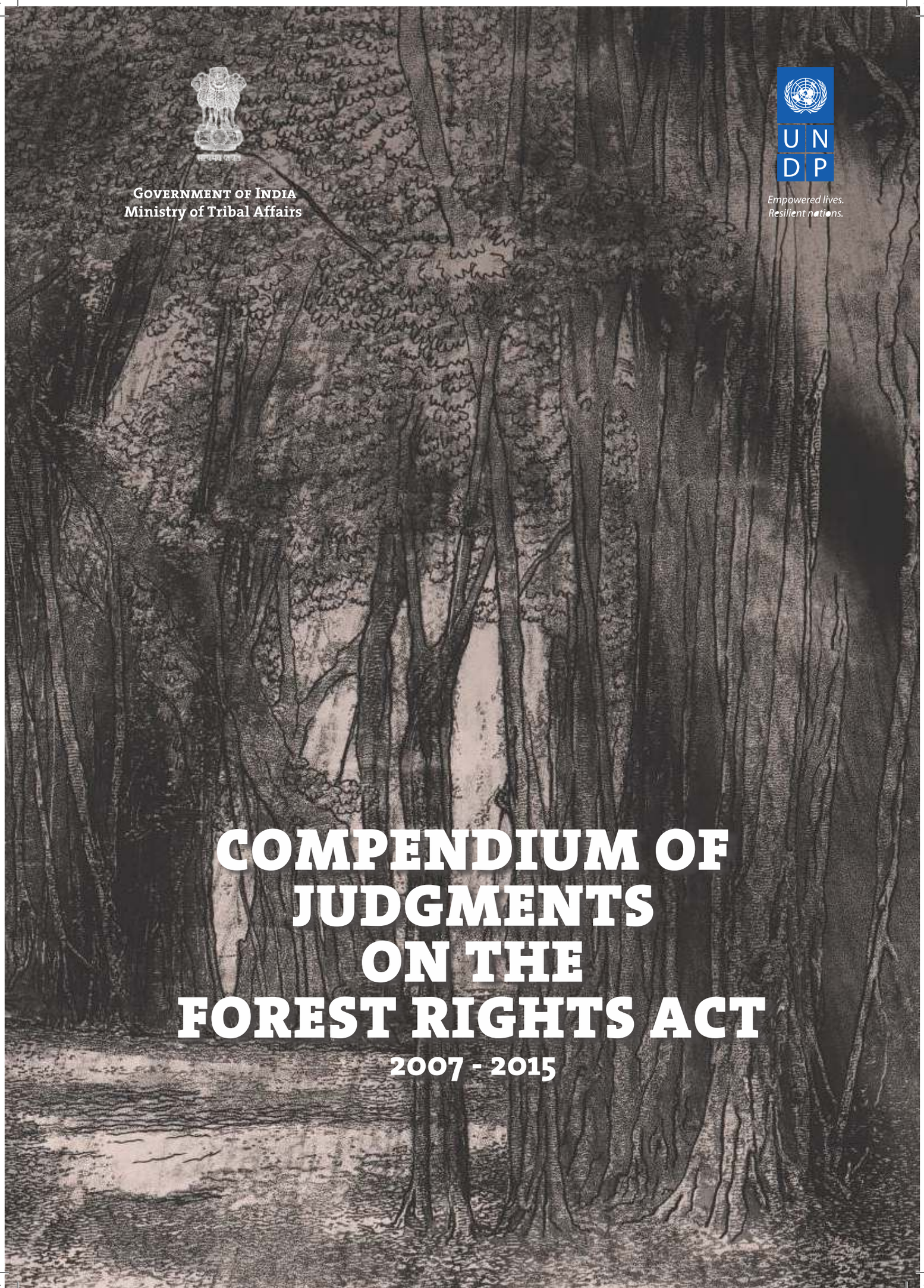

Government of India
Ministry of Tribal Affairs

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COMPENDIUM OF JUDGMENTS ON THE FOREST RIGHTS ACT

2007 - 2015

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EDITED BY

SHOMONA KHANNA

December, 2015

This publication has been produced with support from the United Nations Development Programme.

NOTE

The present compendium contains judgments and orders as found in a variety open source websites and the compilations prepared by the editor up to 24.11.2015. Therefore, judgments and orders which have been reported and/or passed subsequently have not been included. While every effort has been made to ensure accuracy of the legal information provided in this publication, it is advised that before using the same for litigation or advocacy purposes, the content be confirmed from the original order/ judgment.

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JOINT SECRETARY

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PREFACE

At the time the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (hereafter FRA) was enacted by Parliament in December 2006, and subsequently brought into force on 31.12.2007, there were only a handful of court decisions relating to the recognition of forest rights of forest dwelling communities. As is well known, tribal and forest dwelling communities are among the most marginalised communities in India, and rarely have the wherewithal to assert their rights before Courts of law.

The development of jurisprudence in the area of forest rights has therefore been slow. Further prior to the enactment of the FRA, the forest law regime treated such forest dwellers as "encroachers" and therefore criminals in the eyes of the law.

The FRA has brought a paradigm shift in the forest law which had existed for almost one and half centuries, bringing the people who were "offenders", into their rightful place as right holders. From "encroachers" who needed to be "evicted" the forest dwellers have been recognised as "integral to the very survival and sustainability of the forest ecosystem" The chasm which separated forest dwelling communities from such rightful place has been recognised as a "historical injustice" which the FRA sets out to correct.

This compendium of judgments is an attempt to bring to public domain, the ground work for the development of jurisprudence in this area, which is still at a nascent stage. For implementation of FRA to be effective and be realized in letter and spirit and also based on the request from the State Governments, the need for compilation of various enabling judgments of Hon'ble Supreme Court and High courts and lower courts under FRA was felt and the same was commissioned by the Ministry of Tribal Affairs as part of the MoTA-UNDP project

The compilation also attempts to provide brief analysis of each of the case with a view to share the directions on implementation and positive rulings which can be used by all stake holders involved in the implementation of the Act. This compendium is designed to give exposure to the latest position in interpretation of the provisions of the Act and is expected to serve as a ready reference for judges, public prosecutors, legal practitioners and other stakeholders.

The Judgments which are compiled here are those which touch some fundamental aspects, like directions of the Supreme Court and High Court for implementation of the Act, Constitutional validity of the Act and which touch upon issues, though factual or procedural, but frequently raised or provide clarity on the spirit, object and reasons of the Act.

Contd.

The case law compiled in this book fare selective and representative in nature and an attempt is made to cover most of the issues involved in interpretation and implementation of the Act by the judiciary. The comments prefixing the case law are only illustrative and explanatory in nature. They are not to be read in any other way.

FRA acknowledges the fact that people, forests, environments are part of the larger ecosystems. It is hoped that this approach of the FRA, where the silos within which the law, the justice system and the statutes operate are overridden in the interests of arriving at decisions which truly render justice in a holistic manner, will be carried forward as the jurisprudence around this law develops and evolves over the coming years.

I would like to congratulate UNDP for supporting the process of compilation of the judgments on FRA, the first of its kind and would especially like to thank Ms Shomona Khanna for her relentless effort in creating this document completely from scratch and searching through the archives of the Ministry. I would also acknowledge the support provided by the FRA division of my Ministry to compile this document.

Ashok Pai

JACO CILLIERS

COUNTRY DIRECTOR

UNDP India

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FOREWORD

Legal empowerment is a process of systemic change through which the poor and excluded are able to use the law, the legal system and legal services to protect and advance their rights and interests. It is fundamental to the progress of any society.

India's Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, or the Forest Rights Act is a landmark legislation which recognizes the rights of forest dwelling communities to live in the forest, and empowers them to protect, manage and govern forest resources.

To ensure that the provisions of the Act reach every corner of India, it is important to share as widely as possible, information on how the Act works, and how it can empower millions of forest dwelling communities in the country. Developed in partnership with the Ministry of Tribal Affairs, this publication compiles for the first time, enabling and historic rulings of various courts of law, that have strengthened the Act. In doing so, it aims to be a useful and practical guide for executive authorities engaged in protecting the rights of these vulnerable communities.

I take this opportunity to congratulate the Ministry of Tribal Affairs for this endeavour which I hope will prove a useful and practical resource which will enrich the ongoing discourse on the Forest Rights Act and the developing jurisprudence in this important area of law.

Jaco Cilliers
Country Director

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Acknowledgements

Lawyers in particular, and legal professionals in general, are hoarders by nature. We store information and ideas and arguments and judgments, squirreling them away in our varied filing systems for future use and benefit. This compendium began as just such a hoarding exercise, but within a few short weeks it was painfully apparent that this was valuable information which needed to be shared widely and used widely. As a perusal of the judgments in this compendium will reveal, where lawyers and judicial officers have had ready access to decisions of other constitutional courts, they have been greatly benefitted and enabled to arrive at just decisions. Where such material was not readily available, the process was arduous and complicated.

It is with great humility, therefore, that I acknowledge the efforts of those legal professionals who have stepped into the unknown and taken the plunge by bringing cases to court which have resulted in the judgments comprising this compendium. To these intrepid explorers, I am truly thankful.

The guidance and leadership of Mr. Ashok Pai, Joint Secretary Ministry of Tribal Affairs, and National Project Director of the UNDP-MoTA Joint Project on Forest Rights Act, cannot be articulated in words. It has been a privilege to be challenged and encouraged at the same time by him.

Many thanks are also due to the officers in the FRA division of MoTA, who have suffered stoically as I pulled out file after dusty file to create this compilation.

I must also acknowledge the vision and encouragement of Alka Narang, Sushil Chaudhary and Sreetama Guptabhaya of the UNDP, who have never lost faith in this project, even at times when I was ready to do so. My sincere thanks to Sudeep Chaudhuri for the beautiful cover, and the painstaking attention to detail with the design and layout which is user-friendly and aesthetic at the same time.

Finally, I must thank my Research Associate, Tusharika Mattoo, for her unflappable equanimity and unflagging enthusiasm for this ‘project’, which at one time had us overwhelmed with its enormity. This compendium would not have been possible without her.

If there are errors and mistakes, the burden for these is entirely mine.

NEW DELHI
23.12.2015

SHOMONA KHANNA
ADVOCATE

SUPREME COURT OF INDIA

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27. **Ajay Dubey vs. National Tiger Conservation Authority & Ors.**
2012 SCC OnLine SC 875 | 16.10.2012

30. **Orissa Mining Corporation vs. Ministry of Environment and Forests 2012 SCC Online 875 & Ors.**
(2013) 6 SCC 476 | 18.04.2013

Centre for Environmental Law, World Wide Fund India vs. Union of India & Ors.

WRIT PETITION (CIVIL) NO. 337 OF 1995
SUPREME COURT OF INDIA CITATION
11.8.2009 (INTERIM ORDER)
CORAM: K.G. BALAKRISHNAN, C.J.I. AND P. SATHASIVAM AND DR. B.S. CHAUHAN, JJ.
CITATION: (2011) 12 SCC 757

SUMMARY

The Centre for Environmental Law, World Wide Fund-India vs. Union of India & Ors. **case, or 'the WWF case' as it is better known, has been treated as a continuing mandamus by the Supreme Court of India since it was first filed twenty years ago in 1995. A large number of orders of far-reaching importance have been passed in this case.[1]**

A large number of applications seeking different kinds of directions were posted before the Court on this date. One such application being IA No. 126-27, probably filed by the project proponent, sought the permission of the Court for diversion for non-forest purpose of 17.78 hectares of land within the Kedarnath Musk Deer Wildlife Sanctuary in Uttarakhand. The Court observed that the National Board for Wildlife had recommended the permission be granted. While accepting this recommendation, the Court included an additional condition that the Chief Wildlife Warden shall ensure that the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) are also complied with (see paras 13 to 15 below).

EDITOR'S NOTE

On numerous occasions it has been argued that the FRA runs counter to various orders and directions passed by the Supreme Court in this and the *Godavarman*

[1] For an overview of the WWF case, see Shomona Khanna, *Exclude and Protect: A Report on the WWF Case on Wildlife Conservation in the Supreme Court of India*, SRUTI, New Delhi (2008).

[2] *T.N. Godavarman Thirumalpad vs. Union of India & Ors.* Writ Petition (Civil) No. 202 of 1995, pending.

***case*[2], and for this reason cannot be implemented. This argument is clearly incorrect, as the Supreme Court itself has proceeded in this particular decision, as well as in other orders extracted elsewhere in this compendium, on the basis that the provisions of the FRA should be implemented.**

ORDER

I.A. Nos. 2 & 92:

1. N.B.W.L. to file its report/reply within eight weeks.

I.A. No. 37:

2. It is alleged that the Uttaranchal Jal Vidyut Nigam Ltd. has constructed a power house within the boundary of Askot Wildlife sanctuary. We are told that the National Board for Wildlife has not taken any steps so far in this regard. Learned counsel appearing for the State of Uttaranchal contends that the boundary of the sanctuary has not yet been finally decided. The State shall file a fresh report regarding the determination of the boundary of the sanctuary. List after eight weeks.

I.A.No. 52:

3. It is stated that about 1390 families are staying within the boundary of Rajaji National Park. There was a scheme to rehabilitate them in another area for which the government has diverted 1123 hectares of forest land earmarked by the State Government. But so far these families have not yet been shifted to these areas. The State Government is directed to file an affidavit as to what steps have been taken in this regard also explaining the nature of the land which is kept separate for the intended purpose. List after eight weeks.

I.A.No. 95:

4. It is alleged that the Jal Vidhyut Nigam Ltd. and the Irrigation Department of the State have set up certain illegal constructions including shops in the Rajaji National Park but the State has not taken any steps in this regard. Learned counsel for the State submits that it had already issued notices to Jal Vidyhut Nigam Ltd. to remove the unauthorised constructions, including the shops. State shall file an affidavit to this effect within eight weeks.

I.A.Nos. 54, 67 & 76:

5. Adjourned by eight weeks.

I.A.Nos. 83 & 84:

6. Report of F.A.C. is awaited. Adjourned by eight weeks.

I.A.No. 100:

7. N.B.W.L. to file its report regarding the same within eight weeks.

I.A.Nos. 104-105:

8. Adjourned by eight weeks.

I.A.No. 106:

9. When the matter was called nobody was present on behalf of State of Madhya Pradesh. Even on the last occasion also no counsel appeared on behalf of the State. The I.A. is rejected for non-prosecution.

I.A.Nos. 114-115:

10. The National Hydro-Electric Power Corpn. Ltd. seeks to construct Pakal Dul Hydro Electric Project for which 1163.898 hectares of land out of which 386.186 land is within the Kishtwar National Park area. National Board for Wild Life has examined the same and has filed a report clearing this project subject to certain conditions. These conditions are acceptable to N.B.W.L. Subject to fulfilment of the conditions imposed by N.B.W.L. and on payment of Rs. 236 crores for conservation purpose, the project is cleared as regards 386.186 hectares. So far as 311.042 hectares of forest land is concerned, the matter is referred to C.E.C. Post these applications before the Forest Bench.

I.A.Nos. 116 to 118 & 119 to 121

11. State Government seeks time to file its response. Issue notice to National Board for Wildlife. The State Government as also the Board to file their response for the proposed project. List after eight weeks.

I.A.Nos. 122-123

12. None appeared. I.As. are rejected for non-prosecution.

I.A.Nos. 126-127

13. The Lancho Hydro Energies Pvt. Ltd. seeks permission to divert 17.78 ha. of forest land, which is a part of Kedarnath Musk Deer Wildlife Sanctuary, Uttarakhand. The National Board for Wildlife (NBWL) has considered the Project and subject to fulfilment of certain conditions it has recommended that the Project could be cleared. We accept the same, subject to conditions laid down by National Board for Wildlife. The Project is cleared accordingly.

14. The Chief Wildlife Warden to monitor the Project and to see whether all the conditions are complied with and the provisions of the Scheduled Tribes and other Forest Dwellers (Recognition of Rights) Acts, 2006, be also complied with.

15. I.A.s are disposed of accordingly.

I.A.Nos. 128-129:

16. About 180.79 ha. forest land earmarked for construction of Adwa-Meja link canal is part of Ban Sugar Canal Project. The project was cleared subject to fulfilment of certain conditions. One of the conditions is relocation of 10 villages. Now, the State Government submits that villagers are not willing to move out of the villages and it is difficult to comply the directions issued by this Court. The matter is referred to NBWL as to what steps could be taken in this regard. The National Board for Wildlife to file response/ report. List after eight weeks.

I.A.Nos. 130-131:

17. Issue notice to National Board for Wildlife and to the State of Himachal Pradesh.

I.A.No. 134:

18. The Fambonglho Wildlife Sanctuary was originally notified as 51.76 sq. km. Another 100 hectares of land was added to this Sanctuary. But later after carrying rationalisation of boundaries it was found that 58.37 hectares are to be excluded.

19. This I.A. has been filed for appropriate directions regarding rationalization of the boundaries. This is cleared subject to conditions laid down by the National Board for Wildlife. I.A is allowed accordingly.

Court Masters

Centre for Environmental Law, World Wide Fund India vs. Union of India & Ors.

IA NO. 2637 IN WP(C) 202 OF 1995
SUPREME COURT OF INDIA
15.07.2011
CORAM: K.S. PANICKER RADHAKRISHNA AND CHANDRAMAULI KR. PRASAD, JJ.

SUMMARY

As far back as 14.2.2000, the Supreme Court in I.A. No. 548 in WP 202 of 1995 (unreported) had passed the following order:

> **"In the meantime, we restrain respondents No. 2 to 32[3] from ordering the removal of dead, diseased, dying or wind-fallen trees, drift wood and grasses, etc. from any National Park, Game Sanctuary or forest. If any order to this effect has already been passed by any of the respondent-States, the operation of the same shall stand immediately stayed."**

Since the order was interim in nature, applications for modification of the order or exemption from its operation were filed by a variety of stakeholders from time to time, and orders granting relief were passed by the Court.

A similar Intervention Application No. 2637 in WP 202/95 was filed by tribals from Kerala seeking modification of the order dated 14.2.2000, with particular reference to the extraction of shikakai, honey and wild turmeric from a wildlife sanctuary.

When the matter came up for hearing before the Forest Bench, the Amicus Curiae (friend of the Court) argued that under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA), there is a vested right to extract minor forest produce or MFP, and therefore forest dwellers are not required to approach this Court for permission every time.

Accordingly, the Court passed an order granting a specific as well as general relief, and further directed that the tribal applicants would have access to the State Legal

[3] Respondent No. 2 to 32 were the State Governments and Union Territories.

Services Authority if they so desire.

EDITOR'S NOTE

This order is significant as it demonstrates the approach of the Forest Bench with regard to harmonious construction of the various orders passed by it in the past with the Forest Rights Act enacted in 2006.

ORDER

XXX

Item No.315 (I.A. No. 2637 of 2009)

1. Application is disposed of giving liberty to the applicants to approach the Notified Authority under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and it is for the Notified Authority to consider their applications and to take appropriate decisions in accordance with law.

2. Petitioners, if so advised, may also approach the State Legal Services Authority for legal assistance.

3. Application is disposed of accordingly.

Court Masters

Inavi Village vs. State of Nagaland & Ors.

SLP (C) NO. 36424 OF 2011
SUPREME COURT OF INDIA
23.03.2012
CORAM: R.M. LODHA AND H.L. GOKHALE, JJ.

SUMMARY

The villagers of Inavi Village preferred an appeal against the judgment dt. 24.8.2011 of the Division Bench of the Gauhati High Court (see elsewhere in this compendium). As is apparent from the order passed in these proceedings, the Supreme Court was not inclined to interfere in the substantive issues arising in the case.

However, the Court did grant the villagers a modicum of relief. It recorded the submission of the senior counsel at the bar representing the petitioners that they would not re-enter the Intangki National Park, and would file a written undertaking in this behalf.

