
Case No : C.O. No. 12407 (W) of 1990

Bengal Brickfields Owners' Association and Others	APPELLANT
Vs	
State of West Bengal and Others	RESPONDENT

Date of Decision : 30-10-2003

Acts Referred:

Constitution of India, 1950 — Article 14, 245, 246, 277
Mines and Minerals (Development and Regulation) Act, 1957 — Section 14, 15, 2, 9, 9(3)
West Bengal Land Reforms (Amendment) Act, 1981 — Section 4C
West Bengal Land Reforms Act, 1955 — Section 4(2A), 4C
West Bengal Minor Minerals Rules, 1973 — Rule 24, 26, 31, 4

Citation : (2006) 2 CHN 577

Hon'ble Judges : Maharaj Sinha, J

Bench : Single Bench

Advocate : A.K. Chakraborty, for the Appellant; B.R. Patranobis, for the Respondent

Judgement

Maharaj Sinha, J.—In this writ application, a notification issued by the Government of West Bengal, being Memo No. 9503(16)-M & M dated 30th October, 1986, is under challenge. A copy of the said notification is the only Annexure, being marked "A", to the writ application.

2. The present writ application was, in fact, moved way back in the year 1990, to be precise, on 23rd November, 1990, when a learned Single Judge, His Lordship Justice Kalyanmoy Ganguly (as His Lordship then was), was pleased to give directions for filing affidavits in the presence of the learned Advocates for both the petitioners and the State respondents.

3. His Lordship Justice Ganguly was also pleased to pass an interim order directing the respondents to allow the petitioners extracting earth on payment of usual assessed royalty. Liberty was also granted to the petitioners by the learned Judge to amend the prayer portion of the petition by adding a prayer therein. On that basis there was also an interim order in terms of the amended Prayer—"F"

of the writ petition till the disposal of the writ application.

4. By the said interim order in terms of Prayer-"F", the concerned respondents were restrained by way of an injunction from "taking any step and/or further step on the basis of Section 4C of the West Bengal Land Reforms Act, 1955, as amended and the respondents were further directed to allow the petitioners to extract earth on payment of usual assessed royalty till the disposal of the writ petition.

5. By virtue of the above interim order, made way back in the year 1990, the interests of the writ petitioner herein, were and have since been protected and are still being protected.

6. For the sake of convenience, the text of the said impugned notification dated 30th October, 1986, is set out below:

NOTIFICATION

After issue of Commerce and Industries Deptt's Notification No. 5955--CI/ Mines dated 27.07.85 amending Rule 4 of the West Bengal Minor Minerals Rules, 1973 extraction of minor minerals has been prohibited in any land classified in revenue records as agricultural land, orchard or forest. Now a question has been raised as to whether agricultural land in respect of which quarry permit has already been granted by the Collector for the purpose of extraction of minor mineral before issue of Commerce & Industries Deptt's Notification No. 5955-CI/Mines dated 27.07.85 shall come under the purview of amended Rule 4 of the West Bengal Minor Minerals Rules, 1973.

The matter has been duly considered by the Board of Revenue in consultation with the Commerce & Industries Deptt of this Government and it has been decided that agricultural lands in respect of which valid quarry permits had already been granted by the Collector before 27.07.1985 i.e. the date on which amended Rule 4 of West Bengal Minor Minerals Rules, 1973 came into force shall not come under the purview of this rule as the classification of the subject land has virtually been changed by non-agricultural use. In cases of old brickfield and sand quarries on agricultural lands as stated above which have existing sanction the Collector may issue quarry permits after conversion of such land in accordance with the provisions of Section 4C of the West Bengal Land Reforms (Amendment) Act, 1981 and after due observance of the conditions as laid down in Rules 24, 26 and 31 of the West Bengal Minor Minerals Rules, 1973.

7. The first writ petitioner, it appears, is the association of Bengal Brickfield Owners which is a non-profit making organization and was incorporated under the provisions of the Indian Companies Act, 1913. The 2nd, 3rd, 4th, 5th and the 6th petitioners herein, are all individual brickfield owners and also Members of the said Organization and the 4th respondent is the honorary Secretary of the said association.

