

(2008) 05 CAL CK 0018
In the Calcutta High Court
Case No : C.R.R. No. 2721 of 2005

Chhotelal Choudhury and Others

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 09-05-2008

Acts Referred:

Constitution of India, 1950 — Article 245, 246
Criminal Procedure Code, 1973 (CrPC) — Section 482
Mines and Minerals (Development and Regulation) Act, 1957 — Section 10, 11, 12, 13(1), 13(2)
Penal Code, 1860 (IPC) — Section 290, 397, 447
West Bengal Land Reforms (Amendment) Act, 1981 — Section 4, 4(C)
West Bengal Land Reforms Act, 1955 — Section 4C, 4D
West Bengal Minor Minerals (Amendment) Rules, 2002 — Rule 33
West Bengal Minor Minerals Rules, 1973 — Rule 30

Citation : (2008) 3 CHN 1060 : (2008) CriLJ 3655

Hon'ble Judges : Partha Sakha Datta, J

Bench : Single Bench

Advocate : Ashok Kumar Chakraborty and Pinaki Ranjan Chakraborty, for the Appellant; Debabrata Roy, for the Respondent

Final Decision : Allowed

Judgement

1. By this application dated 12-9-2006 u/s 482 of the Cr.P.C. prayer is made for quashing of a proceeding being G.R. Case No. 240 of 2005 u/s 4(D) of the West Bengal Land Reforms Act, 1955 and Sections 21(1) and 21(2) of the Mines and Minerals (Development and Regulation) Act, 1957 read with Section 30 of the West Bengal Mines and Minerals Rules, 1973 and u/s 290/397/447 of the Indian Penal Code now pending before the learned sub-Divisional Judicial Magistrate, Kalyani in the District of Nadia.

2. The de facto complainant who is the F.I.R. maker is an officer said to be authorised u/s 22 of the Mines and Minerals (Regulation and Development) Act, 1957 and an officer authorised by the Collector u/s 4(D) of the West Bengal Land Reforms Act, 1955. He lodged an F.I.R. with the Kalyani Police Station against the

present petitioners alleging that they unauthorisedly extracted and removed 1,05,000 c. ft. of ordinary sand/ordinary clay/gravel/building stone/morum/brick earth/marble which are minor minerals in terms of Section 3(c) of the Mines and Minerals (Regulation and Development) Act, 1957 read with a notification of the Government of India without any permission of the appropriate authority or without holding any quarry or permit of mining lease as required under the West Bengal Minor Minerals Rules, 1973 and therefore has committed theft of the said quantum of sand/clay/gravel/building stone/morum/brick earth/marble by trespassing into the land and soil and thereby caused public nuisance. Further the petitioners/accused persons unauthorisedly made conversion and without the permission of the Collector of the lands so as to extract minor minerals from the lands and thereby they are liable to be prosecuted u/s 4(D) of the West Bengal Land Reforms Act, 1955. Thus, according to the F.I.R. maker such unauthorised extraction and removal of minor minerals makes the persons liable to prosecution u/s 4(D) of the Land Reforms Act, Rule 30 of the West Bengal Minor Minerals Rules, 1973 and Sections 21(1) and 21(2) of the Mines and Minerals (Regulation and Development) Act, 1957 and also under Sections 290/379/447 of the Indian Penal Code.

3. I have heard Mr. Ashok Kumar Chakraborty, learned Senior Advocate appearing with Mr. Pinaki Ranjan Chakraborty for the petitioners and Mr. Debebrata Roy, learned Advocate appearing for the State of West Bengal.