The Court also recorded the submission the Advocate General for the State of Nagaland that the State shall not enforce the order of the High Court for recovery of the compensation from the petitioner.

Finally, the Court acknowledged the submission of the petitioners that they were in dire need of rehabilitation, and directed that if a representation in this regard is made by the petitioner--village, the State government will consider the same in accordance with law.

EDITOR'S NOTE

Since the Supreme Court expressed no opinion either way on the decision of the High Court, the observations made in the impugned judgment regarding application of the Forest Rights Act may not have the force of precedent, and in any event, would not have any bearing outside of the Gauhati High Court.

ORDER

1. Mr. Vikas Singh, learned senior counsel for the petitioner submits that all the villagers of the petitioner village assure this Court that they would not re-enter the Intangki National Park. He submits that a written undertaking on their behalf shall be filed in the Registry within two weeks from today.

2. In view of the above statement of the learned senior counsel for the petitioner, Mr. K.N. Balgopal, learned Advocate General for the State of Nagaland submits that the State shall not enforce the order of the High Court for recovery of the compensation from the petitioner.

3. We accept the above statements of the learned senior counsel.

4. Mr. Vikas Singh, learned senior counsel further submits that the villagers who have been ousted from Intangki National Park, are without any shelter and they intend to make a representation to the State Government for their rehabilitation/relocation.

5. We observe that if such representation is made by the villagers of the petitioner--village, the respondents shall consider the same in accordance with law.

6. With the above observations, the special leave petition and the I.A. (for impleadment) stand disposed of.

Court Masters

Ajay Dubey vs. National Tiger Conservation Authority & Ors.

SLP(C) NO. 21339 OF 2011
SUPREME COURT OF INDIA
16.10.2012 (INTERIM ORDER)
CORAM: A.K. PATNAIK AND SWATANTER KUMAR, JJ.
CITATION: 2012 SCC ONLINE SC 875

SUMMARY

A writ petition was filed before the Jabalpur Bench of the Madhya Pradesh High Court seeking directions for control of tourism related activities within the Core and Buffer Areas of the Tiger Reserves in the State. When the High Court did not pass any directions as sought, the petitioner filed a special leave petition before the Supreme Court. When the matter came up for hearing, the Supreme Court was informed by counsel that the failure to notify core and buffer areas around tiger reserves is a widespread problem across the country, and not just in Madhya Pradesh. Taking note of the serious decline in tiger population in the country, the Supreme Court vide order dt. 3.4.2012 directed-

> **"all the concerned States to notify the Buffer/ Peripheral area as required under the Wildlife (Protection) Act, with regard to tiger reserve falling in the States as expeditiously as possible, in any event, within three months from today."[4]**

At a further hearing on 24.7.2012, the Court found that its directions had not been complied with, and directed:

> **"(s)ubject to payment of Rs. 10,000/- (Rupees Ten Thousand only), as cost, by each State, we grant final opportunity for issuing notification and placing the same on record with affidavits explaining the circumstances for delay."[5]**

Some of the States, in purported compliance of the Supreme Court's directives, issued such orders without complying with the provisions of the Wildlife (Protection) Act, 1972 (1972 Act) and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) relating to prior informed consent of forest dwellers before declaration of such inviolate areas for wildlife protection.

[4] Order dt. 3.4.2012 in SLP(C) No. 21339 of 2011, Supreme Court of India.

[5] Order dt. 24.7.2012 in SLP(C) No. 21339 of 2011, Supreme Court of India.

A plethora of applications for intervention and modification of the aforesaid interim orders were filed before the Court, including by some Scheduled Tribes and other traditional forest dwellers. After hearing all the parties, the Court modified its previous orders through a detailed order dated 16.10.2012. In the said order, the Court directed that henceforth tourism activities in and around Tiger Reserves shall be in strict compliance with the 'Guidelines for Tourism in and around Tiger Reserves' framed by the National Tiger Conservation Authority on 15th October 2012, even as it left it open to any party to challenge the said Guidelines, if they are aggrieved by them, before the appropriate forum.

Directions were issued to the State Governments to prepare their Tiger Conservation Plans in accordance with the provisions of Section 38(V) of the 1972 Act.

EDITOR'S NOTE

The significance of this order lies not so much in its content as in the fact that after the initial interim orders were passed, several applications were moved before the Court seeking to bring to its notice the enabling provisions of the FRA. One immediate consequence of this was that the Draft Guidelines prepared by the Ministry of Environment and Forests (MoEF) and placed before the Court stated at the outset that the rights of forest dwellers as provided in the FRA would be protected.

It may be noted that the main petition, along with a batch of other connected writ petitions, is pending adjudication before the Supreme Court at the time of writing.

ORDER

1. Heard learned counsel for the parties.

2. On 24th July, 2012, this Court passed an order that till the final directions are issued by this Court with reference to the Guidelines submitted by the National Tiger Conservation Authority of India , core zone or the core areas in the Tiger Reserved Areas will not be used for tourism.

3. The National Tiger Conservation Authority [for short 'the Authority'] has by Notification dated 15th October, 2012 notified the Comprehensive Guidelines for Tiger Conservation and Tourism. Part B of these Guidelines are titled: "Guidelines for Tourism in and around Tiger Reserves". The Guidelines for Tourism in and around the Tiger Reserves have been framed by virtue of the powers of the Authority under Section 38(O)(1)(c) of the Wild Life Protection Act, 1972 [for short 'the Act'] which empowers the Authority to lay down normative standards for tourism activities in buffer and core area of Tiger Reserves.

4. Now that the Guidelines for Tourism in and around the Tiger Reserves have been notified by the Authority, we modify the aforesaid interim order dated 24th July, 2012 and direct that henceforth tourism activities will be strictly in accordance with the Guidelines for Tourism in and around Tiger Reserves notified in Part B of the aforesaid Notification dated 15th October, 2012. All the concerned authorities will ensure that the requirements in the aforesaid Guidelines for Tourism in and around the Tiger Reserves are complied with before tourism activities recommence.

5. We make it clear that we have not declared the Notification dated 15th October, 2012 either intra vires or ultra vires and if any party is aggrieved by the Notification dated 15th October, 2012 of the Authority it will be open to the aggrieved party to challenge the same before the appropriate forum.

6. It has been brought to our notice by the learned Additional Solicitor General that under sub-section (3) of Section 38(v) of the Act, the State Government is required to prepare a Tiger Conservation Plan. We direct that the respective State Governments will prepare the Tiger Conservation Plan within six months from today and submit the same to the National Tiger Conservation Authority for approval in accordance with Section 38(O)(1)(a) of the Act.

7. While passing this order modifying the earlier interim order, we have taken note of the submission of the learned Additional Solicitor General that tourism activities may recommence strictly in accordance with the Guidelines for Tourism in Part B as indicated above. All the applications for vacating or modification of interim order dated 24th July, 2012 stand disposed of.

8. The matters are released from part-heard.

9. List the Special Leave Petition along with other pending interlocutory applications and Writ Petition (C) Nos. 387 of 2012 and 438 of 2012 on 27th November, 2012.

Court Masters

Orissa Mining Corporation vs. Ministry of Environment and Forests & Ors.

WP (C) 180 OF 2011
SUPREME COURT OF INDIA
18.04.2013
CORAM: AFTAB ALAM, K.S. RADHAKRISHNAN AND RANJAN GOGOI, JJ.
CITATION: (2013) 6 SCC 476

SUMMARY

BRIEF FACTS

The writ petition (originally filed in the form of an Intervention Application in the *Godavarman case*[6]) was filed by the Orissa Mining Corporation (OMC) for quashing of the order dated 24.8.2010 passed by the Ministry of Environment and Forests (MoEF) rejecting Stage-II forest clearance for diversion of 660.749 hectares of forest land for mining of bauxite ore in the Niyamgiri Hills, Lanjigarh, Orissa.

The Petitioner OMC, which was the holder of the mining lease, challenged the action of the MoEF on the ground that the previous judgments[7] of the Supreme Court in the same case were binding upon it, and that it was not open to the Government of India to reject the forest clearance. In particular, the Petitioner challenged the finding of the MoEF that the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) were violated in any way. The project proponent, M/s Sterlite (a subsidiary of Vedanta Resources) and the State of Orissa were joined as party respondents, but supported the Petitioner throughout.

[6] *T.N. Godavarman Thirumalpad vs. Union of India & Ors.* WP (C) No. 202 of 1995, Supreme Court of India. Pending.

7 Judgments dt. 23.11.2007 and 8.8.2008 in *T.N. Godavarman Thirumalpad vs. Union of India & Ors.* reported in (2008) 2 SCC 222 and (2008) 9 SCC 711 respectively.

Arguments on behalf of the MoEF were addressed by the Solicitor General for India. Relying upon the reports of the two expert committees set up by the MoEF to examine the issue prior to taking its decision, the constitutional provisions relating to Fifth Schedule areas, and the provisions of the FRA, he argued that the MoEF was within its powers in arriving at an informed decision that the forest clearance should be rejected, even subsequent to the previous judgments of the Supreme Court allowing the project.

FINDINGS OF COURT

The Court examined the constitutional provisions relating to special status to Scheduled Tribes and Scheduled Areas under Article 244 and the Fifth Schedule, and a plethora of judicial precedents on the issue. It examined the provisions of the Panchayats (Extension to Scheduled Areas) Act, 2006 and the FRA with regard to the powers of the village level Gram Sabha in protection and preservation of the customary and cultural rights of the tribals and other traditional forest dwellers (OTFDs), including their religious and cultural rights which are also recognised as fundamental rights under Articles 25 and 26 of the Constitution. Customary and cultural rights of tribal people are also the subject of a number of international conventions and declarations, the Court observed.

The Court noted that in the Statement of Objects and Reasons of the FRA it is stated that forest dwelling people and forests are inseparable, and that forests have the best chance to survive if communities participate in their conservation and regeneration measures. Taking special note of the centrality of the Gram Sabha, the Court was of the view that the Gram Sabha has a significant role to play in safeguarding the customary and religious rights of the forest dwellers, and in particular the community forest resource rights.

In the present case, these important provisions of the law regarding the role of the Gram Sabha in conservation of the community forest resource rights had not been complied with.

The Court, accordingly, directed that these issues be placed before the Gram Sabhas concerned in a specially convened meeting for this purpose, which will be attended and certified by a judicial officer of the rank of District Judge appointed for this purpose by the Chief Justice of the High Court.

These decisions of the Gram Sabhas will be forwarded to the MoEF, which shall take a final decision on the grant of Stage II forest clearance for the bauxite mining project in the light of these decisions. A time frame for completing this exercise was also laid down.

EDITOR'S NOTE

Pursuant to this judgment, the State government sought extension of time for completion of the process. Eventually, 12 Gram Sabhas comprising of Dongaria Kondhs and Kutia Kondhs held meetings where resolutions were passed unanimously in favour of preservation of the Niyamgiri hills, and against the bauxite mining project. Thereafter, the MoEF issued a final order dt. 8.1.2014 rejecting the grant of forest clearance to the said project.

Being a decision rendered by a three judges bench of the Supreme Court, this judgment constitutes binding judicial precedent across the country under Article 141 of the Constitution of India.

JUDGMENT

(The judgment of the Court was delivered by K.S. Radhakrishnan, J.)

1. Orissa Mining Corporation (OMC), a State of Orissa Undertaking, has approached this Court seeking a Writ of Certiorari to quash the order passed by the Ministry of Environment and Forests (MoEF) dated 24.8.2010 rejecting the Stage-II forest clearance for diversion of 660.749 hectares of forest land for mining of bauxite ore in Lanjigarh Bauxite Mines in Kalahandi and Rayagada Districts of Orissa and also for other consequential reliefs.

2. OMC urged that the above order passed by the MoEF has the effect of neutralizing two orders of this Court passed in I.A. Nos. 1324 and 1474 in Writ Petition (C) No. 202 of 1995 with I.A. Nos. 2081-2082 (arising out of Writ Petition No. 549 of 2007) dated 23.11.2007 reported in (2008) 2 SCC 222 [hereinafter referred to as 'Vedanta case'] and the order passed by this Court in I.A. No. 2134 of 2007 in Writ Petition No. 202 of 1995 on 08.08.2008 reported in (2008) 9 SCC 711 [hereinafter referred to as the 'Sterlite case']. In order to examine the issues raised in this writ petition, it is necessary to examine the facts at some length.

FACTS

3. M/s. Sterlite (parent company of Vedanta) filed an application on 19.3.2003 before MoEF for environmental clearance for the purpose of starting an Alumina Refinery Project (ARP) in Lanjigarh Tehsil of District Kalahandi, stating that no forest land was involved within an area of 10 kms The 4th respondent - Vedanta, in themeanwhile, had also filed an application on 6.3.2004 before this Court seeking clearance for the proposal for use of 723.343 ha of land (including 58.943 ha of reserve forest land) in Lanjigarh Tehsil of District Kalahandi for setting up an Alumina Refinery. Noticing that forest land was involved, the State of Orissa submitted a proposal dated 16.08.2004 to the MoEF for diversion of 58.90 hectare of forest land which included 26.1234 hectare of forest land for the said ARP and the rest for the conveyor belt and a road to the mining site. The State of Orissa, later, withdrew that proposal.

4. The MoEF, as per the application submitted by M/s Sterlite, granted environmental clearance on 22.9.2004 to ARP on 1 million tonne per annum capacity of refinery along with 75 MW coal based CPP at Lanjigarh on 720 hectare land, by delinking it with the mining project. Later, on 24.11.2004, the State of Orissa informed MoEF about the involvement of 58.943 ha of forest land in the project as against "NIL" mentioned in the environmental clearance and that the Forest Department of Orissa had, on 5.8.2004, issued a show-cause-notice to 4th respondent for encroachment of 10.41 acres of forest land (out of 58.943 ha for which FC clearance proposal was sent) by way of land breaking and leveling.

5. The State of Orissa, on 28.2.2005 forwarded the proposal to MoEF for diversion of 660.749 ha of forest land for mining bauxite ore in favour of OMC in Kalahandi and Rayagada Districts. The Central Empowered Committee (CEC), in the meanwhile, addressed a letter dated 2.3.2005 to MoEF stating that pending the examination of the

project by CEC, the proposal for diversion of forest land and/or mining be not decided.

6. Vedanta, however, filed an application I.A. No. 1324 of 2005 before this Court seeking a direction to the MoEF to take a decision on the application for forest clearance for bauxite mining submitted by the state Government on 28.2.2005 for the Refinery project. The question that was posed by this Court while deciding the above-mentioned I.A. was whether Vedanta should be allowed to set up its refinery project, which involved the proposal for diversion of 58.943 ha.of forest land. CEC had, however, objected to the grant of clearance sought by Vedanta on the ground that the Refinery would be totally dependent on mining of bauxite from Niyamgiri Hills, Lanjigarh, which was the only vital wildlife habitat, part of which constituted elephant corridor and also on the ground that the said project would obstruct the proposed wildlife sanctuary and the residence of tribes like Dongaria Kondha.

7. The Court on 03.06.2006 directed the MoEF to consult the experts/organizations and submit a report. MoEF appointed Central Mining Planning and Design Institute (CMPDI), Ranchi to study the social impact of ground vibration on hydro-geological characteristics, including ground propensity, permeability, flow of natural resources etc. CMPDI submitted its report on 20.10.2006. MoEF appointed the Wildlife Institute of India (WII), Dehradun to study the impact of the Mining Project on the bio-diversity. WII submitted its report dated 14.06.2006 and the supplementary report dated 25.10.2006 before the MoEF. Reports of CMPDI, WII were all considered by the Forest Advisory Committee (FAC) on 27.10.2006 after perusing the above mentioned reports approved the proposal of OMC, for diversion of 660.749 ha. of forest land for the mining of bauxite in Kalahandi and Rayagada Districts subject to the conditions laid down by WII.

8. The State of Orissa had brought to the notice of this Courtabout the lack of basic infrastructure facilities in the Tribal areas ofboth the districts, so also the abject poverty in which the localpeople were living in Lanjigarh Tehsil, including the tribal people,and also the lack of proper housing, hospitals, schools etc. But thisCourt was not agreeable to clear the project, at the instance ofVedanta, however, liberty was granted to M/s. Sterlite to move the Court if they would agree to comply with the modalities suggestedby the Court.

9. Following were the modalities suggested by theCourt, while disposing of the Vedanta case on 23.11.2007:

   "(i) State of Orissa shall float a Special Purpose Vehicle (SPV) for scheduled area development of Lanjigarh Project in which the stakeholders shall be State of Orissa, OMC Ltd. and M/s SIIL. Such SPV shall be incorporated under the Companies Act, 1956. The accounts of SPV will be prepared by the statutory auditors of OMC Ltd. and they shall be audited by the Auditor General for State of Orissa every year. M/s SIIL will deposit, every year commencing from 1-4-2007, 5% of its annual profits before tax and interest from Lanjigarh Project or Rs 10 crores whichever is higher for Scheduled Area Development with the said SPV and it shall be the duty of the said SPV to account for the expenses each year. The annual report of SPV shall be submitted to CEC every year. If CEC finds non-utilisation or misutilisation of funds the same shall be brought to the notice of this Court. While calculating annual profits before tax and interest M/s SIIL shall do so on the basis of the market value of the material which is sold by OMC Ltd. to M/s SIIL or its nominee.

   (ii) In addition to what is stated above, M/s SIIL shall pay NPV of Rs 55 crores and Rs 50.53 crores towards Wildlife Management Plan for Conservation and Management of Wildlife around Lanjigarh bauxite mine and Rs 12.20 crores towards tribal

development. In addition, M/s SIIL shall also bear expenses towards compensatory afforestation.

(iii) A statement shall be filed by M/s SIIL with CEC within eight weeks from today stating number of persons who shall be absorbed on permanent basis in M/s SIIL including land-losers. They shall give categories in which they would be permanently absorbed. The list would also show particulars of persons who would be employed by the contractors of M/s SIIL and the period for which they would be employed.

(iv) The State Government has the following suggestions on this issue:

1. The user agency shall undertake demarcation of the lease area on the ground using four feet high cement concrete pillars with serial number, forward and back bearings and distance from pillar to pillar.

2. The user agency shall make arrangements for mutation and transfer of equivalent non-forest land identified for compensatory afforestation to the ownership of the State Forest Department.

3. The State Forest Department will take up compensatory afforestation at Project cost with suitable indigenous species and will declare the said area identified for compensatory afforestation as "protected forest" under the Orissa Forest Act, 1972 for the purpose of management.

4. The user agency shall undertake rehabilitation of Project-affected families, if any, as per the Orissa Rehabilitation and Resettlement Policy, 2006.

5. The user agency shall undertake phased reclamation of mined-out area. All overburden should be used for back-filling and reclamation of the mined-out areas.

6. The user agency shall undertake fencing of the safety zone area and endeavour for protection as well as regeneration of the said area. It shall deposit funds with the State Forest Department for the protection and regeneration of the safety zone area.

7. Adequate soil conservation measures shall be undertaken by the lessee on the overburdened dumps to prevent contamination of stream flow.

8. The user agency should undertake comprehensive study on hydrogeology of the area and the impact of mining on the surrounding water quality and stream flow at regular interval and take effective measures so as to maintain the pre-mining water condition as far as possible.

9. The user agency should undertake a comprehensive study of the wildlife available in the area in association with institutes of repute like Wildlife Institute of India, Dehradun, Forest Research Institute, Dehradun, etc. and shall prepare a site specific comprehensive wildlife management plan for conservation and management of the wildlife in the Project impact area under the guidance of the Chief Wildlife Warden of the State.

10. The user agency shall deposit the NPV of the forest land sought for diversion for undertaking mining operations.

11. The user agency shall prepare a comprehensive plan for the development of tribals in the Project impact area taking into consideration their requirements for health, education, communication, recreation, livelihood and cultural lifestyle.