8. From the 2nd paragraph of the writ petition it appears that the first petitioner,

being the association, has more than 1,000 members on its roll and that the 2nd petitioner herein is swing on behalf of himself and on behalf of the other members of the said association,

9. It appears from the writ petition that by way of an amendment by the West Bengal Land Reforms (Amendment) Act 1981, Section 4C thereof was incorporated whereby the Brickfield Owners were to produce conversion certificate for grant of quarry permits for those Brickfields and unless those conversion certificates were produced various legal steps were being taken against the Brickfield Owners, Criminal cases were also initiated against the members of the first petitioner herein, though the respondent authority had no such jurisdiction or authority or legal sanction to seek for such conversion certificate and the respondents as such were acting illegally and in violation of law.

10. The concerned respondents by the said impugned notification dated 30th October, 1986, prohibited the mining operation of those brickfields without conversion certificates even in case of old brickfields where the character of such fields had already been changed.

11. In fact, the relevant portion of the said impugned notification proceed on the basis that "In cases of old brickfields and sand quarries on agricultural land as stated above which have been existing sanction, the Collector may issue quarry permits after conversion of such land in accordance with the provisions of Section 4C of the West Bengal Land Reforms (Amendment) Act, 1981, and after due observance of the conditions as laid down in Rules 24, 26 and 31 of the West Bengal Minor Minerals Rules, 1973".

12. Learned Counsel, Mr. Ashok Chakraborty, appearing on behalf of the writ petitioners, submitted that Section 4C was introduced and/or incorporated in the West Bengal Land Reforms Act, 1955, by way of an amendment in the year 1981. It was submitted that by introduction of the said Section 4C in the West Bengal Land Reforms Act and by calling the Brickfield Owners to come under the jurisdiction of the State respondents under the State Legislature, the State respondents acted far beyond their jurisdiction and in utter violation of Entry 54, List I and Articles 245 and 246 of the Constitution of India and in utter violation of Section 2 of the Mines and Minerals (Regulation and Development) Act, 1957.

13. It was further submitted that in view of the declaration made in Section 2 of the Mines and Minerals (Regulation and Development) Act, 1957, the brickfields came to be covered by the Union Legislature under Entry 54 List I Seventh Schedule to the Constitution of India and the State Government thus, had no legislative competence to make any law of their own so as to override the legislation or rather central legislation as provided in Entry 54 List I Seventh Schedule to the Constitution of India. Section 4C of the West bengal Land Reforms Act was, therefore, invalid in view of the Entry 54 List I Seventh Schedule and Article 246 of the Constitution of India.

14. Since, it was contended the State Government had no legislative power to control brickfields under the provisions of West Bengal Land Reforms Act, the said amended Section 4C of the said Act namely, Land Reforms Act also had no manner of application to the cases of minor minerals in view of the declaration u/s 2 of the Mines and Minerals (Regulation and Development) Act, 1957:

The entire field relating to mines and minerals came to be occupied by Parliament and Parliament alone in view of the said declaration. The State Government only as a delegated authority had been empowered to prescribe rules relating to minor minerals but the State Legislature was no longer capable of enacting a law of its own relating to minor minerals. (See *Shyam Sundar Rathi Vs. The Addl. District Magistrate, Bankura and Others*,) (Paragraph 26 at page 63)

15. It was contended on behalf of the petitioners by the learned Counsel that the character of land was usually determined by its actual mode of user and not by any classification or presumption of classification in R.S. record-of-rights and as such the impugned prohibition in the notification under challenge is violative of Article 14 of the Constitution of India. By incorporating the said Section 4C by way of amendment of the West Bengal Land Reforms Act the State Government, it was argued, sought to apply the provisions of Entry 23 List II of the Seventh Schedule to the Constitution of India which was not permissible since the State Government had no legislative competence to make any law in this regard and therefore, had no legal competence or authority to apply the West Bengal Land Reforms Act as well to control the brickfields and minor minerals.

