80 CWN 981

Calcutta High Court

Case No: C.R. No"s. 433, 434, 435 and 436 (W) of 1963

Ajit Kumar Gurey and Others		APPELLANT
	Vs	
State of West Bengal and Others		RESPONDENT

Date of Decision: July 8, 1964

Acts Referred:

- Constitution of India, 1950 - Article 265, 366(28)
- Mines and Minerals (Development and Regulation) Act, 1957 - Section 10, 11, 12, 13, 14

Citation: 80 CWN 981

Hon'ble Judges: D. Basu, J

Bench: Single Bench

Judgement

D. Basu, J.
Though the applicants are different, these four applications under Article 226 have been heard together in view of the fact that they involve a common question of law, namely, the interpretation of the scope of Schedule I, read with rule 17 (1) (i) of the West Bengal Minor Minerals Rules, 1959, made under the Mines & Minerals (Regulation & Development) Act, 1957. Before proceeding further, it would be useful to set out the relevant provisions of the aforesaid Act and the Rules.

2. The Mines and Minerals (Regulation and Development) Act, 1957 (hereinafter referred to as "the Act") was passed by Parliament in exercise of its power under Entry 54 of List I of the 7th Schedule to the Constitution, which gives the Union Parliament exclusive legislative power with respect to:

Regulation of mines and mineral development 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.

3. Though this Act provides for the development of all minerals it makes special provisions for ''minor minerals''. While ''minerals'' are defined in section 3(a) as including "all minerals except mineral oils", a species of this genus is defined in clause (e) of section 3 as ''minor minerals'';

Minor minerals means building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed purposes, and any other mineral which the Central Government may, by notification in the Official Gazette, declare to be a minor mineral.

4. A ''mining lease'' is defined in clause (c) of section 3 as--

a lease granted for the purpose of undertaking mining operations, and includes a sub-lease granted for such purpose", and ''mining operations'', under clause (d) means "any operations undertaken for the purpose of winning any mineral.

Section 9 of the Act provides that the holder of a ''mining lease'' must pay, in respect of any mineral removed by him from the leased area, royalty at the rate specified in the Second Schedule of the Act. Section 14, however, says that--

The provisions of sections 4-13(inclusive) shall not apply to prospecting licences and mining leases in respect of minor minerals.

5. The result of section 14 is that the provision as regards royalty, in section 9, is not applicable to mining leases in respect of ''minor minerals''. For minor minerals, separate provisions have been made. Section 15(1), for instance, says--

The State Government may, by notification in the Official Gazette, make rules for regulating the grant of prospecting licences and mining leases in respect of minor minerals and for purposes connected therewith.

6. By virtue of the power conferred by section 15(1) of the Act, as aforesaid, the State of West Bengal has made the West Bengal Minor Minerals Rules, 1959 (vide Notification No. 1844 M.P., dated 13.5.59), (hereinafter referred to as "the Rules"), for--

regulating the grant of mining leases in respect of minor minerals and for purposes connected therewith.

Rule 4(1) of these Rules provides that--

A mining lease shall be granted by the State Government or by an officer authorised by the State Government in this behalf." Rule 17(1) (i) next provides--

Every mining lease shall include and be subject to the following conditions: --

The lessee shall pay royalty en all minerals dispatched from the leased area at such rate as may be fixed by the State Government within the limits given in Schedule I.

7. The relevant portion of Schedule I of the Rules imposes a royalty upon, "ordinary earth for brick-making" and the minimum rate of that royalty is Re 1|- for 1000 bricks manufactured.

8. Rule 25, which has been added by an amendment per Notification No. 4806 M.P. of the 18th November, 1959, provides that--

Any person extracting any minor mineral without a proper lease or license granted under these rules shall be punishable with imprisonment....

9. Rule 26, which was added at the same time, lays down certain exceptions to the requirement of lease or licence. But this Rule is immaterial for the purposes of the cases before me inasmuch as the Petitioners do not claim any exemption under this Rule.