12. As per the policy of the State Government, the user agency shall earmark 5% of the net profit accrued in the Project to be spent for the development of health, education, communication, irrigation and agriculture of the said scheduled area within a radius of 50 km.

13. Controlled blasting may be used only in exigencies wherever needed to minimise the impact of noise on wildlife of the area.

14. The user agency shall undertake development of greenery by way of plantation of suitable indigenous species in all vacant areas within the Project.

15. Trees shall be felled from the diverted area only when it is necessary with the strict supervision of the State Forest Department at the cost of the Project.

16. The forest land diverted shall be non-transferable. Whenever the forest land is not required, the same shall be surrendered to the State Forest Department under intimation to Ministry of Environment and Forests, Government of India.

If M/s SIIL, State of Orissa and OMC Ltd. jointly agree to comply with the above rehabilitation package, this Court may consider granting of clearance to the Project.

CONCLUSION

12. If M/s SIIL is agreeable to the aforestated rehabilitation package then they shall be at liberty to move this Court by initiating a proper application. This Court is not against the Project in principle. It only seeks safeguards by which we are able to protect nature and subserve development. IAs are disposed of accordingly. However, we once again reiterate that the applications filed by M/s VAL stand dismissed."

The Court opined that if Sterlite, State of Orissa and OMC jointly agree to comply with the "Rehabilitation Package", the Court might consider granting clearance to the project. Stating so, all the applications were disposed of, the order of which is reported in (2008) 2 SCC 222.

10. M/s. Sterlite, 3rd respondent herein, then moved an application - being I.A. No. 2134 of 2007 - before this Court, followed by affidavits, wherein it was stated that M/s. Sterlite, State of Orissa and OMC had unconditionally accepted the terms and conditions and modalities suggested by this Court under the caption "Rehabilitation Package" in its earlier order dated 23.12.2007. Siddharth Nayak, who was the petitioner in WP No. 549/07, then filed a Review Petition No. 100/2008 and sought review of the order dated 23.11.2007 passed by this Court stating that this court had posed a wrong question while deciding I.A. No. 2134 of 2007 and pointed out that Alumina Refinery was already set up by Vedanta and production commenced and the principal question which came up before this Court was with regard to the ecological and cultural impact of mining in the Niyamgiri Hills. Further, it was also pointed out that if Sterlite was allowed to mine in the Niyamgiri Hills, it would affect the identity, culture and other customary rights of Dongaria Kondh. Review Petition was, however,dismissed by this Court on 07.05.2008.

11. This Court then passed the final order in Sterlite case on8.8.2008, the operative portion of which reads as follows:

> "13. For the above reasons and in the light of the affidavits filed by SIIL, OMCL and the State of Orissa, accepting the rehabilitation package, suggested in our order dated 23-11-2007, we hereby grant clearance to the forest diversion proposal for diversion of 660.749 ha of forest land to undertake bauxite mining on Niyamgiri Hills in Lanjigarh. The next step would be for MoEF to grant its approval in accordance with law."

12. MoEF, later, considered the request of the State of Orissa dated 28.2.2005 seeking prior approval of MoEF for diversion of660.749 ha of forest land for mining of bauxite ore in Lanjigarh Bauxite Mines in favour of OMC, in accordance with Section 2 of the Forest (Conservation) Act, 1980. MoEF, after considering the proposal of the State Government and referring to therecommendations of FAC dated 27.10.2006, agreed in principle for diversion of the above mentioned forest land, subject to various conditions which are as follows:

    (i) The Compensatory Afforestation shall be raised over non-forest land, equal in extent to the forest land proposed to be diverted, at the project cost. The User Agency shall transfer the cost of Compensatory Afforestation to the State Forest Department.

    (ii) The non-forest land identified for Compensatory Afforestation shall be declared as Reserved Forests under Indian Forest Act, 1927.

    (iii) The User Agency shall create fence and maintain a safety zone around the mining area. The User Agency will deposit fund with the Forest Department for creation, protection and regeneration of safety zone area and also will have to bear the cost of afforestation over one and a half time of the safety zone area in degraded forest elsewhere.

    (iv) The reclamation of mines shall be carried out concurrently and should be regularly monitored by the State Forest Department.

    (v) RCpillars of 4 feet height shall be erected by the User Agency at the project cost to demarcate the area and the pillars will be marked with forward and back bearings.

    (vi) The State Government shall charge Net Present Value (NPV) from the User Agency for the entire diverted forest land, as directed by Hon'ble Supreme Court and as per the guidelines issued vide Ministry of Environment and Forests letters No. 5-1/98-FC(Pt.II) dated 18th September 2003 and 22nd September 2003.

    (vii) As per Hon'ble Supreme Court's order dated 23.11.2007 and 08.08.2008, M/s SIIL shall pay NPV of Rs.55 crores.

    (viii) An undertaking from the User Agency shall also be obtained stating that in case the rates of NPV are revised upwards, the additional/differential amount shall be paid by the User Agency.

    (ix) As per Hon'ble Supreme Court's order dated 23.11.2007 and 08.08.2-008, M/s SIIL shall pay Rs.50.53 crores towards Wildlife Management Plan for Conservation and Management of Wildlife around Lanjigarh bauxite mine.

(x) As per Hon'ble Supreme Court's order dated 23.11.2007 and 08.08.2-008, M/s SIIL is required to contribute Rs.12.20 crores towards tribal development apart from payment of NPV and apart from contribution to the Management of Wildlife around Lanjigarh Bauxite Mine. Moreover, while allocating CAMPA Funds the said amount of Rs.12.20 crores shall be earmarked specifically for tribal development.

(xi) The State Government shall deposit all the funds with the Ad-hoc Body of Compensatory Afforestation Fund Management and Planning Authority (CAMPA) in Account No. CA 1585 of Corporation Bank (A Government of India Enterprise) Block-II, Ground Floor, CGO Complex, Phase-I, Lodhi Road, New Delhi-110 003, as per the instructions communicated vide letter N.5-2/2006-PC dated 20.05.2006.

(xii) As per Hon'ble Supreme Court's order dated 23.11.2007 and 08.08.2-008, M/s SIIL shall deposit 5% of its annual profits before tax and interest from Lanjigarh Project of Rs.10 crores whichever is higher as contribution for Scheduled Area Development. The contribution is to be made every year commencing from 01.04.2007. The State of Orissa shall float a Special Purpose Vehicle (SPV) for scheduled area development of Lanjigarh Project in which the stake-holders shall be State of Orissa, OMC Ltd. and M/s SIIL. Such SPV shall be incorporated under the Companies Act, 1956. The Accounts of SPC shall be prepared by the Statutory auditors of OMC Ltd and they shall be audited by the Auditor General for State of Orissa every year.

(xiii) The permission granted under FC Act shall be co-terminus with the mining lease granted under MMRD Act or any other relevant Act.

(xiv) Tree felling shall be done in a phased manner to coincide with the phasing of area to be put to mining with a view to minimizing clear felling. The felling will always be carried out under strict supervision of State Forest Department.

(xv) All efforts shall be made by the User Agency and the State Government to prevent soil erosion and pollution of rivers/nallas/streams etc.

(xvi) The Wildlife Management Plan (WMP) shall be modified accordingly as suggested by the Wildlife Institute of India (WII), Dehradun and shall be implemented by the State Government/User Agency at the project cost. The progress of implementation of the WMP shall be regularly monitored by the WILL and Regional Office, Bhubaneshwar.

(xvii) Any other condition that the CCF (Central), Regional Office, Bhubaneshwar / the State Forest Department may impose from time to time for protection and improvement of flora and fauna in the forest area, shall also be applicable.

(xviii) All other provisions under different Acts, rules, and regulations including environmental clearance shall be complied with before transfer of forest land.

(xix) The lease will remain in the name of Orissa Mining Corporation (OMCL) and if any change has to be done, it will require prior approval of the Central Government as per guidelines.

(xx) The present forest clearance will be subject to the final outcome of the Writ petition No. 202 of 1995 from the Hon'ble Supreme Court and Court's order dated 23.11.2007 and 08.08.2008.

(xxi) Other standard conditions as applicable to proposals related to mining shall apply in the instant case also."

13. MoEF, then, vide its letter dated 11.12.2008 informed the State of Orissa that it had, in principle, agreed for diversion of 660.749 ha. of forest land for mining bauxite in favour of OMC, subject to fulfilment of the above mentioned conditions, and after getting the compliance report from the State Government. Order dated 11.12.2008 was slightly modified on 31.12.2008. It was further ordered that the transfer of forest land to the user agency should not be effected by the State Government till formal orders approving diversion of forest land were issued.

14. MoEF then granted environmental clearance to OMC vide its proceedings dated 28.04.2009 subject to various conditions including the following conditions:
"(iii) Environmental clearance is subject to grant of forestry clearance. Necessary forestry clearance under the Forest (Conservation) Act, 1980 for diversion of 672.018 ha forest land involved in the project shall be obtained before starting mining operation in that area. No mining shall be undertaken in the forest area without obtaining requisite prior forestry clearance."

15. The State Government then forwarded the final proposal to the MoEF vide its letter dated 10.08.2009 stating that the user agencyhad complied with all the conditions stipulated in the letter of MoEF dated 11.12.2008. On the Forest Rights Act, the Government letterstated as follows:
"**Provisions of Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.**

The Govt. of India, MoEF vide their letter dated 28.04.2009 have accorded environmental clearance to Lanjigarh Bauxite Mining Project. This letter of Govt. of India, MoEF puts on record that there is no habitation in the mining lease area on the plateau top and no resettlement and rehabilitation is involved. Public hearing for the project was held on 07.02.2003 for Kalahandi District and on 17.03.2003 for Rayagada District. In both the cases, the project has been recommended. Copies of the public hearing proceedings have already been submitted to Govt. of India, MoEF along with forest diversion proposal. This project was also challenged in the Hon'ble Supreme Court of India on the ground that it violates the provisions of the Scheduled Tribes & Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 WP (C) No. 549 of 2007 was filed in the Hon'ble Supreme Court of India by one Sri Siddharth Nayak challenging the project on the above issue. After examining different aspects of the writ petition in IA No. 2081-2082 in WP (C) No. 549/2007, the Hon'ble Supreme Court of India had cleared the project by way of disposing the Writ Petition vide their order dated 23.11.2007. Subsequently, Hon'ble Supreme Court had finally cleared the project vide their order dated 08.08.2008. In view of the above position and orders of Hon'ble Supreme Court of India, no further action in this regard is proposed."

16. State of Orissa's final proposal was then placed before the FACon 4.11.2009. FAC recommended that the final clearance would beconsidered only after ascertaining of the community rights on forestland and after the process for establishing such rights under ForestRights Act was completed. FAC also decided to constitute an Expert

Group to carry out a site inspection. Consequently, on 1.1.2010, a three-member Team composed of Dr. Usha Ramanathan and two others, was constituted to consider and make recommendations to MoEF on the proposal submitted by OMC. The Team carried out the site inspection during the months of January and February, 2010 and submitted three individual reports to MoEF on 25.2.2010 which were not against the project as such, but suggested an in-depth study on the application of the Forest Rights Act. FAC also, on 16.4.2010, considered all the three reports and recommended that a Special Committee, under the Ministry of Tribal Affairs, be constituted to look into the issues relating to the violation of Tribal rights and the settlement of Forest rights under the Forest Rights Act.

17. MoEF then met on 29.6.2010 and decided to constitute a team composed of specialists to look into the settlement of rights on forest dwellers and the "Primitive Tribal Groups" under the Forest Rights Act and the impact of the Project on wildlife and biodiversity in the surrounding areas. Consequently, a 4-member Committeewas constituted headed by Dr. Naresh Saxena to study and assess the impacts of various rights and to make a detailed investigation. The Committee, after conducting several site visits and making detailed enquiries submitted its report to MoEF on 16.8.2010.

18. The State Government then submitted their written objection on 17.08.2010 to the MoEF on the Saxena Committee Report and requested that an opportunity of hearing be given to it before taking any decision on the report. MoEF, however, called a meeting of FAC on 20.8.2010 and placed the Saxena Committee report before FAC, for consideration. Minutes of the Committee meeting was released on 23.8.2010, stating that the Primitive Tribal Groups were not consulted in the process of seeking project clearance and also noticed the violation of the provisions of Forest Rights Act, the Forest (Conservation) Act, 1980, Environmental Protection Act, 1986 and also the impact on ecological and biodiversity values of the Niyamgiri hills upon which the Dongaria Kondh and Kutia Kondh depend. FAC opined that it was a fit case for applying the precautionary principle to obviate the irreparable damage to the affected people and recommended for the temporary withdrawal of the in-principle/State I approval accorded. FAC recommended that the State Government be heard before a final decision is taken by the MoEF.

19. The recommendations of the FAC dated 23.8.2010 and Saxena Committee report were considered by MoEF and the request for Stage-II Clearance was rejected on 24.8.2010, stating as follows:

"**VIII. Factors Dictating Decision on Stage-II Clearance**

I have considered three broad factors while arriving at my decision.

1. The Violation of the Rights of the Tribal Groups including the Primitive Tribal Groups and the Dalit Population.

The blatant disregard displayed by the project proponents with regard to rights of the tribals and primitive tribal groups dependant on the area for their livelihood, as they have proceeded to seek clearance is shocking. Primitive Tribal Groups have specifically been provided for in the Forest Rights Act, 2006 and this case should leave no one in doubt that they will enjoy full protection of their rights under the law. The narrow definition of the Project Affected People by the State Government runs contrary to the letter and spirit of the Forest Rights Act, 2006. Simply because they did not live on the hills does not mean that they have no rights there. The Forest Rights Act, 2006 specifically provides for such rights but these were not recognized and were sought to be denied.

Moreover, the fate of the Primitive Tribal Groups need some emphasis, as very few communities in India in general and Orissa in particular come under the ambit of such a category. Their dependence on the forest being almost complete, the violation of the specific protections extended to their "habitat and habitations" by the Forest Rights Act, 2006 are simply unacceptable.

This ground by itself has to be foremost in terms of consideration when it comes to the grant of forest or environmental clearance. The four-member committee has highlighted repeated instances of violations.

One also cannot ignore the Dalits living in the area. While they may technically be ineligible to receive benefits under the FRA 2006, they are such an inextricable part of the society that exists that it would be impossible to disentitle them as they have been present for over five decades. The Committee has also said on p.40 of their report that "even if the Dalits have no claims under the FRA the truth of their de facto dependence on the Niyamgiri forests for the past several decades can be ignored by the central and state governments only at the cost of betrayal of the promise of inclusive growth and justice and dignity for all Indians". This observation rings true with the MoE&F and underscores the MoE&F's attempt to ensure that any decision taken is not just true to the law in letter but also in spirit.

2. Violations of the Environmental Protection Act 1986:

(i) Observations of the Saxena Committee and MoE&F Records:

In additional to its findings regarding the settlement of rights under the FRA 2006, the four-member Committee has also observed, with reference to the environmental clearance granted for the aluminum refinery, on p.7 of its Report dated 16th August 2010 that:

"The company/s Vedanta Alumina Limited has already proceeded with construction activity for its enormous expansion project that would increase its capacity six fold from 1 Mtpa to 6 Mtpa without obtaining environmental clearance as per the provisions of EIA Notification, 2006 under the EPA. This amounts to a serious violation of the provisions of the Environment (Protection) Act. This expansion, its extensive scale and advanced nature, is in complete violation of the EPA and is an expression of the contempt with which this company treats the laws of the land."

I have reviewed the records of the MoE&F and have found no documentation which establishes such activity to have been granted clearance. Nor is there any evidence to suggest that such requirement was waived by the Ministry. The TORs for the expansion of the project from 1 million tonnes to 6 million tonnes were approved in March 2008. No further right has been granted in any form by the Ministry to the project proponents to proceed with the expansion. While any expansion without prior EC is a violation of the EIA Notification/EPA 1986 this, itself, is not a minor expansion and is therefore a most serious transgression of the EPA 1986.

There also appear to have been other acts of violation that emerge from a careful perusal of the evidence at hand. This is not the first act of violation. On March 19th, 2003 M/s Sterlite filed an application for environmental clearance from the MoE&F for the refinery. In the application it was stated that no forest land is involved in the project and that there was no reserve forest within a radius of 10 kmsof the project site.

Thereafter on September 22nd, 2004, environment clearance was granted by the MoE&F for the refinery project. While granting the environmental clearance, the MoE&F was unaware of the fact that the application for forest clearance was also pending since the environmental clearance letter clearly stated that no forest land was involved in the project.

In March 2005, in proceedings before itself, the Central Empowered Committee (CEC) too questioned the validity of the environmental clearance granted by the MoE&F and requested the Ministry to withhold the forest clearance on the project till the issue is examined by the CEC and report is submitted to the Hon'ble Supreme Court.

(ii) Case before the MEAA by the Dongaria Kondhs:

After the grant of Environment Clearance, the local tribals and other concerned persons including the Dongaria Kondhs challenged the project before the National Environment Appellate Authority (NEAA). [Kumati Majhi and Ors vs.Ministry of Environment. and Forest, Srabbu Sikka and Ors. vs.Ministry of Environment and Forests, R Sreedhar vs. Ministry of Environment and Forest, Prafulla Samantara vs. Ministry of Environment and Forests and Ors Appeal No. 18, 19, 20 and 21 of 2009].

It is brought to my attention that this is the first time that the Dongaria Kondha have directly challenged the project in any Court of law. The Appeals highlighted the several violations in the Environmental Clearance process. Some of the key charges raised were that the full Environmental Impact Assessment Report was not made available to the Public before the public hearing, different EIA reports made available to the public and submitted to the Ministry of Environment and Forests, the EIA conducted was a rapid EIA undertaken during the monsoon months. The matter is reserved for judgment before the NEAA.

(iii) Monitoring Report of the Eastern Regional Office dated 25th May, 2010:

On 25th May 2010, Dr. VP Upadhyay (Director 'S') of the Eastern Regional Office of the Ministry of Environment and Forests submitted his report to the MoE&F which listed various violations in para 2 of the monitoring report. They observed:

a. "M/s Vedanta Alumina Limited has already proceeded with construction activity for expansion project without obtaining environmental clearance as per provisions of EIA Notification 2006 that amounts to violation of the provisions of the Environment (Protection) Act."

b. "The project has not established piezometers for monitoring of ground water quality around red mud and ash disposal ponds; thus, the condition no. 5 of Specific Condition of the clearance letter is being violated."

c. "The condition no. Ii of General Condition of environmental clearance has been violated by starting expansion activities without prior approval from the Ministry."

Furthermore all bauxite for the refinery was to be sourced from mines which have already obtained environmental clearance. The Report listed 14 mines from which Bauxite was being sourced by the project proponents. However out of these 11 had not been granted a mining license while 2 had only received TORs and only 1 had

received clearance.

3. Violations under the Forest Conservation Act:

The Saxena Committee has gone into great detail highlighting the various instances of violations under the Forest (Conservation) Act 1980. All these violations coupled with the resultant impact on the ecology and biodiversity of the surrounding area further condemn the actions of the project proponent. Not only are these violations of a repeating nature but they are instances of wilful concealment of information by the project proponent.

IX. The Decision on Stage-II Clearance

The Saxena Committee's evidence as reviewed by the FAC and read by me as well is compelling. The violations of the various legislations, especially the Forest (Conservation) Act, 1980, the Environment (Protection) Act, 1986, and the Scheduled Tribes and Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, appear to be too egregious to be glossed over. Furthermore, a mass of new and incriminating evidence has come to light since the Apex court delivered its judgment on August 8th, 2008. Therefore, after careful consideration of the facts at hand, due deliberation over all the reports submitted and while upholding the recommendation of the FAC, I have come to the following conclusions:

1. The Stage II forest clearance for the OMC and Sterlite bauxite mining project on the Niyamgiri Hills in Lanjigarh, Kalahandi and Rayagada districts of Orissa cannot be granted. Stage-II Forest Clearance therefore stands rejected.