4. It has been contended in the revisional application that the petitioners had been running a brick manufacturing business in the name and style of M/s. Chowdhury Brick Field on certain plots of land under Police Station Haringhata. Brickfields were set up with a knowledge and consent of the District Mining Authority who is no other than the District Land and Land Reforms Officer, Nadia. During the business year of 2002-03 the petitioners were asked by the District Land and Land Reforms Officer, Nadia to obtain conversion certificate in respect of running of brick field u/s 4(c) of the West Bengal Land Reforms Act. The petitioners had to make an application for such conversion certificate which according to the petitioners was not at all necessary. However, during enquiry the concerned officer of the Government of West Bengal is said to have expressed satisfaction as to the non-agricultural character of the lands in question. However, during the said financial year of 2002-03 the petitioners, being asked for, deposited application for quarry permit under prescribed G form with necessary application fee of Rs. 14,250/- and Rs. 32,300/- on account of advance royalty. Meanwhile, the Bengal Brickfield Owners' Association filed a writ application being C.O. No. 12407(W) of 1990 against the State of West Bengal challenging the applicability of Section 4(c) of the West Bengal Land Reforms Act to the brickfields and that writ application was allowed by His Lordship Hon'ble Justice Maharaj Sinha by judgment and order dated 30-10-2003. In the next financial year the District Mining Authority on the application of the petitioners allowed them to carry on business of brick manufacturing without any objection and they did not insist on any formal quarry

permit. Then one M/s. Paul Bricks filed a writ application being No. W.P. 9084(W) of 2000 challenging the arbitrary demand of payment of royalty and cess on brick earth. There was an interim order which was extended from time to time and the present petitioners were made party to that writ petition and they were also allowed to carry on business upon payment of royalty at the rate of 15/- Rs. per c. ft. on brick earth. During the year 2004-05 the petitioners duly submitted an application with requisite fee and advanced royalty in terms of the order of the Hon'ble Court with Reserve Bank of India and then submitted original challans of such deposit along with application under G form to the District Land and Land Reforms Officer, Nadia who accepted the same but suddenly the instant prosecution was launched by the Block Land and Land Reforms Officer, Haringhata. Accordingly the instant prosecution is bad in law.

5. The prosecution was launched under three different and separate Acts, namely, Section 4(D) of the Land Reforms Act, Sections 21 and 21(2) of the Mines and Minerals (Regulation and Development) Act, 1957 read with Rule 30 of the West Bengal Minor Minerals Rules, 1973 and then under Sections 290/379/447 of the Indian Penal Code.

6. Upon hearing the learned advocates for the parties it is very apparent that the prosecution of the petitioners under Sections 290/379/447 of the Indian Penal Code is not at all maintainable in the eye of law. It is not the case of the de facto complainant that the petitioners had committed theft of mines and minerals from lands belonging to a definite individual. It does not appear that any person lodged complaint with the authority against the petitioner alleging trespass into their lands and extraction of brick earth therefrom. According to the petitioners they had been carrying on brick manufacturing business in the name and style of M/s. Chowdhury Brick Field situated on a good number of plots. If according to the prosecution extraction of brick earth or mines is an offence under Sections 21(1) and 21(2) of the Mines and Minerals (Regulation and Development) Act, 1957, then obviously prosecution u/s 379 of the Indian Penal Code or for that matter u/s 447 of the Indian Penal Code is total misnomer. In this connection, reference may be made to the decision in *Hiralal Bonka and Ors. v. P.S. Bose and Ors.* 1993 (2 CHN) 15 : 1994 Tax LR 712 where it was held that when the offences alleged fall under specific provision of any special Act then inclusion of several sections of the Indian Penal Code together with the provisions of the Special Act is illegal because the offences said to have been committed under the Indian Penal Code are only ancillary to the offence which in the instant case is said to be the offence punishable under Sections 21(1) and 21(2) of the Mines and Minerals (Regulation and Development) Act, 1957. Prosecution u/s 290 of the Indian Penal Code is in the context of the revisional application vis-a-vis the F.I.R. is ludicrous, because Section 290 of the Indian Penal Code is an offence of the public nuisance and it is not understood how there could be an offence of the public nuisance punishable u/s 290 of the Indian Penal Code when the allegations are that without any valid permit extraction of sand and brick earth was made by the petitioners. Therefore, prosecution under the Indian Penal Code is clearly bad

in law, particularly when specific offences have been allowed quoting the provisions of the special law.