10. The Petitioners are all manufacturers of bricks. They have been served with a notice (per annexure A to the Petition in each case) issued by the Junior Land Reforms Officer, purporting to act under the Rules, calling upon the Petitioners to produce their account books for the purpose of assessment of royalty, as well as calling upon them to obtain a licence. Though in C.R. 433 and 436, the notice speaks only of licence, the counter-affidavit filed on behalf of the Opposite Parties (which include the State of West Bengal) makes it clear that the books of account have been asked for the purpose of assessing the royalty. There are also other materials on the record to show that the Opposite Parties are going to assess the royalty and to take steps for its recovery in the immediate future. For the failure of the Petitioners to obtain licence, the Junior Land Reforms Officer, who issued the notices, has already prosecuted the Petitioners in all the cases excepting C.R. 368 before the Sub-Divisional Magistrate (who is also impleaded as Opposite party), under rule 25. The Petitioners, accordingly, pray for an order commanding the Respondents to forbear from proceeding to demand licence as well as royalty from the Petitioners and also from proceeding with the prosecution of the Petitioners in the cases pending before the Sub-Divisional Magistrate.

11. The points for determination in these cases are--

(a) Whether the earth or other material used by the Petitioner for making bricks falls within the definition of a "minor mineral" in section 3 (e) of the Act.

(b) Whether such material is "ordinary earth" within the meaning of Schedule I of the Rules.

(c) Can licence be demanded from the Petitioners under the Rules ?

(d) Are the Petitioners liable to be prosecuted under the Rules ?

(e) Are the Petitioners liable to pay royalty ? Is rule 17(1) (i), read with Schedule I, ultra vires ?

12. A The first question to be answered is whether the material used by the Petitioners is a "minor mineral" within the definition in section 3(e) of the Act, for, if this question be answered in the negative, the Rules will have no application at all to these cases.

(i) On this point, the case of the Petitioners in CM. 368 (Jagadamba Prasad and others) is the strongest. Their case, in para. 2 of the Petition, is that, for making bricks, they do not excavate any earth from their lands but simply use the silt which is deposited on their lands by the water of the adjoining river which is let in by dams constructed by the Petitioners. This silt, according to the Petitioners, is dried up by the sun and then used for brick making, by the application of human labour and skill. In para. 5 of the counter-affidavit, it is not denied that the channels or dams are constructed by the Petitioners but it is contended that the silt, when dried up by natural heat, becomes "mixed up with the earth of the land", and that, apart from the silt, the Petitioners also use the earth from the land itself for making their bricks. In para. 3 of the affidavit-in-reply, however, it is stated that the silt "remains quite different from the solid earth on which it is deposited" and that it is only that silt which is used by the Petitioners.

13. From these affidavits, it may be taken to have been established for the purposes of these applications that it is not by digging earth from their lands but by taking the silt deposited by river-water that these Petitioners manufacture their bricks. Whether in removing the silt any insignificant portion of the surface soil is necessarily appropriated is immaterial for the purposes of answering the question of law involved, for, the Petitioners cannot be brought within the sweep of the definition in section 3(e) of the Act unless the basic material used by them can be called ''ordinary clay''. There is no provision in the Act for extending the definition to cases where an insignificant or infinitesimal quantity of earth is mixed up with other material which is not ''ordinary clay''. In passing, it may be said that ''silt'' has not been brought within the definition by any declaration of the Central Government as is referred to in the second part of the definition. The sole question for determination, therefore, is whether silt deposited by river, brought on the land artificially by constructing channels and dams, can be called ''ordinary clay''.

14. It cannot be overlooked, in this context, that the word ''clay'' is qualified by the word ''ordinary''. Hence, even though the Dictionary meaning of the word clay may include earth in ail its forms, in the present context, it cannot but mean the earth which forms the subsoil of a piece of land. The reason is that though the definition of ''minor mineral'' is an artificial statutory definition, the words used in the definition cannot reasonably be imputed and meaning which is altogether divorced from the meaning of the words ''mineral'' and ''mining'' for the regulation of which the Act has been enacted, as its Title and Preamble says. Though the definition of the word ''mineral'' in clause (a) of the section is not of specific assistance, a reading of all the clauses in section 3 would make it clear that a mineral is a substance which can be obtained only by a ''mining operation'' as defined in clause (d). Such operation has to be undertaken "for the purpose of winning any mineral". It is clear that the taking of anything from the surface of a land cannot be said to be a mining operation, which obviously involves the digging of the sub-soil in the

case of coal, petroleum and other major minerals. What the definition in clause (e) does is only to extend the list of such well-known minerals to "building stones", "gravel", "ordinary clay" and "ordinary sand other than sand used for prescribed purposes". At any rate in my opinion, unless the earth is removed from the sub-soil by any process, it cannot be called a mining operation, and the removal of silt obtained from river-water by accumulating that water on the surface of the land by artificial devices cannot be held to be "ordinary clay" within the purview of the definition in section 3(e). This view is fortified, by the words "ordinary earth" which are used in Schedule I of the Rules, to which I shall advert presently.