2. Since forest clearance is being rejected, the environmental clearance for this mine is inoperable.

3.It appears that the project proponent is sourcing bauxite from a large number of mines in Jharkhand for the one million tonne alumina refinery and are not in possession of valid environmental clearance. This matter is being examined separately.

4.Further, a show-cause notice is being issued b y the MOE&F to the project proponent as to why the environmental clearance for the one million tonnes per annum alumina refinery should not be cancelled.

5.A show-cause notice is also being issued to the project proponent as to why the terms of reference (TOR) for the EIA report for the expansion from one million tonnes to six million tonnes should not be withdrawn. Meanwhile, the TOR and the appraisal process for the expansion stands suspended.

Separately the MoE&F is in the process of examining what penal action should be initiated against the project proponents for the violations of various laws as documented exhaustively by the Saxena Committee.

On the issues raised by the Orissa State Government, I must point out that while customary rights of the Primitive Tribal Groups are not recognized in the National Forest Policy, 1988 they are an integral part of the Forest Rights Act, 2006. An Act passed by Parliament has greater sanctity than a Policy Statement. This is apart from the fact that the Forest Rights Act came into force eighteen years after the National

Forest Policy. On the other points raised by the State Government officials, on the procedural aspects of the Forest Rights Act, 2006, I expect that the joint Committee set up by the MoE&F and the Ministry of Tribal Affairs would give them due consideration. The State Government officials were upset with the observations made by the Saxena Committee on their role in implementing the Forest Rights Act, 2006. Whether State Government officials have connived with the violations is a separate issue and is not relevant to my decision. I am prepared to believe that the State Government officials were attempting to discharge their obligations to the best of their abilities and with the best of intentions. The State Government could well contest many of the observations made by the Saxena Committee. But this will not fundamentally alter the fact that serious violations of various laws have indeed taken place.

The primary responsibility of any Ministry is to enforce the laws that have been passed by Parliament. For the MoE&F, this means enforcing the Forest (Conservation) Act, 1980, the Environmental (Protection) Act, 1986, the Scheduled Tribes and Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and other laws. It is in this spirit that this decision has been taken."

The order dated 24.8.2010 was communicated by MoEF to the State of Orissa vide its letter dated 30.8.2010, the legality of those orders are the subject matter of this writ petition.

20. Shri K.K. Venugopal, learned senior counsel appearing forOMC, referred to the earlier judgments of this Court in Vedanta as well as Sterlite and submitted that those judgments are binding onthe parties with regard to the various questions raised and decidedand also to the questions which ought to have been raised anddecided. Learned senior counsel also pointed out that MoEF itself,after the above mentioned two judgments, had accorded Stage-Iclearance vide its proceeding dated 11.12.2008 and that the Stateof Orissa vide its letter dated 10.8.2009 had informed MoEF of the compliance of the various conditions stipulated in the Stage-I clearance dated 11.12.2008. Consequently, there is no impediment in the MoEF granting Stage-II clearance for the project.

21. The learned senior counsel also submitted that the reasons stated by the FAC as well as the Saxena Committee are all untenable and have nothing to do with Bauxite Mining Project (BMP) undertaken by OMC. Learned senior counsel also submitted that the constitution of, initially, a 3 Member Committee and, later, a 4 Member Committee, was intended only to cancel the Stage-I clearance granted to the BMP in compliance with the judgment of this Court. Learned counsel also pointed out that the claim under the Forest Rights Act was also raised by Sidharth Nayak through a review petition, which was also rejected by this Court on 7.5.2008. Consequently, it would not be open to the parties to again raise the issues which fall under the Forest Rights Act.

22. Shri C.A. Sundaram, learned senior counsel appearing for the State of Orissa, submitted that various reasons stated by the MoEF for rejecting the Stage-II clearance are unsustainable in law as well as on facts. Learned senior counsel pointed out that reasons stated by the Saxena Committee as well as MoEF alleging violation of the Environmental Protection Act, 1986, are totally unrelated to the BMP. Learned senior counsel pointed out that Alumina Refinery is an independent project and the violation, if any, in respect of the same ought not to have been relevant criteria for the consideration of the grant of Stage-II clearance to the BMP, being granted to OMC. Referring to the Monitoring Report of Eastern Regional Office dated 25.5.2010, learned senior counsel pointed out that the findings recorded in that report are referable to 4th respondent and not to the mining project granted to OMC.

23. The learned senior counsel also submitted that Saxena Committee as well as MoEF has committed a factual error in taking into account the alleged legal occupation of 26.123 ha of village forest lands enclosed within the factory premises which has no connection with regard to the mining project, a totally independent project. Learned senior counsel also submitted that in the proposed mining area, there is no human habitation and that the individual habitation rights as well as the Community Forest Resource Rights for all villages located on the hill slope of the proposed mining lease area, have already been settled. Learned senior counsel also pointed out that the Gram Sabha has received several individual and community claims from Rayagada and Kalahandi Districts and they have settled by giving alternate lands.

24. Shri Sundaram also submitted that the Forest Rights Act deals with individual and community rights of the Tribals which does not, in any manner, expressly or implied, make any reference to the religious or spiritual rights protected under Articles 25 and 26 of the Constitution of India and does not extend to the property rights. Learned senior counsel also submitted that the State Government continues to maintain and have ownership over the minerals and deposits beneath the forests and such rights have not been taken away by the Forest Rights Act and neither the Gram Sabha nor the Tribals can raise any ownership rights on minerals or deposits beneath the forest land.

25. Shri C.U. Singh, learned senior counsel appearing for the 3rd respondent - Sterlite, submitted that various grounds stated in Saxena report as well as in the order of MoEF dated 24.8.2010, were urged before this Court when Vedanta and Sterlite cases were decided and, it was following those judgments, that MoEF granted Stage-I approval on 11.12.2008 on the basis of the recommendation of FAC. In compliance of the Stage-I clearance accorded by MoEF, SPV (OMC and Sterlite) undertook various works and completed, the details of the same have been furnished along with the written submissions filed on 21.1.2013. Learned senior counsel submitted that the attempt of the MoEF is to confuse the issue mixing up the Alumina Refinery Project with that of the Bauxite Mining Project undertaken by Sterlite and OMC through a SPV. The issues relating to expansion of refinery and alleged violation of the Environmental Protection Act, 1986, the Forest Conservation Act, 1980 etc. have nothing to do with the mining project undertaken by OMC and Sterlite. Learned senior counsel, therefore, submitted that the rejection of the Stage-II clearance by MoEF is arbitrary and illegal.

26. Shri Mohan Parasaran, Solicitor General of India, at the outset, referred to the judgment of this Court in Sterlite and placed considerable reliance on para 13 of the judgment and submitted that while granting clearance by this Court for the diversion of 660.749 ha of forest land to undertake bauxite mining in Niyamgiri hills, left it to the MoEF to grant its approval in accordance with law. Shri Parasaran submitted that it is in accordance with law that the MoEF had constituted two Committees and the reports of the Committees were placed before the FAC, which is a statutory body constituted under Section 3 of the Forest Conservation Act. It was submitted that it was on the recommendation of the statutory body that MoEF had passed the impugned order dated 24.8.2010. Further, it was pointed out that, though MoEF had granted the Stage-I clearance on 11.12.2008, it can still examine as to whether the conditions stipulated for the grant of Stage-I clearance had been complied with or not. For the said purpose, two Committees were constituted and the Saxena Committee in its report has noticed the violation of various conditions stipulated in the Stage-I clearance granted by MoEF on 11.12.2008. Shri Parasaran also submitted that the petitioner as well as 3rd respondent have also violated the provisions of the Forest Rights Act, the violation of which had been specifically noted by the Saxena Committee and accepted by MoEF. Referring to various provisions of the Forest Rights Act under Section 3.1(i), 3.1(e) and Section 5 of the Act, it was submitted that concerned forest dwellers be treated not merely as right

holders as statutory empowered with the authority to protect the Niyamgiri hills. Shri Parasaran also pointed out that Section 3.1(e) recognises the right to community tenures of habitat and habitation for "primitive tribal groups" and that Dongaria Kondh have the right to grazing and the collection of mineral forest of the hills and that they have the customary right to worship the mountains in exercise of their traditional rights, which would be robed of if mining is permitted in Niyamgiri hills.

27. Shri Raj Panjwani, learned senior counsel appearing for the applicants in I.A. Nos. 4 and 6 of 2012, challenged the environmental clearance granted to OMC on 28.4.2009 by MoEF before the National Environment Appellate Authority (NEAA) under Section 4(1) of the NEAA Act, 1997, by filing Appeal Nos. 20 of 2009 and 21 of 2009 before NEAA. NEAA vide its order dated 15.5.2010 allowed the appeals and remitted the matter to MoEF to revisit the grant of environmental clearance to OMC on 28.4.2009. Later, MoEF by its order dated 11.7.2011 has withdrawn the environmental clearance dated 28.4.2009 granted in favour of OMC and that OMC, without availing of the statutory remedy of the appeal, filed I.A. No. 2 of 2011 in the present writ petition.

28. Shri Sanjay Parekh, learned counsel appearing for the applicants in I.A. Nos. 5 and 6 of 2011, referred to the various provisions of the Forest Rights Act and the Rules and submitted that the determination of rights of scheduled tribes (STs)/other traditional forest dwellers (TFDs) have to be done by the Gram Sabha in accordance with the machinery provided under Section 6 of the Act. Learned counsel also submitted that the forest wealth vests in the STs and other TFDs and can be diverted only for the purpose mentioned in Section 3(3). Learned counsel also referred to the Saxena Committee report and submitted that the report clearly reveals the community rights as well as the various rights and claims of the primitive traditional forest dwellers. Learned counsel also submitted that if the mining is undertaken in Niyamgiri hills, it would destroy more than 7 sq. km. of undisturbed forest land on the top of the mountain which is the abode of the Dongaria Kondh and their identity depends on the existence of Niyamgiri hills.

JUDICIAL EVALUATION

29. We may, at the outset, point out that there cannot be any doubt that this Court in Vedanta case had given liberty to Sterlite to move this Court if they were agreeable to the "suggested rehabilitation package" in the order of this Court, in the event of which it was ordered that this Court might consider granting clearance to the project, but not to Vedanta. This Court in Vedanta case had opined that this Court was not against the project in principle, but only sought safeguards by which the Court would be able to protect the nature and sub-serve development.

30. Sterlite, State of Orissa and OMC then unconditionally accepted the terms and conditions and modalities suggested by this Court in Vedanta under the caption "Rehabilitation Package" and they moved this Court by filing I.A. No. 2134 of 2007 and this Court accepted the affidavits filed by them and granted clearance to the diversion of 660.749 ha of forest land to undertake the bauxite mining in Niyamgiri Hills and ordered that MoEF would grant its approval in accordance with law.

31. MoEF, then considered the proposal of the State Government made under Section 2 of the Forest (Conservation) Act, 1980 and also the recommendations of the FAC and agreed in principle for the diversion of 660.749 ha of forest land for mining of bauxite ore in Lanjigarh Bauxite Mines in favour of OMC, subject to 21 conditions vide its order 11.12.2008. One of the conditions was with regard to implementation of the Wildlife Management Plan (WMP) suggested by WII and another was with regard to

the implementation of all other provisions of different Acts, including environmental clearance, before the transfer of the forest land. Further, it was also ordered that after receipt of the compliance report on fulfilment of the 21 conditions from the State of Orissa, formal approval would be issued under Section 2 of the Forest (Conservation) Act, 1980.

32. MoEF examined the application of the OMC for environmental clearance under Section 12 of the EIA Notification, 2006 read with para 2.1.1(i) of Circular dated 13.10.2006 and accorded environmental clearance for the "Lanjigarh Bauxite Mining Project" to OMC for an annual production capacity of 3 million tonnes of bauxite by opencast mechanized method involving total mining lease area of 721.323 ha, subject to the conditions and environmental safeguards, vide its letter dated 28.4.2009. 32 special conditions and 16 general conditions were incorporated in that letter. It was ordered that failure to comply with any of the conditions might result in withdrawal of the clearance and attract action under the provisions of the Environment Protection Act, 1986. It was specifically stated that the environmental clearance would be subject to grant of forestry clearance and that necessary clearance for diversion of 672.018 ha. Of forest land involved in the project be obtained before starting operation in that area and that no mining be undertaken in the forest area without obtaining prior forestry clearance. Condition No. XXX also stipulated that the project proponent shall take all precautionary measures during mining operation for conservation and protection of flora and fauna spotted in the study area and all safeguards measures brought out by the WMP prepared specific to the project site and considered by WII shall be effectively implemented. Further, it was also ordered that all the recommendations made by WII for Wildlife Management be effectively implemented and that the project proponent would also comply with the standards prescribed by the State and Central Pollution Control Boards. Later, a corrigendum dated 14.7.2009 was also issued by MoEF adding two other conditions - one special condition and another general condition.

33. The State of Orissa vide its letter dated 10.8.2009 informed MoEF that the user agency had complied with the stipulations of Stage-I approval. Specific reference was made point by point to all the conditions stipulated in the letters of MoEF dated 11.12.2008 and 30.12.2008 and, in conclusion, the State Government has stated in their letter as follows:

> "In view of the above position of compliance by the User Agency to the direction of Hon'ble Supreme Court of India dated 8.8.2008 and stipulations of the Government of India, MoEF vide their Stage-I approval order dated 30.12.2008, the compliance is forwarded to the Government of India, MoEF to kindly examine the same and take further necessary steps in matters of according final approval for diversion of 660.749 ha of forest land for the project under Section 2 of the Forest Conservation Act, 1980."

34. MoEF, it is seen, then placed the letter of the State Government dated 10.8.2008 before the FAC and FAC on 4.11.2009 recommended that the final clearance be considered only after ascertaining the community rights of forest land and after the process for establishing such rights under the Forest Rights Act is completed. Dr. Usha Ramanathan Committee report was placed before the FAC on 16.4.2010 and FAC recommended that a Special Committee under the Ministry of Tribal Affairs be constituted to look into the issue relating to violation of tribal rights and the settlement of various rights under the Forest Rights Act, which led, as already indicated, to the constitution of the Saxena Committee report, based on which the MoEF passed the impugned order dated 24.8.2010.

35. FAC, in its meeting, opined that the final clearance under the Forest (Conservation) Act

would be given, only after ascertaining the "Community Rights" on forest land and after the process of establishing such rights under the Forest Rights Act. After perusing the Usha Ramanathan report, FAC on 16.4.2010 recommended that a Special Committee be constituted to look into the issues relating to the alleged violation of rights under the Forest Rights Act. MoEF, then on 29.6.2010 constituted the Saxena Committee and the Committee after conducting an enquiry submitted its report which was placed before the FAC on 20.8.2010 and FAC noticed prima facie violation of the Forest Rights Act and the Forest (Conservation)Act.

36. The petitioner has assailed the order of MoEF dated 24.08.2010 as an attempt to reopen matters that had obtained finality. Further, it is also submitted that the order wrongly cites the violation of certain conditions of environmental clearance by "Alumina Refinery Project" as grounds for denial of Stage II clearance to OMC for its "Bauxite Mining Project". The contention is based on the premise that the two Projects are totally separate and independent of each other and the violation of any statutory provision or a condition of environmental clearance by one cannot be a relevant consideration for grant of Stage II clearance to the other.

37. The petitioner's assertion that the Alumina Refinery Project and the Bauxite Mining Project are two separate and independent projects, cannot be accepted as such, since there are sufficient materials on record to show that the two projects make an integrated unit. In the two earlier orders of this Court (in the Vedanta case and the Sterlite case) also the two Projects are seen as comprising a single unit. Quite contrary to the case of the petitioner, it can be strongly argued that the Alumina Refinery Project and Bauxite Mining Project are interdependent and inseparably linked together and, hence, any wrong doing by Alumina Refinery Project may cast a reflection on the Bauxite Mining Project and may be a relevant consideration for denial of Stage II clearance to the Bauxite Mining Project. In this Judgment, however, we do not propose to make any final pronouncement on that issue but we would keep the focus mainly on the rights of the Scheduled Tribes and the "Traditional Forest Dwellers" under the Forest Rights Act.

STS AND TFDS:

38. Scheduled Tribe, as such, is not defined in the Forest Rights Act, but the word "Traditional Forest Dweller" has been defined under Section 2(o) as any member or community who has at least three generations prior to the 13th day of December, 2005 primarily resided in and who depend on the forest or forests land for bona fide livelihood needs. Article 366(25) of the Constitution states that STs means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are defined under Article 342 to be the Scheduled Tribes. The President of India, in exercise of the powers conferred by Clause (1) of Article 342 of the Constitution, has made the Constitution (Schedule Tribes) Order, 1950. Part XII of the Order refers to the State of Orissa. Serial No. 31 refers to Dongaria Kondh, Kutia Kandha etc.

39. Before we examine the scope of the Forest Rights Act, let us examine, how the rights of indigenous people are generally viewed under our Constitution and the various International Conventions.

CONSTITUTIONAL RIGHTS AND CONVENTIONS:

40. Article 244 (1) of the Constitution of India which appears in Part X provides that the administration of the Scheduled Areas and Scheduled Tribes in States (other than Assam, Meghalaya and Tripura) shall be according to the provisions of the Fifth Schedule and Clause (2) states that Sixth Schedule applies to the tribal areas in

Assam, Meghalaya, Tripura and Mizoram. Evidently, the object of the Fifth Schedule and the Regulations made thereunder is to preserve tribal autonomy, their cultures and economic empowerment to ensure social, economic and political justice for the preservation of peace and good Governance in the Scheduled Area. This Court in *Samatha vs. Arunachal Pradesh* (1997) 8 SCC 191 ruled that all relevant clauses in the Schedule and the Regulations should be harmoniously and widely be read as to elongate the Constitutional objectives and dignity of person to the Scheduled Tribes and ensuring distributive justice as an integral scheme thereof. The Court noticed that:

> "10. Agriculture is the only source of livelihood for the Scheduled Tribes apart from collection and sale of minor forest produce to supplement their income. Land is their most important natural and valuable asset and imperishable endowment from which the tribal derive their sustenance, social status, economic and social equality, permanent place of abode, work and living....(Consequently), tribes have great emotional attachments to their lands."

41. Part B of the Fifth Schedule [Article 244(1)] speaks of the administration and control of Schedules Areas and Scheduled Tribes. Para 4 thereof speaks of Tribes Advisory Council. Tribes Advisory Council used to exercise the powers for those Scheduled Areas where Panchayat Raj system had not been extended. By way of the Constitution (73rd Amendment) Act, 1992, Part IX was inserted in the Constitution of India. Article 243-B of Part IX of the Constitution mandated that there shall be panchayats at village, intermediate and district levels in accordance with the provisions of that Part. Article 243-C of Chapter IX refers to the composition of Panchayats. Article 243-M (4)(b) states that Parliament may, by law, extend the provisions of Part IX to the Scheduled Areas and the Tribal areas and to work out the modalities for the same.

42. The Central Government appointed Bhuria Committee to undertake a detailed study and make recommendations as to whether the Panchayat Raj system could be extended to Scheduled Areas. The Committee submitted its report on 17.01.1995 and favoured democratic, decentralization in Scheduled Areas. Based on the recommendations, the Panchayat (Extension to Scheduled Areas) Act, 1996 (for short 'PESA Act') was enacted by the Parliament in the year 1996, extending the provisions of Part IX of the Constitution relating to Panchayats to the Scheduled Areas. The Statement of Objects and Reasons of the Act reads as follows:

> "There have been persistent demands from prominent leaders of the Scheduled Areas for extending the provisions of Part IX of the Constitution to these Areas so that Panchayati Raj Institutions may be established there. Accordingly, it is proposed to introduce a Bill to provide for the extension of the provisions of Part IX of the Constitution to the Scheduled Areas with certain modifications providing that, among other things, the State legislations that may be made shall be in consonance with the customary law, social and religious practices and traditional management practices of community resources;..... The offices of the Chairpersons in the panchayats at all levels shall be reserved for the Scheduled Tribes; the reservations of seats at every panchayat for the Scheduled Tribes shall not be less than one-third of the total number of seats."