16. In support of the above contentions and submissions the learned Counsel for the writ petitioner relied on two decisions. The first of such decision was in the case of *Shyam Sundar Rathi Vs. The Addl. District Magistrate, Bankura and Others*, and the second decision was in the case of *Chandeswar Prosad Singh and Another Vs. Sub Divisional Land Reforms Officer, Barrackpore and Others*,

17. In the case of the said *Shyam Sundar Rathi Vs. The Addl. District Magistrate, Bankura and Others*, His Lordship Justice Chitotosh Mukherjee (as His Lordship then was) had the occasion to consider the provisions of Section 4(2A)(b) of the West Bengal Land Reforms Act, the said section prohibited a raiyat from excavating or using himself or through others earth or clay for brick making.

18. It was held by His Lordship Justice Mukherjee that such provision namely the said Section 4(2A)(b) of the West Bengal land Reforms Act was beyond the competence of the State Legislature and as such the said provisions were violative of the Constitution,

19. It was observed by His Lordship Justice Mukherjee at page 63 paragraph 27 AIR 1975 Calcutta 58 (supra):

After the declaration of the Central Government u/s 2 of the Mines and Minerals (Regulation and Development) Act, 1957, the entire field relating to mines and minerals came to be occupied by the Parliament, the State Government only as a

delegated authority has been empowered to prescribe rules relating to minor minerals but the State Legislature is no longer capable of enacting a law of its own relating to minor minerals.

20. In the case of Chandeswar Prosad Singh and Another Vs. Sub Divisional Land Reforms Officer, Barrackpore and Others, His Lordship Late Justice Dipak Kr. Sen (as His Lordship then was) had to consider a similar case as to the present one. After having considered the provisions made in Sections 14 and 15 of the Mines and Minerals (Regulation and Development) Act, 1957, it was observed in paragraphs 46, 47, 48, 49 and 50 of the above judgment as follows:

Paragraph 46:

Reading the said Sections 14 and 15 together, it is clear that mining leases or concessions in respect of major minerals are intended to be granted in terms of the rules made under the Act, obviously by the Central Government whereas the State Government will frame rules providing for grant of quarry lease, mining lease and other minerals concessions in respect of minor minerals.

Paragraph 47:

It appears that acting under this limited delegated power, the State Government has promulgated the said West Bengal Mines and Minerals Rules, 1973. A number of rules included therein, it appears, go far beyond the ambit of action 15 of said Act which are not quoted hereafter.

Paragraph 48:

In Rule 4 of the said rules, the State Government has sought to prohibit minimum operation in respect of minor minerals. The prohibition, in my view, can only be imposed By the Central Government under the Act and the same does not come within the four-corners of the rule-making power granted to the State Government u/s 15 of the said Act. Similarly, by Rule 31 the State Government has sought to regulate the use. of minor minerals after extraction.

Paragraph 49:

The rule lays down that a person will be entitled to extract a minor mineral for his own use but shall not dispose of the same thereafter by sale or otherwise without prior permission of the prescribed authority nor shall convert the same into bricks or tiles except where such bricks or tiles are required for the own use of the person extracting the same.

Paragraph 50:

In my view such prohibitory rules are in excess of the limited rule-making power delegated to the State Government.

21. It is interesting to note, however, that in the impugned notification it was observed as follows : "In cases of old brickfields and sand quarries on agricultural lands as stated above which have existing sanction the Collector may

issue quarry permits after conversion of such land in accordance with the provisions of Section 4C of the West Bengal Land Reforms (Amendment) Act, 1981 and after due observance of the conditions as laid down in Rules 24, 26 and 31 of the West Bengal Minor Minerals Rules, 1973."

22. It was held in the said decision in Chandeswar Prosad Singh and Another Vs. Sub Divisional Land Reforms Officer, Barrackpore and Others, that Rule 31 of the West Bengal Minor Minerals Rules, 1973, had sought to regulate the use of minor minerals after extraction.

23. It was said that the said rule had laid down that a person would be entitled to extract the minor minerals for his own use but could not dispose of the same, thereafter, by sale or otherwise without prior permission of the prescribed authority nor he could convert the same into bricks or tiles except where such bricks or tiles were required for the own use of the person extracting the same.