7. Now Mr. Chakraborty, learned Senior Advocate appearing for the petitioners submitted that in view of Entry 54, List I, seventh schedule of the Constitution of India read with Section 2 of the Mines and Minerals (Regulation and Development) Act, 1957 any enactment under State Legislature under Entry 23, List II, seventh schedule has no manner of application to the brick field and accordingly, the prosecution of the petitioners u/s 4(D) of the W.B.L.R. Act is not maintainable. My attention has been drawn in this respect to a decision of this Court in *Bengal Brickfield Owners' Association and Ors. v. State of West Bengal* 2006 (3) CHN 28 wherein it has been held that in view of Entry 54, List I, seventh schedule and Articles 245 and 246 of the Constitution of India read with Section 2 of the Mines and Minerals (Regulation and Development) Act, 1957, the Central legislative authority is the only legislative authority in respect of mines and minerals and State Legislation Entry 23, List I of the seventh schedule to the Constitution of India is ineffective and infructuous; and thus the State Government is the delegatee of power making rule u/s 15 of the said Act, 1957 and the State Legislature has no independent law making power of their own and as such Section 4(c) of the West Bengal Land Reforms Act as introduced by the amendment in the year 1981 could not operate as a valid provision in view of the provision made in Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957 in respect of the minor minerals. At page 37 of the judgment it was held that concerned authorities were not legally empowered to issue quarry permits in accordance with the provision of Section 4(c) of the West Bengal Land Reforms (Amendment) Act, 1981 and the West Bengal Minor Minerals Rules, 1973. Thus the said notification could not be issued as the State Government lacked the legislative competence of control to cover the brickfields and the minor minerals by legislation in view of the provision made in Entry 54, List I, seventh schedule of the Constitution of India. Mr. Debabrata Roy, learned advocate appearing for the State of West Bengal could not dispute this legal position as has been adumbrated by the decision of this Court. Therefore, prosecution of the petitioners u/s 4(D) of the West Bengal Land Reforms Act in respect of alleged extraction of brick earth without quarry permit or alleged conversion of the land from agriculture to non-agriculture in connection with extraction of brick earth for the purpose of manufacturing business of brick is not maintainable. As said above, in view of the Central enactment concerning mines and minerals covering the field of extraction of brick earth which is a minor minerals, there could not be application of the general statute, namely, Indian Penal Code, apart from the provision of the W.B.L.R. Act, 1955, as amended.

8. The question is raised as to the propriety and legitimacy of the Block Land and Land Reforms Officer making the complaint against the? petitioners under the aforesaid sections of the law. Mr. Chakrabarty placed a decision of this Court in *Smt. Seema Sarkar v. State* 1995 (1) CHN 1. Herein the reported case the Magistrate took cognizance of offence on the basis of the charge-sheet submitted

by the police u/s 21(2) of the Mines and Minerals (Regulation and Development) Act, 1957 and also u/s 379 of the Indian Penal Code. It was held that this was an admitted position that the complainant who was the Block Land and Land Reforms Officer was not an authorised person to make such complaint and accordingly taking cognizance on the basis of the complaint by the Magistrate for violation of the provision of Section 21(2) of the Mines and Minerals (Regulation and Development) Act, 1957 is bad in law. It was further observed that if taking cognizance of offence is bad, then other part of the offences for which cognizance has been taken cannot also be sustained in law. It was held that cognizance was one and it cannot be divided. Splitting of cognizance is not permissible under the law. Here in the instant case the position is exactly the same.