(ii) The case of the Petitioners in C.R. 433, 434 and 436 stands on a different footing.

15. The case of the Petitioners in C.R. 433 (Ajit Kumar) and C.R. 436 (Panchanan & others) is that they make the bricks by excavating earth from their lands, but that since water and other materials have to be mixed up with that earth, the component cannot be called "ordinary clay". This plea cannot be accepted. The question which is relevant for the application of the Act and the Rules made thereunder is whether the Petitioners are taking earth from the sub-soil; if so, they are using a "minor mineral". It is patent that in these cases the Petitioners are taking earth from their sub-soil and that earth would come within the meaning of the words "ordinary clay" in section 3(e) of the Act. Learned Advocate for these Petitioners, of course, relied upon the decision of the Court of Appeal in Re Todd, Birleston & Co., (1903) 1 K.B. 603, (C.A.) where the Earl of Halsbury followed the House of Lords decision in Lord Provost of Glassgow v. Farie, 13 App. Cas. 657, to hold that "clay", forming either the surface or the sub-soil, is not a "mineral" within the meaning of sections 77-79 of the Railway Coauses Consolidation Act, 1845. The text of that statute, given in the foot-note at page 604 of the Report, shows that "clay" was not specifically mentioned as a mineral therein and the question therefore, arose whether it fell under the expression "other minerals" in "any mines of coal, ironstone, slate or other minerals", and the decision could be justified on the ground that clay was not a substance ejusdem generis with coal, ironstone or slate which were specified. Be that as it may, by specifically including "ordinary clay" in the definition of a "minor mineral", the Act before me has obviated the question whether clay could be called a mineral or not; hence, the decision of the English Court of Appeal has no bearing upon the case before me. The only point for determination in this case is whether earth taken from the sub-soil ceases to be "ordinary clay" merely because it is mixed with water or other materials for making bricks, after the earth is excavated. The answer is in the negative, since section 15(1) and the Rules make thereunder are attracted if there is any mining operation with respect to a "minor mineral"; these provisions are, accordingly, attracted as soon as earth is extracted from the sub-soil, unless, of course, the purposes for which it is so extracted are excepted, say, by Rule 26. Brick-making is not so excepted.

16. The case of the Petitioner in C.R. 434 (Narendra Nath) stands midway. In para. 1 of his Petition, he states that he manufactures bricks "from the earth in plot No. 1610...."; but in para. 3A, he states that the bricks are made of the silt deposited by letting in river-water

through channels constructed at his cost, in the same manner as stated in the Petition in C.R. 368. It is evident that para. 3A has been subsequently inserted, without adjusting the statement in para. 1. In para. 7 of the affidavit-in-opposition, it is stated that whatever be the process used by the Petitioner, the earth contained in the bricks made by the Petitioner is 90% and to this there is no effective denial in the affidavit-in-reply. At the hearing also, this case has not been argued on the basis that the bricks are made of silt, without excavating any earth. I cannot therefore, distinguish this case from C.R. 433 and 436.

17. My conclusion is that in all these three cases, 433, 434 and 436, minor mineral, i.e., ''ordinary clay'' is being taken by the Petitioners for making bricks.

18. B. The next point is whether the material taken by the Petitioners is ''ordinary earth'' within the meaning of Schedule I of the Rules.

19. In general, statutory instruments should use the language of the statute, wherever possible, inasmuch as if any expression of wider import is used in the statutory instrument it is liable to be annulled as ultra vires. I cannot, therefore, approve of the use of a different expression, ''ordinary earth''; in the Schedule of the Rules in place of ''ordinary clay'' which is used in the parent statute, and the makers of the Rules may take note of this. At the same time, I do not think it is intended to convey any meaning different from that conveyed by the expression ''ordinary clay'' as used in the statute. Both the words ''clay'' and ''earth'' are interchangeable, according to the Dictionary meaning and it is in that general sense, and probably without being conscious that a different expression was being used in the Schedule, that a change in the phraseology has been adopted.

20. In the result, my conclusion is the same as under the previous point, namely, that the Petitioners in all the cases, except C.R. 368, are taking ''ordinary earth'' from their lands, for making bricks.