24. On the basis of the above finding His Lordship Late Justice D.K. Sen held that the said rule along with other rules of the said 1973 rules, were in excess of the limited rule-making power delegated to the State Government.

25. The learned Counsel Mr. Chakraborty, on behalf of the writ petitioners, further contended that under the Mines and Minerals (Regulation and Development) Act, 1957, the Central Government, being the absolute Legislative Authority, could only make laws for regulation and development of mines and in this connection he submitted that the entries in the Constitution namely Entries 5, 18, 23, 45 and 50 under List II of the Seventh Schedule including West Bengal Land Reforms Act, 1955 and the residuary power of the State under Article 277 were all violative of the Constitutional provisions in respect of minerals.

26. In support of his submission Mr. Chakraborty relied on a decision of the Supreme Court in the case of M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others,

27. In the case of Orissa Cement Ltd. v. State of Orissa (supra), the Hon^{ble} Supreme Court was faced with the question of validity of the levy of a "Cess" based on the royalty derived from mining lands, by the State of Bihar, Orissa and Madhya Pradesh, which was under challenge in appeal.

28. The assessee in that appeal claimed that the issue there was directly and squarely governed by an earlier decision of the Supreme Court rendered by a seven-Judge Bench in the case of India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others, striking down a similar levy under Tamil Nadu Act holding the same to be beyond the legislative competence of the State Legislature, The Hon^{ble} Supreme Court, however, after having considered the long line of authorities and the provisions of the relevant Acts and the rules held that the levy of "Cess" in that case was unconstitutional.

29. However, for our present purpose it would be useful to mention the following passages of the Supreme Court in the said case of Orissa Cement Ltd. v. State of

Orissa (supra) in paragraphs 40 and 42 at page 1701 thereof:

Paragraph 40:

To take up Entry 50 first, a perusal of Entry 50 would show that the competence of the State Legislature with respect thereto is circumscribed by "any limitations imposed by Parliament by law relating to mineral development." The M. M. R. D. Act, 1957, is, there can be no doubt about this, a law of Parliament relating development. Section 9 of the said Act empowers the Central Government to fix, alter, enhance or reduce the rates of royalty payable in respect of minerals removed from the land or consumed by the lessee. Sub-section (3) of Section 9 in terms states that the royalties payable under the Second Schedule to that Act shall not be enhanced more than once during a period of three years. India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others, has held that this is a clear bar on the State Legislature taxing royalty so as, in effect, to amend the Second Schedule to the Central Act and that if the "Cess" is taken as a tax falling under Entry 50 it will be ultra vires in view of the provisions of the Central Act."

Paragraph 42:

This consideration apart, even assuming it is a fee, the State Legislature can impose a fee only in respect of any of the matters in the State List. The entry in the State List that is relied upon for this purpose is Entry 23. But Entry 23, it will be seen, is "subject to the provisions of List I with respect to regulation and development" of mines and minerals under the control of the Union. Under Entry 54 of List I, regulation of mines and minerals development is in the field of Parliamentary Legislation "to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest." Such a declaration is contained in Section 2 of the M.M.R.D. Act, 1957, which has been set out earlier. It, therefore, follows that any State Legislation to the extent it encroaches on the field covered by the M.M.R.D. Act, 1957 will be ultra vires. The assessee contends, in this case, that the legislation in question is beyond the purview of the State Legislature by reason of the enactment of the M.M.R.D. Act. It would appear, prima facie that the contention has to be upheld on the basis of the trilogy of decisions referred to at the outset viz. The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others, , State of Orissa Vs. M.A. Tulloch and Co., and India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others, . They seem to provide a complete answer to this question....