9. Mr. Chakraborti argued that West Bengal Minor Minerals Rules, 1973 has been repealed with effect from 8-11 -2002 by enactment of the West Bengal Minor Minerals Rules, 2002. As such, no allegation under the provision of the Rule of 1973 is maintainable as the F.I.R. was lodged on 18-4-2005. This position could not be assailed of. The F.I.R. related to the allegation of commission of offence of Section 4(D) of the West Bengal Land Reforms Act, 1955 read with Rule 30 of the West Bengal Minor Minerals Rules, 1973. When the F.I.R. was lodged, the West Bengal Minor Minerals Rules, 1973 had been repealed by the Rules of 2002. Rule 33 of the Rules 2002 is the only penal provision under the special statute and the prosecution having not been launched under Rule 33, no offence can said to have been committed under Rule 33 of the said Rules 2002. Importantly, in the matter of applicability of the Mines and Minerals (Regulation and Development) Act, 1957 to the brick field a decision of the Supreme Court in D.K. Trivedi and Sons and Others Vs. State of Gujarat and Others, has been cited. In this decision the constitutionality of the provision of the Act 1957 was the issue and the Hon'ble Supreme Court while holding that Sub-section (1) of Section 15 of the Act 1957 to be constitutionally valid held inter alia that Sub-section (2) of Section 13 which is illustrative of the general power conferred by Section 13(1) contains sufficient guidelines to follow in framing the rules u/s 15(1) and the same way, the State Government have before them the extractions and other matters provided for in Sections 4 to 12 while "framing their own rules u/s 15(1). The guidelines for the exercise of the rule making power u/s 15(1) are those to be found in the object for which such power is conferred only for regulating the grant of quarry leases, mining leases, or other mineral concessions in respect of minor minerals and for the purposes connected therewith. Section 21(1) of the Act 1957 is a penal provision for contravention of the provision of Sub-section (1) of Section 4 of the Act and Section 4(1) provides that no person shall undertake any reconnaissance, prospective or mining operations in any area except under and in accordance with the terms and conditions of prayer or licence. Section 4(A) of the Act deals with termination of prospecting licences or mining leases. Section 4 of the Act 1957 does not directly relate to minor minerals. It is Rule 33 of the West Bengal Minor Minerals Rules, 2002 which has

laid down the penal provision for extracting minor mineral without proper lease or permit granted under the rules. Now the very allegation of the petitioners extracting brick earth without permit or licence is under question. Ordinarily on an application u/s 482 of the Cr.P.C. for quashing of a proceeding the documents or papers relied on by the defence are not to be looked into because they constitute the line of defence but when the document is the certified copy of order of this Court relating to the self-same matter and which is not denied and disputed by the State of West Bengal, the taking cognizance of the order of the Hon"ble Court in connection with the consideration of an application u/s 482 of the Cr.P.C. cannot be said to be unlawful.

10. In W.P. No. 9084(W) of 2000 which was between Paul Bricks and Ors. v. State of West Bengal and Ors. His Lordship Hon"ble Justice Maharaj Sinha by order dated 31-1 -2005 observed. "In my opinion, since the private respondents herein namely the applicants 1 to 21 have been added as respondents to this writ application who are similarly circumstanced and have identical interests as that of the writ petitioners herein, the interim order originally made on 30th May 2000 and extended in favour of the said added respondents by the said order dated 22nd September, 2000 should also be made, fully operative in favour of the present added respondents. Thus, the added respondents herein, shall also enjoy the benefit of the said interim order dated 30 May, 2000 until further order. It is made clear, therefore, that the added respondents shall also pay Rs. 15 per 100 cubic feet for extracting brick earth as well like the writ petitioners and the other added respondents, "and this order was further continued with by subsequent order dated 17-2-2005. This order of this Court reveals that the respondents including the present petitioners are to pay of Rs. 15/- per 100 cubic feet for extracting brick earth. Therefore in the context of the judicial order which was passed only a few months before the F. I. R. was lodged it cannot be said that the petitioners committed theft of brick earth or extracted brick earth without permit or royalty.

11. In this view of the matter the instant prosecution is found to be not maintainable.

12. I allow the revisional application and quash the criminal proceeding being G.R. Case No. 240 of 2005 pending before the learned Sub-Divisional Judicial Magistrate, Kalyani (now learned Additional Chief Judicial Magistrate).

13. A copy of the order shall be sent to the learned Additional Chief Judicial Magistrate, Kalyani for information and necessary action.

14. Urgent xerox certified copy, if applied for, shall be provided.