21. C. If the foregoing conclusions be correct, it follow that a mining lease can be demanded under rule 4, read with rule 25 of the Rules, from all the petitioners save Jagadamba Prasad and others, who are the Petitioners in CR. 368.

22. I must point out that there was a lacuna in the Rules as originally framed in May, 1959. The obligation to take a licence or lease comes from a prohibition by the Legislature not to undertake any mining operations in respect of the minerals, without obtaining a lease or licence. That obligation is laid down by section 4 of the Act. But that provision, as has been pointed out, at the outset, does not apply to ''minor minerals'', by reason of section 14. The entire regulation of ''prospecting licences and mining leases'' in respect of minor minerals has been relegated, by rule 15(1), to the State Governments rule-making powers. But when the Rules were originally made in may, 1959 the need for specific rule of the nature of section 4 does not appear to have been appreciated. The lacuna has, however, been filled up by inserting rule 2.5 by the Notification of the 18th

November, 1959, referred to earlier. This Rule says that--

any person extracting any minor mineral without a proper lease or licence granted under these rules... shall be punishable....

23. This Rule combines the prohibition as well as the penalty. After the introduction of rule 25, therefore, anybody extracting a ''minor mineral'' is bound, under pain of penalty, to obtain a ''mining lease'' from the State Government, under rule 4(1), by making an application in that behalf under sub-rule (2) of that Rule. The demand for a ''licence'' in the notice in Ann. A is technically not correct; it should be a ''mining lease''. The word ''licence'' is used in the Act in connection with a ''prospecting licence.'' Except in rule 28, I do not find the use of the word ''licence'' in any of the other provision of the Rules, simply because, as the Preamble of the Rules makes it clear, the Rules have been made to regulate ''the grant of mining leases'' only, even though section 15(1) authorises the State Government to make rules regulating the grant of prospecting licences as well. The careless drafting of Rule 25, regardless of this limited scope of the Rules, may have led the officer who issued the notice to commit similar carelessness.

24. In my opinion, however, the State Government may legitimately call upon the Petitioners in all the cases save C.R. 368 to apply for ''mining leases''.

25. D. It follows from the above that the Petitioners are liable for prosecution under rule 25 if they, on demand, fail to take mining leases. There is no question of obtaining any ''licence'' so long as rules regulating the grant of prospecting licences are not framed by the State Government and the Petitioners undertake ''prospecting'' within the meaning of such Rules. It is a basic principle of criminal proceedings that a person may be prosecuted only upon a definite and intelligible charge and for the commission of a certain offence. In the present case, by demanding a licence, the Petitioners have been misled and they have since been demanding to know from the Respondents under what provision of the law they are bound to obtain a ''licence''. Though the records relating to the criminal proceedings are not before me, the affidavits on either side lead to the inference that the Petitioners have been prosecuted for default in obtaining ''licence'' as demanded per Ann. A., and not for failure to obtain a ''mining lease''.

26. In these circumstances, the Petitioners are entitled to an order in the nature of Prohibition, restraining the Respondents from proceeding with the pending criminal cases but the Respondents shall be at liberty to institute fresh prosecutions after demanding a mining lease, except in the case of the Petitioners in C.R. 368.

27. E. The question of liability of the Petitioners to pay royalty as required by the Rules is the most important question in these cases.

28. It is settled in England, since the days of the Magna Carta, affirmed by the Bill of Rights, that money cannot be raised by taxation without the grant of Parliament. Nothing short of an Act of Parliament can be a valid authority for making an impost Bowles v.

Bank of England, (1913) 1 Ch. 57. A tax or any pecuniary liability of the nature thereof cannot, accordingly, be imposed by a subordinate legislation or statutory instrument, unless the statute makes the imposition expressly Brocklebank v. King, (1925) 1 K.B. 52, and that even where the Legislature confers the Rule-making authority with a blanket power to make such rules "as may be necessary or expedient", it cannot be construed as a power to impose a tax or other pecuniary liability Commrs. v. Cure & Iceley, (1961) 3 W.L.R. 798.

29. The above principles have been given a constitutional footing in India, by Article 265 of the Constitution, which says:

No tax shall be levied or collected except by authority of law.

30. It has been laid down authorititatively, that fee word "law", in this context, means an Act of a competent Legislature State of Kerala and Others Vs. P.J. Joseph, so that if any instrument of subordinate legislation imposes a tax without the specific authority of an Act of the appropriate Legislature, such, imposition shall be Firm Gulam Hussain Haji Yakub and Sons Vs. State of Rajasthan, . Looked at from another standpoint, taxation is regarded as an essential function of the Legislature which cannot be delegated and the essence of this function is the imposition of the Liability by the charging section of the Act cf. Rajnarain Singh Vs. The Chairman, Patna Administration Committee, Patna and Another, .