43. This court had occasion to consider the scope of PESA Act when the constitutional validity of the proviso to section 4(g) of the PESA Act and few sections of the Jharkhand Panchayat Raj Act,2001 were challenged in *Union of India vs. Rakesh Kumar*, (2010)4 SCC 50 and this Court upheld the Constitutional validity.

44. Section 4 of the PESA Act stipulates that the State legislation on Panchayats shall be made in consonance with the customary law, social and religious practices and traditional management practices of community resources.

(a) Clause (d) of Section states that every Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution.

(b) Further it also states in clause (i) of Section 4 that the Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before re-settling or rehabilitating persons affected by such projects in the Scheduled Areas and that the actual planning and implementation of the projects in the Scheduled Areas, shall be coordinated at the State level.

(c) Sub-clause (k) of Section 4 states that the recommendations of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory prior to grant of prospective licence or mining lease for minor minerals in the Scheduled Areas. Panchayat has also endowed with the powers and authority necessary to function as institutions of Self-Government.

45. The customary and cultural rights of indigenous people have also been the subject matter of various international conventions. International Labour Organization (ILO) Convention on Indigenous and Tribal Populations Convention, 1957 (No. 107) was the first comprehensive international instrument setting forth the rights of indigenous and tribal populations which emphasized the necessity for the protection of social, political and cultural rights of indigenous people. Following that there were two other conventions ILO Convention (No. 169) and Indigenous and Tribal Peoples Convention, 1989 and United Nations Declaration on the rights of Indigenous Peoples (UNDRIP), 2007, India is a signatory only to the ILO Convention (No. 107).

46. Apart from giving legitimacy to the cultural rights by 1957 Convention, the Convention on the Biological Diversity (CBA) adopted at the Earth Summit (1992) highlighted necessity to preserve and maintain knowledge , innovation and practices of the local communities relevant for conservation and sustainable use of biodiversity, India is a signatory to CBA. Rio Declaration on Environment and Development Agenda 21 and Forestry principle also encourage the promotion of customary practices conducive to conservation. The necessity to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources have also been recognized by United Nations in the United Nations Declaration on Rights of Indigenous Peoples. STs and other TFDs residing in the Scheduled Areas have a right to maintain their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands.

47. Many of the STs and other TFDs are totally unaware of their rights. They also experience lot of difficulties in obtaining effective access to justice because of their distinct culture and limited contact with mainstream society. Many a times, they do not have the financial resources to engage in any legal actions against development projects undertaken in their abode or the forest in which they stay. They have a vital role to play in the environmental management and development because of their knowledge and traditional practices. State has got a duty to recognize and duly support their identity, culture and interest so that they can effectively participate in achieving sustainable development.

48. We notice, bearing in mind the above objects, the Forest Rights Act has been enacted conferring powers on the Gram Sabha constituted under the Act to protect the community resources, individual rights, cultural and religious rights.

THE FOREST RIGHTS ACT

49. The Forest Rights Act was enacted by the Parliament to recognize and vest the forest rights and occupation in forest land in forest dwelling STs and other TFDs who have been residing in such forests for generations but whose rights could not be recorded and to provide for a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land. The Act also states that the recognized rights of the forest dwelling STs and other TFDs include the responsibilities and authority for sustainable use, conservation of biodiversity and maintenance of ecological balance and thereby strengthening the conservation regime of the forests while ensuring livelihood and food security of the forest dwelling STs and other TFDs. The Act also noticed that the forest rights on ancestral lands and their habitat were not adequately recognized in the consolidation of State forests during the colonial period as well as in independent India resulting in historical injustice to them, who are integral to the very survival and sustainability of the forest ecosystem.

50. The Statement of Objects and Reasons of the Act states that forest dwelling tribal people and forests are inseparable and that the simplicity of tribals and their general ignorance of modern regulatory framework precluded them from asserting their genuine claims to resources in areas where they belong and depended upon and that only recently that forest management regimes have initiated action to recognize the occupation and other right of the forest dwellers. Of late, we have realized that forests have the best chance to survive if communities participate in their conservation and regeneration measures. The Legislature also has addressed the long standing and genuine felt need of granting a secure and inalienable right to those communities whose right to life depends on right to forests and thereby strengthening the entire conservation regime by giving a permanent stake to the STs dwelling in the forests for generations in symbiotic relationship with the entire ecosystem.

51. We have to bear in mind the above objects and reasons, while interpreting various provisions of the Forest Rights Act, which is a social welfare or remedial statute. The Act protects a wide range of rights of forest dwellers and STs including the customary rights to use forest land as a community forest resource and not restricted merely to property rights or to areas of habitation.

52. Forest rights of forest dwelling STs and other TFDs are dealt with in Chapter II of the Act. Section 3 of that chapter lists out what are the forest rights for the purpose of the Act. Following are some of the rights which have been recognized under the Act:

> "3(1)(a) Right to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood by a member or members of a forest dwelling Scheduled Tribe or other traditional forest dwellers;
>
> (b) Community rights such as nistar, by whatever name called, including those used in erstwhile Princely States, Zamindari or such intermediary regimes;
>
> (c) Right of ownership access to collect, use, and dispose of minor forest produce which has been traditionally collected within or outside village boundaries;
>
> (d) Other community rights of uses or entitlement such as fish and other products of water bodies, grazing (both settled or transhumant) and traditional seasonal resource access of nomadic or pastoralist communities;
>
> (e) Rights, including community tenures of habitat and habitation for primitive tribal groups and pre-agricultural communities

(f)-(g) xxx

(h) Rights of settlement and conversion of all forest villages, old habitation, unsurveyed villages and other villages in forests, whether recorded, notified or not into revenue villages;

(i) Right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use;

(j) Rights which are recognized under any State law or laws of any Autonomous District Council or Autonomous Regional Council or which are accepted as rights of tribals under any traditional or customary law of the concerned tribes of any State;

(k) Right of access to biodiversity and community right to intellectual property and traditional knowledge related to biodiversity and cultural diversity;

(l) Any other traditional right customarily enjoyed by the forest dwelling Scheduled Tribes or other traditional forest dwellers, as the case may be, which are not mentioned in clauses (a) to (k) but excluding the traditional right of hunting or trapping or extracting a part of the body of any species of wild animal."

53. The above section has to be read along with a definition clause.

(a) Section 2(a) defines "community forest resource":

"2(a) "Community Forest Resource" means customary common forest land within the traditional or customary boundaries of the village or seasonal use of landscape in the case of pastoral communities, including reserved forests, protected forests and protected areas such Sanctuaries and National Parks to which the community had traditional access."

(b) "Critical wildlife habitat" is defined under Section 2(b) of the Act, which reads as follows:

"(b) "critical wildlife habitat" means such areas of National Parks and Sanctuaries where it has been specifically and clearly established, case by case, on the basis of scientific and objective criteria, that such areas are required to be kept as inviolate for the purposes of wildlife conservation as may be determined and notified by the Central Government in the Ministry of Environment and Forests after open process of consultation by an Expert Committee, which includes experts from the locality appointed by that Government wherein a representative of the Ministry of Tribal Affairs shall also be included, in determining such areas according to the procedural requirement arising from sub-sections (1) and (2) of Section 4."

(c) "Forest dwelling Scheduled Tribes" is defined under Section 2(c) of the Act, which reads as follows:

"(c) "Forest dwelling Scheduled Tribes" means the members or community of the Scheduled Tribes who primarily reside in and who depend on the forests or forestlands for bona fide livelihood needs and includes the Scheduled Tribe Pastoralist communities."

(d) "Forest land" is described under Section 2(d), which reads as follows:

"(d) "forest land" means land of any description falling within any forest area and includes unclassified forests, undemarcated forests, existing or deemed forests, protected forests, reserved forests, sanctuaries and National Parks."

(e) "Gram Sabha" is defined under Section 2(g), which reads as follows:

"(g) "Gram Sabha" means a village assembly which shall consist of all adult members of a village and in case of States having no Panchayats, Padas, Tolas and other traditional village institutions and elected village committees, with full and unrestricted participation of women."

(f) "Habitat" is defined under Section 2(h), which reads as follows:
"(h) "habitat" includes the area comprising the customary habitat and such other habitats in reserved forests and protected forests of primitive tribal groups and pre-agricultural communities and other forest dwelling Scheduled Tribes."

(g) "Scheduled Areas" is described under Section 2(m), which reads as follows:
"(m) "Scheduled Areas" means the Scheduled Areas referred to in clause (1) of Article 244 of the Constitution."

(h) "Sustainable use" is described under Section 2(n), which reads as follows:
"(n) "sustainable use" shall have the same meaning as assigned to it in clause (o) of Section 2 of Biological Diversity Act, 2002 (18 of 2003)."

54. Chapter III of the Act deals with recognition, restoration and vesting of forest rights and related matters. Section 4 of that chapter deals with recognition of, and vesting of, forest rights in forest dwelling STs and other TFDs. Section 5 lists out duties in whom the forest rights vests and also the holders of forest rights empowers them to carry out duties. Those duties include preservation of habitat from any form of destructive practices affecting their cultural and natural heritage.

55. The definition clauses read with the above mentioned provisions give emphasis to customary rights, rights to collect, use and dispose of minor forest produce, community rights like grazing cattle, community tenure of habitat and habitation for primitive tribal groups, traditional rights customarily enjoyed etc. Legislative intention is, therefore, clear that the Act intends to protect custom, usage, forms, practices and ceremonies which are appropriate to the traditional practices of forest dwellers.

56. Chapter IV of the Act deals with the authorities and procedure for vesting of forest rights. That chapter has only one section i.e. Section 6, which has to be read along with The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Amendment Rules, 2007 and the Amendment Rules 2012.

57. The Ministry of Tribal Affairs has noticed several problems which are impeding the implementation of the Act in its letter and spirit.

For proper and effective implementation of the Act, the Ministry has issued certain guidelines and communicated to all the States and UTs vide their letter dated 12.7.2012. The operative portion of the same reads as follows:

"GUIDELINES

i) Process of Recognition of Rights:

a) The State Governments should ensure that on receipt of intimation from the Forest Rights Committee, the officials of the Forest and Revenue Departments remain present during the verification of the claims and the evidence on the site.

b) In the event of modification or rejection of a claim by the Gram Sabha or by the Sub-Divisional Level Committee or the District Level Committee, the decision on the claim

should be communicated to the claimant to enable the aggrieved person to prefer a petition to the Sub Divisional Level Committee or the District Level Committee, as the case may be, within the sixty days period prescribed under the Act and no such petition should be disposed of against the aggrieved person, unless he has been given a reasonable opportunity to present his case.

c) The Sub-Divisional Level Committee or the District Level Committee should, if deemed necessary, remand the claim to the Gram Sabha for reconsideration instead of rejecting or modifying the same, in case the resolution or the recommendation of the Gram Sabha is found to be incomplete or prima-facie requires additional examination.

d) In cases where the resolution passed by the Gram Sabha, recommending a claim, is upheld by Sub-Divisional Level committee, but the same is not approved by the District Level Committee, the District Level Committee should record the reasons for not accepting the recommendations of the Gram Sabha and the Sub-Divisional Level Committee, in writing, and a copy of the order should be supplied to the claimant.

e) On completion of the process of settlement of rights and issue of titles as specified in Annexures II, III & IV of the Rules, the Revenue / Forest Departments shall prepare a final map of the forest land so vested and the concerned authorities shall incorporate the forest rights so vested in the revenue and forest records, as the case may be, within the prescribed cycle of record updation.

f) All decisions of the Sub-Divisional Level Committee and District Level Committee that involve modification or rejection of a Gram Sabha resolution/ recommendation should be in the form of speaking orders.

g) The Sub-Divisional Level Committee or the District Level committee should not reject any claim accompanied by any two forms of evidences, specified in Rule 13, and recommended by the Gram Sabha, without giving reasons in writing and should not insist upon any particular form of evidence for consideration of a claim. Fine receipts, encroacher lists, primary offence reports, forest settlement reports, and similar documentation rooted in prior official exercises, or the lack thereof, would not be the sole basis for rejection of any claim.

h) Use of any technology, such as, satellite imagery, should be used to supplement evidences tendered by a claimant for consideration of the claim and not to replace other evidences submitted by him in support of his claim as the only form of evidence.

i) The status of all the claims, namely, the total number of claims filed, the number of claims approved by the District Level Committee for title, the number of titles actually distributed, the number of claims rejected, etc. should be made available at the village and panchayat levels through appropriate forms of communications, including conventional methods, such as, display of notices, beat of drum etc.

j) A question has been raised whether the four hectare limit specified in Section 4(6) of the Act, which provides for recognition of forest rights in respect of the land mentioned in clause (a) of sub-section (1) of section 3 of the Act, applies to other forest rights mentioned in Section 3(1) of the Act. It is clarified that the four hectare limit specified in Section 4(6) applies to rights under section 3(1)(a) of the Act only and not to any other right under section 3(1), such as conversion of pattas or leases, conversion of forest villages into revenue villages etc.

ii) Minor Forest Produce:

a) The State Government should ensure that the forest rights relating to MFPs under Section 3(1)(c) of the Act are recognized in respect of all MFPs, as defined under Section 2(i) of the Act, in all forest areas, and state policies are brought in alignment with the provisions of the Act. Section 2(i) of the Act defines the term "minor forest produce" to include "all non-timber produce of plant origin, including bamboo, brush wood, stumps, cane, tussar, cocoons, honey, wax, lac, tendu or kendu leaves, medicinal plants and herbs, roots, tubers, and the like".

b) The monopoly of the Forest Corporations in the trade of MFP in many States, especially in case of high value MFP, such as, tendu patta, is against the spirit of the Act and should henceforth be done away with.

c) The forest right holders or their cooperatives/ federations should be allowed full freedom to sell such MFPs to anyone or to undertake individual or collective processing, value addition, marketing, for livelihood within and outside forest area by using locally appropriate means of transport.

d) The State Governments should exempt movement of all MFPs from the purview of the transit rules of the State Government and, for this purpose, the transit rules be amended suitably. Even a transit permit from Gram Sabha should not be required. Imposition of any fee/charges/royalties on the processing, value addition, marketing of MFP collected individually or collectively by the cooperatives/ federations of the rights holders would also be ultra vires of the Act.

e) The State Governments need to play the facilitating role in not only transferring unhindered absolute rights over MFP to forest dwelling Scheduled Tribes and other traditional forest dwellers but also in getting them remunerative prices for the MFP, collected and processed by them.

iii) Community Rights:

a) The District Level Committee should ensure that the records of prior recorded nistari or other traditional community rights (such as Khatian part II in Jharkhand, and traditional forest produce rights in Himachal and Uttarakhand) are provided to Gram Sabhas, and if claims are filed for recognition of such age-old usufructory rights, such claims are not rejected except for valid reasons, to be recorded in writing, for denial of such recorded rights;

b) The District Level Committee should also facilitate the filing of claims by pastoralists before the concerned Gram Sabha (s) since they would be a floating population for the Gram Sabha(s) of the area used traditionally.

c) In view of the differential vulnerability of Particularly Vulnerable Tribal Groups (PTGs) amongst the forest dwellers, District Level Committee should play a pro-active role in ensuring that all PTGs receive habitat rights in consultation with the concerned PTGs' traditional institutions and their claims for habitat rights are filed before the concerned Gram Sabhas.

d) The forest villages are very old entities, at times of pre-independent era, duly existing in the forest records. The establishment of these villages was in fact encouraged by the forest authorities in the pre-independent era for availability of labour within the forest areas. The well defined record of each forest village, including the area, number

of inhabitants, etc. exists with the State Forest Departments. There are also unrecorded settlements and old habitations that are not in any Government record. Section 3(1)(h) of the Act recognizes the right of forest dwelling Scheduled Tribes and other traditional forest dwellers relating to settlement and conversion on forest villages, old habitation, un-surveyed villages and other villages and forests, whether recorded, notified or not into revenue villages. The conversion of all forest villages into revenue villages and recognition of the forest rights of the inhabitants thereof should actually have been completed immediately on enactment of the Act. The State Governments may, therefore, convert all such erstwhile forest villages, unrecorded settlements and old habitations into revenue villages with a sense of urgency in a time bound manner. The conversion would include the actual land-use of the village in its entirety, including lands required for current or future community uses, like, schools, health facilities, public spaces etc. Records of the forest villages maintained by the Forest Department may thereafter be suitably updated on recognition of this right.

iv) Community Forest Resource Rights:

a) The State Government should ensure that the forest rights under Section 3(1)(i) of the Act relating to protection, regeneration or conservation or management of any community forest resource, which forest dwellers might have traditionally been protecting and conserving for sustainable use, are recognized in all villages and the titles are issued as soon as the prescribed Forms for claiming Rights to Community Forest Resource and the Form of Title for Community Forest Resources are incorporated in the Rules. Any restriction, such as, time limit, on use of community forest resources other than what is traditionally imposed would be against the spirit of the Act.

b) In case no community forest resource rights are recognized in a village, the reasons for the same should be recorded. Reference can be made to existing records of community and joint forest management, van panchayats, etc. for this purpose.

c) The Gram Sabha would initially demarcate the boundaries of the community forest resource as defined in Section 2(a) of the Act for the purposes of filing claims for recognition of forest right under Section 3(1)(i) of the Act.

d) The Committees constituted under Rule 4(e) of the Forest Rights Rules, 2008 would work under the control of Gram Sabha. The State Agencies should facilitate this process.

e) Consequent upon the recognition of forest right in Section 3(i) of the Act to protect, regenerate or conserve or manage any community forest resource, the powers of the Gram Sabha would be in consonance with the duties as defined in Section 5(d), wherein the Gram Sabha is empowered to regulate access to community forest resources and stop any activity which adversely affects the wild animals, forest and the biodiversity. Any activity that prejudicially affects the wild-life, forest and biodiversity in forest area would be dealt with under the provisions of the relevant Acts.

v) Protection Against Eviction, Diversion of Forest Lands and Forced Relocation:

a) Section 4(5) of the Act is very specific and provides that no member of a forest dwelling Scheduled Tribe or other traditional forest dwellers shall be evicted or removed from the forest land under his occupation till the recognition and verification procedure is complete. This clause is of an absolute nature and excludes all possibilities of eviction of forest dwelling Scheduled Tribes or other traditional forest dwellers without settlement of their forest rights as this Section opens with the words "Save as otherwise provided". The rationale behind this protective clause against eviction is to ensure that

in no case a forest dweller should be evicted without recognition of his rights as the same entitles him to a due compensation in case of eventuality of displacement in cases, where even after recognition of rights, a forest area is to be declared as inviolate for wildlife conservation or diverted for any other purpose. In any case, Section 4(1) has the effect of recognizing and vesting forest rights in eligible forest dwellers. Therefore, no eviction should take place till the process of recognition and vesting of forest rights under the Act is complete.

b) The Ministry of Environment & Forests, vide their letter No.11-9/1998-FC(pt.) dated 30.07.2009, as modified by their subsequent letter of the same number dated 03.08.2009, has issued directions, requiring the State/ UT Governments to enclose certain evidences relating to completion of the process of settlement of rights under the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, while formulating unconditional proposals for diversion of forest land for non-forest purposes under the Forest (Conservation) Act, 1980. The State Government should ensure that all diversions of forest land for non-forest purposes under the Forest (Conservation) Act, 1980 take place in compliance with the instructions contained in the Ministry of Environment & Forest's letter dated 30.07.2009, as modified on 03.08.2009.