30. On the basis of the above judgment of the Supreme Court in the case of Orrisa Cement and Ors. v. State of Orissa and Anr., the learned Counsel on behalf of the writ petitioner contended that the Supreme Court was pleased, inter alia, to hold that in view of Entry 54 List I Seventh Schedule and Articles 245 and 246 of the Constitution read with Section 2 of the Mines and Minerals (Regulation and Development) Act, 1957, the Central Legislative Authority is the only absolute Legislative Authority in respect of minor minerals and Entry 23 List I Seventh

Schedule to the Constitution of India became ineffective or infructuous and on that basis the State Government had been only delegatee of power of making rule u/s 15 of the said 1957 Act and the State Legislature had no independent law-making power of their own and as such Section 4C of the West Bengal Land Reforms Act as introduced by the said amendment in the year 1981 could not operate as a valid provision in view of the provision made in Section 15 of the said Mines and Minerals (Regulation and Development) Act, 1957, in respect of minor minerals in the first place.

31. As aforesaid, though the direction for filing affidavits were given way back on 23rd November, 1990, the State respondents never thought it fit to contest this present proceeding by using their affidavits since 1990 till 2002 for long 12 years.

32. However, on July 24, 2002, when the matter appeared as a part heard matter learned Advocate for the respondents appeared and sought direction for affidavits again after 12 long years from the day of the initiation of this writ proceeding. However, considering the prayer, such leave was granted and an affidavit-in-opposition was used only on behalf of the 6th respondent herein.

33. The said opposition was affirmed on 21st of August, 2002, much after the expiry of the time granted on 24th of July, 2002. However, none ever appeared in support of the said opposition or in support of the case or defence of the State respondents at the time of hearing.

34. After having considered the affidavit-in-opposition used on behalf of the 6th respondent herein, nothing much is found in substance which can be said to be a reasonable defence or a substantial defence in favour of the State respondents. The questions raised on behalf of the writ petitioners are, no doubt, legal and Constitutional questions. These questions, however, on a plain reading of those judgments relied upon on behalf of the writ petitioners have to be accepted. The pronouncements made in those judicial authorities are clear enough and binding upon this Court in the first place.

35. No answer has been provided on behalf of the State respondents or on behalf of the 6th respondent herein that the State respondents were not competent to make any law regulating operation of brickfields of all sorts and minor minerals as was sought to be done by the State respondents in the present case.

36. The present case, to my mind, is fully covered by the decisions relied upon by the learned Counsel on behalf of the petitioners and on a clear analysis of the questions raised and the submissions made, I am of the opinion that the said decisions have a direct and a very substantial and/or material bearing upon the questions and/or issues involved in the present case. The said decisions relied upon on behalf of the petitioners provide a complete answer to the questions raised by the petitioners in the present writ application. On the basis of the said decisions it is clear that the concerned authorities could not issue the said notification, namely the impugned notification, as it did on 30th October, 1986.

37. The concerned authorities also were not legally empowered to issue quarry permits in accordance with the provisions of Section 4C of the West Bengal Land Reforms (Amendment) Act, 1981 and in observation or observations of the rules of the West Bengal Minor Minerals Rules, 1973, as mentioned in the said impugned notification. The said notification could not be issued as the State Government lacked the legislative competence to control and cover the brickfields and the minor minerals by legislation in view of the prohibition made in Entry 54 List I of the Seventh Schedule to the Constitution of India.

38. Since the State respondents had and have, in my opinion, no authority or jurisdiction to make any law or laws regulating the brickfields and minor minerals for the reasons stated in the judgment, the impugned notification is struck down.

39. The impugned notice being Annexure--"A" to the writ application, dated 30th October, 1986, is, thus, quashed as the State Government had no legal authority to issue such notification dated 30th October, 1986, in the first place.

40. Having regard to the facts and circumstances of the case, it is declared that Annexure--"A" to the writ petition, being the impugned notification, was issued in violation of the Mines and Minerals (Regulation and Development) Act, 1957, and the West Bengal Minor Minerals Rules, 1973 and in violation of the prohibition made in Entry 54 List I Seventh Schedule to the Constitution of India.

41. In view of the above decision, needless to mention, the writ petitioners shall be permitted to carry on their business and extract earth upon payments of usual assessed royalty in terms of the said interim order made in this writ application on 23rd November, 1990, thus the said interim order dated 23rd November, 1990 is also confirmed.

42. Thus, the writ application is disposed of in terms of the above order.

43. There will be no order as to costs.

44. Let a xerox certified copy, if applied for, be given expeditiously.