31. The next question whether the impugned "royalty" is a tax within the meaning of Article 265 is answered by Article 366 (28) of the Constitution which says that "taxation; in the Constitution, unless the context otherwise requires--

includes the imposition of any tax or impost, whether general or local or special....

32. The word "impost" is of a wide amplitude so as to include any compulsory levy imposed by law, without the consent of the assessee and has been held to include a "toll" Mrs. K.K. Wadhwani Vs. State of Rajasthan and Another, and even a compulsory contribution such as that payable by an employer under the Employees" State Insurance Act, 1948 Anand Kumar Bindal Vs. Employees" State Insurance Corporation and Others, .

33. I have no doubt that the royalty which is recoverable from the lessee of a mining lease, under rule 17(1) (i) of the Rules before me is an "impost", compulsorily levied by the State Government on all persons liable to obtain a mining lease with respect to minor minerals and would, accordingly, come within the meaning of a "tax" under Article 265. The question is whether the Act has authorised this imposition specifically. The answer is clearly in the negative. For, section 9, which authorises the imposition of a royalty from the holder of a mining lease, does not extend to mining leases relating to "minor minerals", by reason of section 14, which has been noticed at the outset.

34. Section 15(1) which empowers the State Government to make rules "for regulating the grant of prospecting licences and mining leases in respect of minor minerals", says nothing about the imposition of a royalty and there is nothing else in the Act which provides that the holder of a mining lease shall be liable to pay a royalty. Without more, it must be held that rule 17(1) (i), together with Schedule I, is not only ultra vires because of want of statutory authority but also unconstitutional, on account of contravention of Article 265, and the Petitioners are not liable to pay it, so long as valid legislative authority for the imposition is not available to the State Government.

35. A new plea was urged on behalf of the Respondents at the hearing that the royalty is being demanded by the State not as the Sovereign by way of a tax, but by virtue of its proprietary rights over the sub-soil which has vested in the State of West Bengal, by virtue of section 5 (a) (i) of the Estates Acquisition Act, 1953. It is, of course, admitted in the Petitions that the rights of the intermediaries under which the Petitioners used to hold the disputed lands have vested in the State and that the Petitioners have come to hold the lands as tenants directly under the State, u/s 5(c) of the Act. Nevertheless, this plea is not available to the Respondents in these cases inasmuch as section 5(c) says that the persons who become tenants direct under the State under that provision--

shall hold...as if the State had been the intermediary, and on the same terms and conditions as immediately before the date of vesting.

36. In order, therefore, to make the petitioners liable to pay royalty by virtue of the above provision of the West Bengal Estates Acquisition Act. 1953, the Respondents must establish that the Petitioners were liable to pay any royalty to the erstwhile intermediaries under whom they used to hold prior to the coming into operation of this Act, lor taking earth from the lands held by them. Even if such liability were established, the State would have been able to recover only at the rates which the agreement between the Petitioners and their erstwhile landlords provided and not according to the Schedule prescribed by the Rules under assumed statutory authority. No such case of proprietary right to demand royalty has, however, been made in the counter-affidavits. This new plea involves mixed questions of fact and law, and cannot be entertained in the face of the pleading of the Respondents.

37. As the record stands, the Respondents have all along relied upon the Rules in making their demand for royalty, and have never claimed to recover royalty because the sub-soil has vested in the State under the West Bengal Estates Acquisition Act, 1953. For the reasons given by me, the impugned demand must be held to be illegal and unconstitutional. In the result, all these applications shall succeed and the Rules must be made absolute on the following terms:

Let appropriate writs be issued restraining the Respondents from proceeding with their demand against the Petitioners for licence or payment of royalty in pursuance of the notices per Ann. A. In C.R. 433, 434 and 436, there will be a further order restraining the

Respondents from proceeding with the criminal cases pending against the Petitioners before the Respondent Sub-Divisional Magistrate, being case Nos. 176 of 1963; 120C of 1963; 175C of 1963; but the Respondents in these three cases shall be at liberty to make a fresh demand for a mining lease and, in default thereof, institute fresh prosecution against the Petitioners of these three cases.

In view of the nature of the questions involved, there will be no order as to costs.