c) There may be some cases of major diversions of forest land for non-forest purposes under the Forest (Conservation) Act, 1980 after the enactment of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 but before the issue of Ministry of Environment & Forests' letter dated 30.07.2009, referred to above. In case, any evictions of forest dwelling Scheduled Tribes and other traditional forest dwellers have taken place without settlement of their rights due to such major diversions of forest land under the Forest (Conservation) Act, 1980, the District Level Committees may be advised to bring such cases of evictions, if any, to the notice of the State Level Monitoring Committee for appropriate action against violation of the provisions contained in Section 4(5) of the Act.

d) The Act envisages the recognition and vesting of forest rights in forest dwelling Scheduled Tribes and other traditional forest dwellers over all forest lands, including National Parks and Sanctuaries. Under Section 2(b) of the Act, the Ministry of Environment & Forests is responsible for determination and notification of critical wildlife habitats in the National Parks and Sanctuaries for the purpose of creating inviolate areas for wildlife conservation, as per the procedure laid down. In fact, the rights of the forest dwellers residing in the National Parks and Sanctuaries are required to be recognized without waiting of notification of critical wildlife habitats in these areas. Further, Section 4(2) of the Act provides for certain safeguards for protection of the forest rights of the forest rights holders recognized under the Act in the critical wildlife habitats of National Parks and Sanctuaries, when their rights are either to be modified or resettled for the purposes of creating inviolate areas for wildlife conservation. No exercise for modification of the rights of the forest dwellers or their resettlement from the National Parks and Sanctuaries can be undertaken, unless their rights have been recognized and vested under the Act. In view of the provisions of Section 4(5) of the Act, no eviction and resettlement is permissible from the National Parks and sanctuaries till all the formalities relating to recognition and verification of their claims are completed. The State/ UT Governments may, therefore, ensure that the rights of the forest dwelling Scheduled Tribesand other traditional forest dwellers, residing in National Parks and Sanctuaries are recognized first before any exercise for modification of their rights or their resettlement, if necessary, is undertaken and no member of the forest dwelling Scheduled Tribe or other traditional forest dweller is evicted from such areas without the settlement of their rights and completion of all other actions required under section 4 (2) of the Act.

e) The State Level Monitoring Committee should monitor compliance of the provisions of Section 3(1)(m) of the Act, which recognizes the right to in situ rehabilitation including alternative land in cases where the forest dwelling Scheduled Tribes and other traditional forest dwellers have been illegally evicted or displaced from forest land without receiving their legal entitlement to rehabilitation, and also of the provisions of Section 4(8) of the Act, which recognizes their right to land when they are displaced from their dwelling and cultivation without land compensation due to State development interventions.

vi) Awareness-Raising, Monitoring and Grievance Redressal:

a) Each State should prepare suitable communication and training material in local language for effective implementation of the Act.

b) The State Nodal Agency should ensure that the Sub Divisional Level Committee and the District Level Committee make district-wise plans for trainings of revenue, forest and tribal welfare departments' field staff, officials, Forest Rights Committees and Panchayat representatives. Public meetings for awareness generation in those villages where process of recognition is not complete need to be held.

c) In order to generate awareness about the various provisions of the Act and the Rules, especially the process of filing petitions, the State Government should organize public hearings on local bazaar days or at other appropriate locations on a quarterly basis till the process of recognition is complete. It will be helpful if some members of Sub Divisional Level Committee are present in the public hearings. The Gram Sabhas also need to be actively involved in the task of awareness raising.

d) If any forest dwelling Scheduled Tribe in case of a dispute relating to a resolution of a Gram Sabha or Gram Sabha through a resolution against any higher authority or Committee or officer or member of such authority or Committee gives a notice as per Section 8 of the Act regarding contravention of any provision of the Act or any rule made thereunder concerning recognition of forest rights to the State Level Monitoring Committees, the State Level Monitoring Committee should hold an inquiry on the basis of the said notice within sixty days from the receipt of the notice and take action, if any, that is required. The complainant and the Gram Sabha should be informed about the outcome of the inquiry."

FOREST RIGHTS ACT AND MMDR ACT

58. State of Orissa has maintained the stand that the State has the ownership over the mines and minerals deposits beneath the forest land and that the STs and other TFDs cannot raise any claim or rights over them, nor the Gram Sabha has any right to adjudicate such claims. This Court in *Amritlal Nathubhai Shah and Ors. vs. Union Government of India and Another* (1976) 4SCC 108, while dealing with the scope of Mines and Minerals(Regulation and Development) Act, 1957 held as follows:

    "3. .....the State Government is the "owner of minerals" within its territory, and the minerals "vest" in it. There is nothing in the Act or the Rules to detract from this basic fact. That was why the Central Government stated further in its revisional orders that the State Government had the "inherent right to reserve any particular area for exploitation in the public sector". It is therefore quite clear that, in the absence of any law or contract etc to the contrary, bauxite, as a mineral, and the mines thereof, vest in the State of Gujarat and no person has any right to exploit it otherwise then in accordance with the provisions of the Act and the Rules....."

The Forest Rights Act, neither expressly nor impliedly, has taken away or interfered with the right of the State over mines or minerals lying underneath the forest land, which stand vested in the State. State holds the natural resources as a trustee for the people. Section 3 of the Forest Rights Act does not vest such rights on the STs or other TFDs. PESA Act speaks only of minor minerals, which says that the recommendation of Gram Sabha shall be made mandatory prior to grant of prospecting licence or mining lease for minor minerals in the Scheduled Areas. Therefore, as held by this Court in Amritlal (supra), the State Government has the power to reserve any particular area for Bauxite mining for a Public Sector Corporation.

GRAM SABHA AND OTHER AUTHORITIES

59. Under Section 6 of the Act, Gram Sabha shall be the authority to initiate the process for determining the nature and extent of individual or community forest rights or both and that may be given to the forest dwelling STs and other TFDs within the local limits of the jurisdiction. For the said purpose it receive claims, and after consolidating and verifying them it has to prepare a plan delineating the area of each recommended claim in such manner as may be prescribed for exercise of such rights. The Gram Sabha shall, then, pass a resolution to that effect and thereafter forward a copy of the same to the Sub-Divisional Level Committee. Any aggrieved person may move a petition before the Sub-Divisional Level Committee against the resolution of the Gram Sabha. Sub-section (4) of Section 6 confers a right on the aggrieved person to prefer a petition to the District Level Committee against the decision of the Sub-Divisional Level Committee. Sub-section (7) of Section 6 enables the State Government to constitute a State Level Monitoring Committee to monitor the process of recognition and vesting of forest rights and to submit to the nodal agency. Such returns and reports shall be called for by that agency.

60. Functions of the Gram Sabha, Sub-Divisional Level Committee, District Level Committee, State Level Monitoring Committee and procedure to be followed and the process of verification of claims etc. have been elaborately dealt with in 2007 Rules read with 2012 Amendment Rules. Elaborate procedures have therefore been laid down by Forest Rights Act read with 2007 and 2012 Amendment Rules with regard to the manner in which the nature and extent of individual or customary forest rights or both have to be decided. Reference has already been made to the details of forest rights which have been conferred on the forest dwelling STs as well as TFDs in the earlier part of the Judgment.

INDIVIDUAL/COMMUNITY RIGHTS

61. Forest Rights Act prescribed various rights to tribals/forest dwellers as per Section 3 of the Act. As per Section 6 of the Act, power is conferred on the Gram Sabha to process for determining the nature and the extent of individual or community forests read with or both that may be given to forest dwelling STs and other TFDs, by receiving claims, consolidate it, and verifying them and preparing a map, delineating area of each recommended claim in such a manner as may be prescribed. The Gram Sabha has received a large number of individual claims and community claims from the Rayagada District as well as the Kalahandi District. From Rayagada District Gram Sabha received 185 individual claims, of which 145 claims have been considered and settled by granting alternate rights over 263.5 acres of land. 40 Individual claims pending before the Gram Sabha pertain to areas which falls outside the mining lease area. In respect of Kalahandi District 31 individual claims have been considered and settled by granting alternate rights over an area of 61 acres.

62. The Gram Sabha has not received any community claim from the District of Rayagada. However, in respect of Kalahandi District 6 community claims had been received by the Gram Sabha of which 3 had been considered and settled by granting an alternate area of 160.55 acres. The balance 3 claims are pending consideration.

CUSTOMARY AND RELIGIOUS RIGHTS (SACRED RIGHTS)

63. Religious freedom guaranteed to STs and the TFDs under Articles 25 and 26 of the Constitution is intended to be a guide to a community of life and social demands. The above mentioned Articles guarantee them the right to practice and propagate not only matters of faith or belief, but all those rituals and observations which are regarded as integral part of their religion. Their right to worship the deity Niyam-Raja has, therefore, to be protected and preserved.

64. The Gram Sabha has a role to play in safeguarding the customary and religious rights of the STs and other TFDs under the Forest Rights Act. Section 6 of the Act confers powers on the Gram Sabha to determine the nature and extent of "individual" or "community rights". In this connection, reference may also be made to Section 13 of the Act coupled with the provisions of PESA Act, which deal with the powers of Gram Sabha. Section 13 of the Forest Rights Act reads as under:

    "13. Act not in derogation of any other law. - Save as otherwise provided in this Act and the provisions of the Panchayats (Extension of the Scheduled Areas) Act, 1996 (40 of 1996), the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force."

65. The PESA Act has been enacted, as already stated, to provide for the extension of the provisions of Part IX of the Constitution relating to Panchayats to the Scheduled Areas. Section 4(d) of the Act says that every Gram Sabha shall be competent to safeguard and preserve the traditions, customs of the people, their cultural identity, community resources and community mode of dispute resolution. Therefore, Grama Sabha functioning under the Forest Rights Act read with Section 4(d) of PESA Act has an obligation to safeguard and preserve the traditions and customs of the STs and other forest dwellers, their cultural identity, community resources etc., which they have to discharge following the guidelines issued by the Ministry of Tribal Affairs vide its letter dated 12.7.2012.

66. We are, therefore, of the view that the question whether STs and other TFDs, like Dongaria Kondh, Kutia Kandha and others, have got any religious rights i.e. rights of worship over the Niyamgiri hills, known as Nimagiri, near Hundaljali, which is the hill top known as Niyam-Raja, have to be considered by the Gram Sabha. Gram Sabha can also examine whether the proposed mining area Niyama Danger, 10 km. away from the peak, would in any way affect the abode of Niyam-Raja. Needless to say, if the BMP, in any way, affects their religious rights, especially their right to worship their deity, known as Niyam Raja, in the hills top of the Niyamgiri range of hills, that right has to be preserved and protected. We find that this aspect of the matter has not been placed before the Gram Sabha for their active consideration, but only the individual claims and community claims received from Rayagada and Kalahandi Districts, most of which the Gram Sabha has dealt with and settled.

67. The Gram Sabha is also free to consider all the community, individual as well as cultural and religious claims, over and above the claims which have already been received from Rayagada and Kalahandi Districts. Any such fresh claims be filed before the Gram Sabha within six weeks from the date of this Judgment. State Government as well as the Ministry of Tribal Affairs, Government of India, would assist the Gram

Sabha for settling of individual as well as community claims.

68. We are, therefore, inclined to give a direction to the State of Orissa to place these issues before the Gram Sabha with notice to the Ministry of Tribal Affairs, Government of India and the Gram Sabha would take a decision on them within three months and communicate the same to the MoEF, through the State Government. On the conclusion of the proceeding before the Gram Sabha determining the claims submitted before it, the MoEF shall take a final decision on the grant of Stage II clearance for the Bauxite Mining Project in the light of the decisions of the Gram Sabha within two months thereafter.

69. The Alumina Refinery Project is well advised to take steps to correct and rectify the alleged violations by it of the terms of the environmental clearance granted by MoEF. Needless to say that while taking the final decision, the MoEF shall take into consideration any corrective measures that might have been taken by the Alumina Refinery Project for rectifying the alleged violations of the terms of the environmental clearance granted in its favour by the MoEF.

70. The proceedings of the Gram Sabha shall be attended as an observer by a judicial officer of the rank of the District Judge, nominated by the Chief Justice of the High Court of Orissa who shall sign the minutes of the proceedings, certifying that the proceedings of the Gram Sabha took place independently and completely uninfluenced either by the Project proponents or the Central Government or the State Government.

71. The Writ Petition is disposed of with the above directions. Communicate this order to the Ministry of Tribal Affairs, Gram Sabhas of Kalahandi and Rayagada Districts of Orissa and the Chief Justice of High Court of Orissa, for further follow up action.

ALLAHABAD HIGH COURT

TABLE OF JUDGMENTS AND ORDERS

Ishwar Chandra Gupta etc. vs. State of UP & Ors.

WP (MS) (6887) OF 2010, ETC
ALLAHABAD HIGH COURT
22.02.2011
CORAM: NARAYAN SHUKLA, J.
CITATION: 2011 (3) ADJ 314; All 2011 All 88; SCC ONLINE All 303

SUMMARY

The batch of seven writ petitions challenged the order passed by the authorities at Dudhwa Tiger Reserve, whereby evictions had taken place. The order passed by the Chief Conservator of Forest and Field Director, Dudhwa Reserve, in his capacity as appellate authority, upholding the order of the prescribed authority, was also challenged. The authority had passed the order under S. 61-B (2) (as amended for the State of Uttar Pradesh) of the Indian Forest Act, 1927 (1927 Act), and the Wildlife Protection Act, 1972 (1972 Act) to cut short the proceedings, even though regular proceedings for eviction were pending.

The Court considered the facts of only one case in detail, since it was representative of the other cases. In the said case the rent for the land in question was deposited from 1928 to 1985, after which the authorities refused to receive the rent. Accordingly, a civil suit was filed after which the petitioners paid the rent continuously.

A local organisation, Katarniya Ghat Foundation, being involved in the protection of the environment, moved an application for impleadment, and argued that vide State Government notification dated 9.6.2014, the forest area had been declared a Critical Tiger Habitat for Dudhwa Tiger Reserve.

The petitioners claimed protection under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA), which they argued overrides Section 61B of the 1927 Act, which is repugnant thereto. According to the petitioners, they were in possession since the time of their ancestors, and were dependent on the land in question (Gauri Phanta) for their livelihood. The evictions were challenged also under Article 19(1)(g)[8] of the Constitution, with the petitioners further arguing that their actual possession of the land for a long period

[8] Article 19(1)(g) of the Constitution relates to the freedom to practise any profession, or to carry on any occupation, trade or business.

of time should be seen as conclusive proof of valid occupation, thus establishing their right. The contention was that the evictions were "illegal" and "violative of principles of natural justice", as the shops in the mandi were allotted to them in 1928 on a yearly basis, and subsequently electricity connections were also allotted.

The respondent State government opposed the writ petitions on a variety of technical and substantive grounds. Among other things, it contended that the petitioners don't belong to STs or OTFDs, and that they are using land for outright commercial purposes i.e. running shops. Lengthy arguments were also raised by both sides on the issue of repugnancy of the UP State Amendment to the 1927 Act, and the FRA. The petitioners contended that Article 254(2) of the Constitution had not been compiled with, and cited several Supreme Court precedents in this regard.

FINDINGS OF THE COURT

Subsequent to examining the statutory provisions under the 1927 Act, the 1972 Act and the FRA, the Court did not find that the petitioners were able to establish their identity as forest dwelling STs or OTFDs. The Court held that since they are not covered by the FRA, the question of repugnancy did not arise.

In what appears to be an aside, having already concluded that the petitioners are not eligible under FRA, the Court further observed:

> **"after reading of Section 13 of the Forest Rights Act, 2006 I find that the provisions of Forest Rights Act, 2006 are in addition to and not in derogation of the provisions of the Indian Forest Act, 1927, therefore, being not the position of repugnancy between two Acts, I am of the view that the petitioners are governed under Section 61 of the Indian Forest Act (as amended "The Indian Forest (Uttar Pradesh Amendment) Act, 2000), and they have rightly been dealt with accordingly".**

The Court was clearly unimpressed by the fact that no lease document was produced by the petitioners, and possession was the only reason the Civil Court allowed depositing of the rent. It also cited *T.N. Godavarman vs. Union of India & Ors.* (1997) 2 SCC 267 where the Supreme Court has made it necessary to prevent deforestation by restricting non-forest activities.

DIRECTIONS ISSUED

The final direction issued by the Court was that "the petitioners have no right to continue their possession over the forest land with their non-forest activities like doing business."

Accordingly, the writ petitions were dismissed.

EDITOR'S NOTE

Although there appear to be a number of damaging observations in this judgment, it must be remembered that the decision has been rendered by the Single Judge in the unique facts of the case. Clearly, the matter emerged from a long standing civil dispute and complex litigations, and FRA was just one more attempt by the petitioners to continue what were clearly commercial activities- running of shops- on forest land. The decision would not, therefore, have precedent value insofar as

other cases where the facts are different.

ORDER

1. Heard Mr. Prashant Chandra, learned Senior Advocate assisted by Ms. Shraddha Agarwal, Dr. Salil Kumar Srivatava and Mr. Hari Om Singh, learned Counsels for the Petitioners and Mr. D.K. Upadhyay, learned Chief Standing Counsel for the State as well as Mr. A.R. Masoodi, learned Advocate.

2. The Petitioners have challenged the order passed by the Prescribed Authority/Deputy Director, Dudhwa Tiger Reserve Division, Pallia, Kheri, whereby they have been evicted from the forest land as also the order passed by the Appellate Authority i.e. the Chief Conservator of Forest and Field Director, Dudhwa Tiger Reserve, Lakhimpur Kheri upholding the order passed by the Prescribed Authority. The Prescribed Authority has passed the order in exercise of power provided under Section 61-B(2) of the Indian Forest Act, 1927 (as amended vide The Indian Forest (Uttar Pradesh Amendment) Act, 2000) as well as under Section 34-A of the Wild Life (Protection) Act, 1972 (as amended in 2002 & 2006).

3. The land in question is situated near Dudhwa National Park. The place is named as Gauri Phanta.

4. The Petitioners claim protection under the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (in short 'Forest Rights Act, 2006'), which according to them, has overriding effect over the Indian Forest Act, 1927. Besides it they claim that they are in possession over there since the time of their ancestors and are carrying on business to earn their bread and butter since 1928. They also claim that their evictions are violative of Article 19(1)(g) of the Constitution of India as well as the law laid down by the Hon'ble Supreme Court in the case of *Chief Conservator of Forests, Government of A.P vs. Collector and Ors.* reported in (2003) 3 SCC 472. It is also their case that the shops in the Mandi were allotted to the Petitioners in the year 1928 on yearly lease rent on the application moved by their father. Accordingly their shops are established having electricity connection etc.

5. It is stated that they had been depositing the lease rent since 1928, which continued till 1985, when the department refused to accept the rent despite their best efforts. When the authorities did not accept the rent, they filed a Civil Suit being Suit No. 844 of 1992 in the Court of Additional Civil Judge (Junior Division), Lakhimpur Kheri seeking mandatory decree against the opposite parties, which was decided on 25th of September, 1996 with the direction to the Forest Authorities to accept the arrears of lease rent from the Petitioners from 1st of October, 1986.

6. It is stated that the opposite parties filed an application under Order 9 Rule 13 of the Code of Civil Procedure to recall the order dated 25th of September, 1996, but the same was rejected by means of order dated 3rd of April, 1998. They challenged the said order through an appeal being Civil Appeal No. 40 of 1998 before the District Judge, which was also rejected by means of order dated 12th of March, 1999. Thus, it is stated that the order passed by the Civil Judge attained the finality and pursuant to the order passed by the Civil Judge, they have been depositing the rent till date. Instead of conformation of their right by the Civil Court, they received the notice dated 11th of July, 2010 from the office of Regional Forest Officer, Gauri Phanta Range, Dudhwa Tiger Reserve Division, Palia-Kheri on 14th of July, 2010 for their eviction, in furtherance of the order of eviction

passed on 29th of June, 2010. According to the Petitioners, notices are illegal, arbitrary and uncalled for as well as also violative of principles of natural justice. They preferred applications for restoration, but of no gain. They preferred an appeal, which has also been rejected.

7. Mr. Prashant Chandra, learned Senior Advocate appearing for the Petitioners submitted that the Petitioners' rights and interest are protected under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (hereinafter referred to as the "Forest Rights Act, 2006", which is Central Act. It recognizes the rights and occupation in Forest land of the Forest dwelling scheduled tribes and other traditional forest dwellers. Under this Act a complete procedure to deal with the matter has been provided, therefore, the Petitioners are liable to be governed only under the procedure prescribed therein. Thus he submitted that since the Forest Rights Act, 2006 has overriding effect over the Indian Forest Act, 1927 and Wild Life (Protection) Act, 1972, the orders passed by the Prescribed Authority in exercise of power provided under these Acts are without jurisdiction and therefore unsustainable.

8. In support of his submission he cited a decision i.e. *East Coast Railway and Anr. vs. Mahadev Appa Rao and Ors.* reported in (2010) 7 SCC 678. The relevant paragraph 9 of which is extracted below:

> "9. There is no quarrel with the well-settled proposition of law that an order passed by a public authority exercising administrative/executive or statutory powers must be judged by the reasons stated in the order or any record or file contemporaneously maintained. It follows that the infirmity arising out of the absence of reasons cannot be cured by the authority passing the order stating such reasons in an affidavit filed before the Court where the validity of any such order is under challenge. The legal position in this regard is settled by the decision of this Court in *Commissioner of Police vs. Gordhandas Bhanji* AIR 1952 SC16, wherein this Court observed: (AIR p.18, para 9)
>
> > "9. ...public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.""

9. Apart from title they claim to have perfected their right on the basis of possession in light of the decision of Hon'ble Supreme Court rendered in the case of *Nair Service Society Ltd. vs. K.C. Alexander*, reported in AIR 1968 SC 1165, in which the Hon'ble Supreme Court held "That possession may prima facie raise a presumption of title no one can deny but this presumption can hardly arise when the facts are known. When the facts disclose no title in either party, possession alone decides." He further cited another case i.e. *Chief Conservator of Forest vs. Collector and Ors.* reported in (2003) 3 SCC 472, the relevant paragraph 22 of which is extracted below:

> "22. The pattedars proved their possession of the lands in question from 1312 Fasli (1902 AD) as pattedars. There is long and peaceful enjoyment of the lands in question but no proof of conferment of patta on the late Raja and the facts relating to acquisition of title are not known. The Appellant State could not prove its title to the lands. On these facts, the presumption under Section 110 of the Evidence Act applies and the Appellants have to prove that the pattedars are not the owners. The Appellants placed no evidence on record to rebut the presumption. Consequently, the pattedars' title to the land in question has to be

upheld."

10. He also claims repugnancy between the provisions of two Acts on the ground that Section 61-B of the Indian Forest Act, 1927 as amended by way of the Indian Forest (Uttar Pradesh Amendment) Act, 2000, is repugnant to the Forest Rights Act, 2006. It is also submitted by him that the case of *T.N. Godavarman Thirumulkpad*, reported in 1997 (2) SCC 267, confines to the illegal felling of trees and unauthorised running of saw mills and the directions are pointed towards prevention of Forest timber and the consequential activities, whereas the Chief Conservator of Forests case (Supra) cannot apply to the Forest dwellers and the actual possession even without lease is a conclusive proof of valid occupation. He further submitted that the Hon'ble Supreme Court in the case of *Mohinder Singh Gill vs. Chief Election Commissioner* reported in 1978 (1) SCC 405, has held that the order must be supported with the reasons as the order passed by the public authority exercising administrative/executive or statutory powers must be judged by the reasons stated in the order or any record or file contemporaneously maintained, where as in the present case the orders impugned are not supported with the reasons.

11. In this context he further cited a decision of the Hon'ble Supreme Court i.e. *East Coast Railways and Ors. vs. Mahadev Appa Rao and Ors.* reported in 2010 (7) SCC 678, the relevant paragraph 23 of which is reproduced hereunder:

    "23. Arbitrariness in the making of an order by an authority can manifest itself in different forms. Non-application of mind by the authority making the order is only one of them. Every order passed by a public authority must disclose due and proper application of mind by the persons making the order. This may be evident from the order itself or the record contemporaneously maintained. Application of mind is best demonstrated by disclosure of mind by the authority making the order. And disclosure is best done by recording the reasons that led the authority to pass the order in question. Absence of reasons either in the order passed by the authority or in the record contemporaneously maintained is clearly suggestive of the order being arbitrary hence legally unsustainable."

12. He also invited the attention of this Court towards the Notification dated 9th of June, 2008 issued by the Government of India, Ministry of Tribal Affairs, which speaks that such Scheduled Tribes and Other Traditional Forest Dwellers who are not necessarily residing inside the forest but are depending on the forest for their bona fide livelihood needs would be covered under the definition of 'forest dwelling Scheduled Tribes' and 'Other Traditional Forest Dweller' as given in Sections 2(c) and 2(o) of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. The Petitioners also claim the protection of their right under the aforesaid notification.

13. On this scope he further cited a decision i.e. *Zameer Ahmed Latifur Rehman Shekh vs. State of Maharashtra and Ors.* reported in (2010) 5 SCC 246, of Hon'ble Supreme Court, in which the conditions of repugnancy have been laid down. In the aforesaid case the Hon'ble Supreme Court has referred its earlier decision i.e. *M. Karunanidhi vs. Union of India* reported in (1979) (3) SCC 431, in which the principles to be applied for determining repugnancy between a law made by Parliament and a law made by the State Legislature, were considered by a Constitution Bench of the Hon'ble Supreme Court. The Hon'ble Supreme Court held that the repugnancy may result from the following circumstances:

    "1. Where the provisions of a Central Act and a State Act in the Concurrent List are fully inconsistent and are absolutely irreconcilable, the Central Act will prevail and the State Act will become void in view of the repugnancy.

2. Where, however, a law passed by the State comes into collision with a law passed by Parliament on an entry in the Concurrent List, the State Act shall prevail to the extent of the repugnancy and the provisions of the Central Act would become void provided the State Act has been passed in accordance with Clause (2) of Article 254.

3. Where a law passed by the State Legislature while being substantially within the scope of the entries in the State List entrenches upon any of the Entries in the Central List the constitutionality of the law may be upheld by invoking the doctrine of pith and substance if on an analysis of the provisions of the Act it appears that by an large the law falls within the four corners of the State List and entrenchment, if any, is purely incidental or inconsequential.

4. Where, however, a law made by the State Legislature on a subject covered by the Concurrent List is inconsistent with and repugnant to a previous law made by Parliament, then such a law can be protected by obtaining the assent of the President under Article 254(2) of the Constitution. The result of obtaining the assent of the President would be that so far as the State Act is concerned, it will prevail in the State and overrule the provisions of the Central Act in their applicability to the State only. Such a state of affairs will exist only until Parliament may at any time make a law adding to, or amending, varying or repealing the law made by the State Legislature under the proviso to Article 254."

In paragraph 24 of the same judgment, the Hon'ble Supreme Court further laid down the conditions to be satisfied before any repugnancy could arise, which are as follows:

"1. That there is a clear and direct inconsistency between the Central Act and the State Act.

2. That such an inconsistency is absolutely irreconcilable.

3. That the inconsistency between the provisions of the two Acts is of such a nature as to bring the two Acts into direct collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other."

Further in paragraph 35 the Hon'ble Supreme Court again laid down the following preposition:

"1. That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.

2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.

3. That where the two statutes occupy a particular filed, but there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.

4. That where there is no inconsistency but a statute occupying the same filed seeks to create distinct and separate offence, no question of repugnancy arises and both the statues continue to operate in the same field."

14. Mr. Prashant Chandra, learned Senior Advocate appearing for the Petitioners, also raised one question that the regular proceeding for eviction were already pending, but just to cut short the proceeding, the opposite parties have adopted the recourse to the provisions of Section 61-B of the Indian Forest Act, 1927 to evict the Petitioners,

which is absolutely illegal and arbitrary. According to him it also establishes the high handedness of the authorities concerned.

15. In order to defend the orders passed by the Forest authorities, the opposite parties have filed counter-affidavit, in which they have stated that the writ petitions suffers from vice of non-joinder of necessary party as the Forest Range Officer, Gauri Fanta, Dudhwa Tiger Reserve Forest Division, Palia, Kheri is a necessary party in the matter.

16. Before proceeding to consider the other parts of reply submitted through the counter-affidavit, the Court appreciates the reply submitted by the Petitioners against the aforesaid objections, who submitted that Article 300 of the Constitution of Indian provides that the Government of India may sue or be sued by the name of Union of India and the Government of a State may sue or be sued by the name of the State. The Article 300 of the Constitution of India is extracted below:

> "300. Suits and proceedings.--(1) The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by an Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.
>
> (2) If at the commencement of this Constitution-
>
> a) any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and
>
> b) any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings."

17. Learned Counsel for the Petitioners further submitted that in the list dealing with the property of the State, there is no dispute that the State is a necessary party, as is provided under Article 300 of the Constitution of India and also under Section 79 of the Code of Criminal Procedure. In support of his submission he cited a case i.e. *Chief Conservator of Forests, Government of A.P. vs. Collector and Ors.* reported in (2003) 3 SCC 472.

18. In the present case the State of U.P. Through the Principal Secretary as well as the various Forest Authorities including those, who have passed the orders impugned are impleaded as opposite parties, therefore, I am of the view that the writ petition does not suffer from non-joinder of parties.

19. Now I proceed to take note of the other parts of the reply of the opposite parties submitted through the counter-affidavit.

20. It is stated by the opposite parties that the plea being taken by the Petitioners for the protection of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, is absolutely misconceived as they do not belong to the class of Scheduled Tribe or other Traditional Forest Dwellers;

21. Firstly on the point of repugnancy they say that there is no conflict between the provisions of Indian Forest Act, 1927 and Forest Rights Act, 2006. Section 13 of the Forest

Rights Act, 2006 provides that this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force, therefore, these two Acts run in different field, thus there is no inconsistency between the provisions of these two Acts. So far as the Forest Rights Act, 2006 is concerned, it has been enacted only with a view to protect the Forest rights. The term forest rights has been defined in Section 2(e) of the Forest Rights Act, 2006.

22. The learned Chief Standing Counsel Mr. D.K. Upadhyay vehemently argued by giving emphasis on the facts of the case that it is admitted case of the Petitioners that they run the shop. Neither they belong to any scheduled tribe nor are they traditional forest dwellers, whereas the Forest Rights Act, 2006 is a safeguard to the scheduled tribes and traditional forest dwellers, who depend on the forests and its produce for their livelihood. It is not meant for using the reserve forest land for any commercial purpose. The land in dispute is a reserve forest land and the Petitioners being illegal occupants are not covered under the definition of other traditional forest dwellers, which is defined under Section 2(o) of the 2006 Act. He also invited the attention of this Court towards the written statement filed in S.C.C. Suit No. X-13/1998 *Ramleela Committee Palia vs. Ishwar Chandra Gupta*, in which the Petitioner Mr. lshwar Chandra Gupta admitted that he got the shop constructed about 30-32 years ago with the permission of Ram Leela Committee and after getting the shop constructed he has been doing his business.

23. Thus, it is stated that, from the documents itself it is clear that the Petitioners cannot be termed as traditional forest dwellers and as such no benefit of the Forest Rights Act, 2006 accrued to them. The documents available in the commercial tax department also establishes that the Petitioners are running their business from Pallia, it is also submitted by him that no lease was ever executed by the forest department. The Petitioners have failed to produce any such lease either before the Court below or before this Court. Thus, in absence of any lease granted to the Petitioners, no right is formed upon them either to live or run the business in the forest area and they are purely unauthorised occupants over the land in question, which is a reserve forest land, situated in Digania Forest Block of Dudhwa National Park. Gauri Fanta is one of the Forest ranges of Dudhwa National Park without having any identity of village.

24. It is clearly stated by the opposite parties that the persons belonging to Tharu' scheduled Tribe have been residing in the vicinity of the land in question, whereas they have their residences in two villages falling in Gauri Fanta Forest Range i.e. Seda Beda and Kiratpur, which are about 7 and 15 kilometres away from the land in question. The establishment of any Mandi (market) has also been denied, rather it is stated that the Petitioners and other such unauthorised occupants have stall by occupying the reserve forest land illegally and unauthorisedly.

25. It is further submitted that in light of the dictum of the Hon'ble Supreme Court rendered in the case of *T.N. Godavarman vs. Union of India and Ors.* i.e. Writ Petition (Civil) No. 202 of 1995, the order passed by the Civil Court has lost its efficacy.

26. In order to support the power of the authority, who have passed the order impugned, the notification dated 23rd of May, 2001 issued by the State Government has been brought on record through the supplementary counter-affidavit, whereby all Deputy Conservations of Forest, Divisional Directors, Deputy Directors not below the rank of a Divisional Forest Officer and are holding the charge of respective divisions, has been said to have been authorised officers for the purpose of Indian Forest Act, 1927.

27. Katarniya Ghat Foundation, an Applicant, has moved an application for impleadment

through its Vice President with the submissions that the State Government by notification dated 9th of June, 2010 has declared the Forest area in question to be Core or Critical Tiger Habitat for Dudhwa Tiger Reserve. The rights of trade or business cannot be claimed by any person being a resident of nearby area, therefore, their business activities are in contravention of the aforesaid notification and also in violation of Wild Life Protection Act, 1972. Their illegal occupation is a constant threat to the Wild Life habitat and security of the National Park.

28. The Applicant being a Society involved in the protection of environment and Wild Life has been permitted to be heard through its counsel as an intervenor in the matter.

29. In order to determine the jurisdiction of the Forest authorities as well as the rights and interest of the Petitioners, it is pertinent to mention the provisions of relevant Acts, which are as under:

1. Indian Forest Act, 1927 (as amended The Indian Forest (Uttar Pradesh Amendment) Act, 2000.

Section 2. Interpretation clause-In this Act, unless there is anything repugnant in the subject or context,-

(2) "Forest Officer" means any person whom the State Government or any office empowered by the State Government in this behalf, may appoint to carry out all or any of the purposes of this Act or to do anything required by this Act or any rule made thereunder to be done by a Forest-officer;"

Section 61-B. Summary eviction of unauthorised occupants.--(1) If a Forest Officer, not below the rank of a Divisional Forest Officer is of the opinion that any person is in unauthorised occupation of any land in areas constituted as a reserved or protected forest under Section 20 or Section 29 as the case may be, and that he should be evicted, the Forest Officer shall issue a notice in writing calling upon the persons concerned to show-cause, on or before such date as is specified in the notice, why an order of eviction should not be made.

(2) If after considering the cause, if any, shown in pursuance of a notice under this section, the Forest Officer is satisfied that the said land is in unauthorised occupation, he may make an order of eviction for reasons to be recorded therein, directing that the said land shall be vacated by such date, as may be specified in the order, by the person concerned which shall not be less than then days from the date of the order.

(3) If any person refuses or fails to comply with the order of eviction by the date specified in the order, the Forest Officer who made the order under Sub-section (2) or any other Forest Officer, duly authorised by him in this behalf, may evict that person from and take possession of the said land and may, for this purpose, use such force as may be necessary.

(4) Any person aggrieved by an order of the Forest Officer under Sub-section (2) may, within such period and in such manner as may be prescribed, appeal against such order to the Conservator of Forests of the circle or to such officer as may be authorised by the State Government in this behalf and the order of the Forest Officer shall, subject to the decision in such appeal, be final.

2. Wild Life (Protection) Act, 1972:

"Section 34A. Power to remove encroachment.--(1) Notwithstanding anything contained in any other law for the time being in force, any officer not below the

rank of an Assistant conservator of Forests may,-

(a) evict any person from a sanctuary or National Park, who unauthorisedly occupies Government land in contravention of the provisions of this Act;

(b) remove any unauthorised structures, buildings, or constructions erected on any Government land within any sanctuary or National Park and all the things, tools and effects belonging to such person shall be confiscated, by an order of an officer not below the rank of the Deputy Conservator of Forests:

Provided that no such order shall be passed unless the affected person is given an opportunity of being heard.

(2) The provisions of this section shall apply notwithstanding any other penalty which may be inflicted for violation of any other provision of this Act."

3. The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

Section 2. In this Act, unless the context otherwise requires,-

(a) ...

(b) ...

(c) Forest dwelling Scheduled Tribes" means the members or community of the Scheduled Tribes who primarily reside in and who depend on the forests or forest lands for bona fide livelihood needs and includes the Scheduled Tribe pastoralist communities;

(d) ...

((e) "forest rights" means the forest rights referred to in Section 3;

(f) to (n) ...

(o) other traditional forest dweller" means any member or community who has for at least three generations prior to the 13th day of December,, 2005 primarily resided in and who depend on the forest or forests land for bona fide livelihood needs.

Explanation.--For the purpose of this clause, "generation" means a period comprising of twenty-five years.

Section 3. (1) For the purpose of this Act, the following rights, which secure individual or community tenure or both, shall be the forest rights of forest dwelling Scheduled Tribes and other traditional forest dwellers on all forest lands, namely:

(a) right to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood by a member or members of a forest dwelling Scheduled Tribe or other traditional forest dwellers;

(b) community rights such as nistar, by whatever name called, including those used in erstwhile Princely States, Zamindari or such intermediary regimes;

(c) right of ownership, access to collect, use, and dispose of minor forest produce which has been traditionally collected within or outside village boundaries;

(d) other community rights of uses or entitlements such as fish and other products of water bodies, grazing (both settled or transhumant) and traditional seasonal resource access of nomadic or pastoralist communities;

(e) rights including community tenures of habitat and habitation for primitive tribal groups and pre-agricultural communities;

(f) rights in or over disputed lands under any nomenclature in any State where claims are disputed;

(g) rights for conversion of Pattas or leases or grants issued by any local authority or any State Government on forest lands to titles;

(h) rights of settlement and conversion of all forest villages, old habitation, unsurveyed villages and other villages in forests, whether recorded, notified or not into revenue villages;

(I) right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use;

(j) rights which are recognised under any State law or laws of any Autonomous District Council or Autonomous Regional Council or which are accepted as rights of tribals under any traditional or customary law of the concerned tribes of any State;

(k) right of access to biodiversity and community right to intellectual property and traditional knowledge related to biodiversity and cultural diversity.

(l) any other traditional right customarily enjoyed by the forest dwelling Scheduled Tribes or other traditional forest dwellers, as the case may be, which are not mentioned in Clause (a) to (k) but excluding the traditional right of hunting or trapping or extracting a part of the body of any species of wild animal;

(m) right to in situ rehabilitation including alternative land in cases where the Scheduled Tribes and other traditional forest dwellers have been illegally evicted or displaced from forest land of any description without receiving their legal entitlement to rehabilitation prior to the 13th day of December, 2005.

(2) Notwithstanding anything contained in the Forest (Conservation) Act, 1980, the Central Government shall provide for diversion of forest land for the following facilities managed by the Government which involve felling of trees not exceeding seventy-five trees per hectare, namely:

(a) schools;

(b) dispensary or hospital;

(c) anganwadis;

(d) fair price shops;

(e) electric and telecommunication lines;

(f) tanks and other minor water bodies;

(g) drinking water supply and water pipelines;

(h) water or rain water harvesting structures;

(i) minor irrigation canals;

(j) non-conventional source of energy;

(k) skill upgradation or vocational training centres;

(l) roads; and

(m) community centres:

Provided that such diversion of forest land shall be allowed only if,-

(i) the forest land to be diverted for the purposes mentioned in this Sub-section is less than one hectare in each case; and

(ii) the clearance of such developmental projects shall be subject to the condition that the same is recommended by the Gram Sabha.

Section 4. (1) Notwithstanding anything contained in any other law for the time being in force, and subject to the provisions of this Act, the Central Government hereby recognises and vests forest rights in-

(a) the forest dwelling Scheduled Tribes in States or areas in States where they are declared as Scheduled Tribes in respect of all forest rights mentioned in Section 3;

(b) the other traditional forest dwellers in respect of all forest rights mentioned in Section 3.

(2) ...

(3) ...

(4) ...

(5) Save as otherwise provided, no member of a forest dwelling Scheduled Tribe or other traditional forest dweller shall be evicted or removed from forest land under his occupation till the recognition and verification procedure is complete.

Section 13. Save as otherwise provided in this Act and the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996, the provisions of this Act shall be in additional to and not in derogation of the provisions of any other law for the time being in force.

30. Section 61 -B of the Indian Forest Act, 1927 has been inserted by way of Indian Forest (Uttar Pradesh Amendment) Act, 2000, which received the assent of the President of India on March 7, 2001. The following is the Statement of Objects and Reasons of the

amendment Act, 2001:

> "**Prefatory Note.--Statement of Objects and Reasons.**--In the recent past incidence of forest offences has increased considerably. Forest offences are now committed by organised and influential gangs with money and muscle power. Encroachment on forest land have also increased. The provisions of Indian Forest Act, 1927, in its application to Uttar Pradesh are not adequate to put an effective check on the activities of such offenders. It is, therefore, considered necessary to amend the said Act in its application to Uttar Pradesh so as to equip the officers of the State Government with more powers to deal with such offenders effectively and to provide for stringent punishment for such offences. Certain offences have been made non-bailable. It is also considered necessary to provide for seizure and confiscation of certain other articles like ropes, chains, etc. besides tools, boats, carts and catties and to lay down specific procedure for seizure of forest produce which is the property of Government together with the tools, boats, carts, catties etc. and confiscation of such tools, boats etc. It is also considered necessary to provide for appeal to the State Government against the order of confiscation and to make the decision of the State Government final. In view of large number of cases of encroachment on forest land, it has been considered necessary to provide for summary eviction of unauthorised occupants and disposal of properties left on land by such unauthorised occupants. Certain valuable forest produce are being included in the term "forest produce, Certain other consequential amendments are also being made."

31. As is evident the statement of objects and reasons of the UP. Amendment states that keeping in view the fact that the incidents of forest offences have increased considerably, which are committed by organized and influential gangs with money and muscle power as well as keeping in view large number of cases of encroachment on forest land, it was considered necessary to provide for summary eviction of unauthorised occupants and disposal of properties left on hand by such unauthorised occupants.

32. Section 4 of the Forest Rights Act, 2006 keeps Notwithstanding clause and by giving overriding effect over other laws, the Central Government has been empowered to recognize and vest forest rights in the forest dwelling Scheduled Tribes in States or areas in States where they are declared as Scheduled Tribes in respect of all forest rights mentioned in Section 3. Thus it is very much obvious from the aforesaid provisions that it provides protection only to the Forest dwelling Scheduled Tribes and other Traditional Forest dwellers.

33. The term "Forest Dwelling Scheduled Tribes" has been defined under Section 2(c) of the Forest Rights Act, 2006 as the members or community of the Scheduled Tribes who primarily reside in and who depend on the forests or forest lands for bona fide livelihood needs and includes the Scheduled Tribe pastoralist communities;

34. The term "Other Traditional Forest Dweller" has been defined in Section 2(o) of the Forest Rights Act, 2006 as any member or community who has for at least three generations prior to the 13th of December, 2005 primarily resided in and who depend on the forest or forests land for bona fide livelihood needs.

35. Through the pleadings on record, the Petitioners are not able to establish their identity either as 'forest dwelling scheduled tribes' or as the 'other traditional forest dwellers'.

36. Though the Petitioners have pleaded their right as is saved under CHAPTER II titled as FOREST RIGHTS under the Forest Rights Act, 2006, but since they are not able to establish them either as the forest dwelling scheduled tribes or the other traditional forest dwellers, it is needless to discuss the forest rights in their context as is provided

under the Forest Rights Act, 2006.

37. In light of the aforesaid observations once it is established that they are not covered under the Forest Rights Act, 2006, they cannot hit the provisions of Section 61-B even being repugnant to the provisions of the Forest Rights Act, 2006, yet after reading Section 13 of the Forest Rights Act, 2006,1 find that the provisions of the Forest Rights Act, 2006 are in addition to and not in derogation of the provisions of the Indian Forest Act, 1927, therefore, being not the position of repugnancy between two Acts, I am of the view that the Petitioners are governed under Section 61 -B of the Indian Forest Act, 1927 (as amended "The Indian Forest (Uttar Pradesh Amendment) Act, 2000) and they have rightly been dealt with accordingly.

38. So far as their right to keep the possession over the land in dispute to continue is concerned, I find that neither they have been able to produce any document of title before the Civil Court nor before this Court. Only on the basis of possession the civil Court has permitted them to deposit the rent. Mr. lshwar Chandra Gupta himself has admitted before the Civil Court that there is no lease deed between the parties, rather he is mentioned as lease holder only on the lease rent slips. The ex parte decree of the Civil Court is on record, which establishes this fact. Thus, they have not been able to establish any title over there.

39. It is not in dispute that the land in dispute is a reserve forest land and under the Forest Conservation Act, 1980 the restriction on the different reservation of forests or use of forest land or non-forest use has been imposed. Relevant Section 2 of the Forest Conservation Act, 1980 is extracted below:

"2. **Restriction on the dereservation of forests or use of forest land for non-forest purpose.**--Not with standing anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing

(i) that any reserved forest (within the meaning of the expression "reserved forest" in any law for the time being in force in that State) or any portion thereof, shall cease to be reserved;

(ii) that any forest land or any portion thereof may be used for any non-forest purpose;

(iii) that any forest land or any portion thereof may be assigned by way of lease or otherwise to any private person or to any authority, corporation, agency or any other organization not owned, managed or controlled by Government;

(iv) that any forest land or any portion thereof may be cleared of trees which have grown naturally in that land or portion, for the purpose of using it for reafforestation.

Explanation.--For the purpose of this section, "non-forest purpose" means the breaking up or clearing of any forest land or portion thereof for-

(a) the cultivation of tea, coffee, spices, rubber, palms, oil-bearing plants, horticultural crops or medicinal plants;

(b) any purpose other than reafforestation; but does not include any work relating or ancillary to conservation, development and management of forests and wildlife, namely, the establishment of check-posts, fire lines, wireless communications and construction of fencing, bridges and culverts,

dams, water holes, trench marks, boundary marks, pipelines or other like purposes."

40. It is admitted case of the Petitioners that they run the shop, which is not related in any manner to the forest activities nor are they depend upon any relative activity of forest, therefore, on the count of possession also they have no right to continue their shops over there.

41. The Hon'ble Supreme Court in the case of *T.N. Godavarman Thirumulkpad vs. Union of India and Ors.* reported in (1997) 2 SCC 267, in order to protect the conservation of the Forests throughout the country has issued several directives to the several States of the country including State of U.P., which are reproduced hereunder:

"III. FOR THE STATE OF HIMACHAL PRADESH AND THE HILL REGIONS OF THE STATES OF UTTAR PRADESH AND WEST BENGAL.

1. There will be no felling of trees permitted in any forest, public or private. This ban will not affect felling in any private plantation comprising of trees planted in any area which is not a "forest", and which has not been converted from an earlier "forest". This ban will not apply to permits granted to the right-holders for their bona fide personal use in Himachal Pradesh.

2. IN a "forest", the State Government may either departmentally or through the State Forest Corporation remove fallen trees or fell and remove diseased or dry standing timber from areas other than those notified under Section 18 or Section 35 of the Wild Life Protection Act, 1972 or any other Act banning such felling or removal of trees.

3. For this purpose, the State Government is to constitute an Expert Committee comprising a representative from MoEF, a representative of the State Forest Corporation (as Member Secretary), who will fix the qualitative and quantitative norms for the felling of fallen trees and diseased and standing timber. The State shall ensure that the trees so felled and removed are in accordance with these norms.

Standing Timber

4. Felling of trees in any forest or any clearance of forest land in execution of projects shall be in strict conformity with the Forest Conservation Act, 1980 and any other laws applying thereto. Moreover, any trees so felled, and the disposal of such trees shall be done exclusively by the State Forest Corporation and no private agency is to be involved in any aspect thereof."

42. In terms of the aforesaid observations of the Hon'ble Supreme Court, now it has become necessary to protect the deforestation by restricting the non-forest activities.

43. In the case of *State of West Bengal vs. Sujit Kumar Rana*, reported in AIR 2004 SC 1851, the Hon'ble Supreme Court has observed as under:

"20. ...Forest is a national wealth which is required to be preserved. In most of the cases, the State is the owner of the forests and forest produce. Depletion of forest would lead to ecological imbalance. It is now well-settled that the State is enjoined with a duty to preserve the forest so as to maintain ecological balance and, thus, with a view to achieve the said object forest must be given due protection. Statutes which provide for protection of forest to maintain ecological balance should receive liberal construction at the hands of the superior Courts. Interpretive exercise of such

power should be in consonance with the provisions of such statutes not only having regard to the principle of purposive construction so as to give effect to the aim and object of the legislature; keeping the principles contained in Articles 48A and 51A(g) of the Constitution of India in mind. The provisions for confiscation have been made as a deterrent object so that felling of trees and deforestation is not made."

44. Some of the Petitioners have claimed protection of their right under Forest Rights Act, 2006, on the ground of longevity of their activities standing in the forest areas, whereas they have not been able to establish that they belong to the particular community, whose rights have been protected under the Forest Rights Act, 2006 and activities related to the forest activities.

45. Thus, at this stage in light of the several judicial pronouncements, whereby the non-forest activities in the forest areas have been restricted, in conclusion, I am of the considered view that the Petitioners have no right to continue their possession over the forest land with their non-forest activities like doing business.

46. The writ petitions lack merit and are dismissed.

Jogindar Singh vs. Union of India & Ors.

MISC. BENCH. NO. 424/2012
ALLAHABAD HIGH COURT
16.01.2012
CORAM: DEVI PRASAD SINGH AND S.C. CHAURASIA, JJ.

SUMMARY

The writ petition sought a direction to the Respondent State government to decide the pending applications for recognition of forest rights under Section 3 and Section 6 the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) and Rules.

Without taking a decision on the substantive issue, the writ petition was disposed of with directions to the competent authority to look into the matter and decide the controversy in accordance with law within 2 months, and communicate its decision to the petitioner.

EDITOR'S NOTE

Similar orders were passed in various other cases. See for instance, *Kashmir Singh vs. Union of India & Ors.* (Misc. Bench. No. 424/2012) vide order dated 16.01.2012.

ORDER

1. Sri Pratyush Tripathi, learned counsel, appeared on behalf of Union of India.

2. Heard learned counsel for the parties and perused the record.

3. With the consent of learned counsel for the parties, we proceed to decide the writ petition finally at the admission stage.

4. The present Writ Petition under Article 226 of the Constitution of India has been

preferred for issue of a writ, order or direction in the nature of mandamus commanding the respondent nos. 4,6 and 7 to decide the claim filed by the petitioner dated 03-11-2011 before Respondent Nos. 3 and 6 for the Forest Rights under section 3 read with Rule-11 (1) (a) of the Scheduled Tribes and other Traditional Forest Dweller (Recognitions of Forest Rights)Act, 2006 and Rules,2007 of Land Gata No. 5/8 ad measuring. hectare situated at Village - Udhaonagar, Tehsil - Nighasan, District - Lakhimpur Kheri.

5. Submission of learned counsel for the petitioner is that the petitioner has got statutory right to use the forest land.

6. Without entertaining into the merits of the controversy, we dispose of the writ petition finally directing the competent authority to look into the matter and decide the controversy, in accordance with law, expeditiously say preferably within a period of two months from the date of receipt of certified copy of the present order and communicate the decision to the petitioner.

7. Subject to above, the writ petition is disposed of finally.

Gulab & Anr. vs. State of U.P. & Ors.

WRIT PETITION (CIVIL) NO. 50778 OF 2013
ALLAHABAD HIGH COURT
8.11.2013
CORAM: V.K. SHUKLA AND SUNEET KUMAR, JJ.
CITATION: 2013 SCC ONLINE ALL 10525

SUMMARY

The petitioners in this case claim that there is a patta executed in the name of their forefathers in a forest area in Sonbhadra district. Although this has not been mutated in their names, they have been in possession of the land. However, recently efforts are being made to interfere with their possession of the land. Accordingly, they had previously approached the High Court by way of a writ petition, where the Court had (by order dt. 11.6.2012) directed the District Magistrate (DM) to take a decision.

Thereafter, they approached the DM only to have their petition rejected. The DM reached a finding of fact that the land in question is forest land, and since the petitioners have never approached the Forest Settlement Officer (FSO) for settlement of rights, nor participated in two rounds of consolidation proceedings, they have no right over the land.

The High Court reached a finding that while the preliminary notification under Section 4 of the Indian Forest Act, 1927 (1927 Act) has been issued including the land in question, the final notification under Section 20 of the 1927 Act has not been issued till date. Therefore, the Court concluded, the petitioners are free to make an application under Section 9 of the 1927 Act before the FSO, and granted the petitioners three months time to do so.

Interestingly, the Court referred to the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) and observed that their claim under this Act has to be examined by the FSO. The Court directed that the FSO must decide the claim "on the basis of evidence and record available and strictly as per law."

EDITOR'S NOTE

This judgment is an illustration of a case where the Court has granted relief, in a manner of speaking, to the petitioners before it, while proceeding on an incorrect or inaccurate understanding of the law. It is a matter of great concern that the Court has not considered the *non-obstante* clause in Section 4(1) of FRA nor considered the requirement for harmonious construction in Section 13 of FRA. Read together, these provisions clearly require that the 1927 Act has to cede the legal space regarding procedures and mechanisms for the recognition and vesting of rights to the much more recent FRA enacted in 2006. The error of the Court in directing the FSO to consider the petitioner's claim under the FRA, therefore, prevents this judgment from becoming a reliable judicial precedent.

Unfortunately, the High Court went on to dispose of a large number of writ petitions[9] pending before it in terms of this judgment, thereby compounding the error.

ORDER

1. Gulab and Ramjiyawan both sons of Late Munni are before this Court questioning the validity of the order dated 17th June, 2013, passed by the District Magistrate, Sonbhadra wherein District Magistrate, Sonbhadra has proceeded to reject the representation so filed on behalf of petitioners.

2. Petitioners have come up with the case that there is a patta executed in the name of their forefathers of arazi no. 623 area 12 bigha situated in Mauza Patna, Pargana Vijaigarh, Tehsil Robertsganj, District Sonbhadra and based on the same they are in possession of the property in question and their submission has been that in spite of the fact that there has been patta in their favour there has been no mutation made in their favour and as interference was being made, accordingly, they have filed Civil Misc. Writ Petition No.23941 of 2012 (Gulab and another vs. State of U.P. and others) and this Court on 24th May, 2012, directed the District Magistrate concerned to take decision in the matter. Pursuant to the order passed by this Court representation dated 11th June, 2012, has been moved mentioning therein that petitioners are in possession of the property in question but as their names have not entered into the revenue records, accordingly, they filed writ petition and their claim be decided.

3. After the said representation in question has been moved, the claim of petitioners has been examined and therein a categorical finding of fact has been returned that the land in question, which is being claimed by the petitioners, that patta has been executed in their favour forms part of gata no. 623, which is a forest land and in respect of the said land in question as per the provisions of Indian Forest Act, 1927 Section 4 notification has already been made and at no point of time when the declaration has been made any objections whatsoever have been filed either by the petitioners or by their forefathers claiming any right over the land in question. This much has also been found that there is no such lease deed available on record. Coupled with this on two occasions consolidation operations have been undertaken but at no point of time any rights whatsoever have been claimed by the petitioners on the land in question during the consolidation operations and District Magistrate has proceeded to mention that

[9] See, for instance, *Rajkeshwar vs. State of U.P.* 2013 SCC OnLine All 11520; *Ram Naresh vs. State of UP* 2013 SCC OnLine All 11518; *Shambhu vs. State of UP* 2013 SCC OnLine All 11519.

proceedings in question are barred by Section 49 of U.P. Chakbandi Act and in view of this background after recording such a finding claim of petitioners have been turned down.

4. Shri Anil Kumar Mishra, learned counsel for the petitioner, submitted that in the present case there is a valid lease deed in favour of petitioners' forefathers and, as such, a totally incorrect mention has been made that there is no lease deed in existence and rights of petitioners stands defeated with the passage of time whereas they have a subsisting right over the property in question.

5. Countering the said submission learned Standing Counsel on the other hand contended that entire claim of petitioners is ungenuine one and claim of petitioners stands fully exposed from the attending circumstances.

6. After respective arguments have been advanced the factual situation as is emerging in the present case that gata no. 623 has been declared to be a forest land under the provisions of Section 4 of Indian Forest Act, 1927. Pursuant to notification no. 23 (2)-32/14-Kha-66 made on 10th August,1966 and publication dated 1st January, 1967 respectively this much is accepted that even after the notification has been made under Section 4 of the Indian Forest Act, 1927 and even prior to it at no point of time any objections have been raised that same is not a forest land. The fact of the matter is that gata no. 623 has been recorded as forest land wherein declaration has been made under Section 4 of the Indian Forest Act, 1927. Collateral challenge qua notification made under Section 4 of Indian Forest Act cannot be entertained. Petitioners at no point of time has laid any claim before the Forest Settlement Officer qua the said land in question. Coupled with this there are attending circumstances to disbelieve the case, inasmuch as, at no point of time based on the aforementioned lease deed dated 6th November, 1961 at any point of time any mutation proceedings have been undertaken as well as in consolidation proceedings any claim has been set-up in respect of the gata no. 623 area 12 bigha of land. The District Magistrate concerned has proceeded to mention that proceedings are accordingly barred by Section 49 of U.P. Chakbandi Act. Once such is the factual situation that has been noted by the District Magistrate concerned and categorical finding has been returned that benefit of Section 131-A cannot be accorded as the land in question does is on the north of the Kaimoor range whereas Section 131-A is enforceable on the south of Kaimoor range and as far as benefit of Section 122 B (4 F) is concerned, even the same cannot be accorded as the land in question is forest land.

7. Once such is the factual situation, then no relief or reprieve can be given to petitioners but accepting the land in question to be forest land, and, accordingly, whatever rights or benefits petitioners could claim, same would be considered and dealt with on the premises that it is a forest land. Petitioners in the present writ petition has come up with the case that till date notification under Section 20 of Indian Forest Act has not been made and even the order passed by the District Magistrate does not reflect of any notification having been made under Section 20 of Indian Forest Act. Section 9 of Indian Forest Act deals with extinction of rights, wherein no claim has been preferred and same also provides that before notification is made under Section 20,the person claiming such right can approach Forest Settlement Officer giving therein reason for not approaching within the time frame provided for in respect of claim in question. In view of this, in case till today notification under Section 20 of Indian Forest Act has not been made, then in that event petitioners are free to move an application under Section 9 of Indian Forest Act, and the said application be considered and dealt with by Forest Settlement Officer, preferably within next three months from the date of receipt of certified copy of this order, in accordance with law. Coupled with this petitioners have claimed that they are from the weakest strata of the society and the so called forestland has been

their sole source of sustenance and now Scheduled Tribes and Other Traditional Forest Dwellers(Recognition of Forest Rights) Act, 2006 and even as per the said provision, their claim has to be examined by Forest Settlement Officer. In case petitioners claim benefit of aforementioned provision and petitioners fulfil the prerequisite terms and conditions for getting the benefit of aforementioned provision, then claim on the said aspect of the matter be also considered, in accordance with law, by Forest Settlement Officer within the same time frame as is provided for. Forest Settlement Officer should decide the claim on the basis of evidence and record available and strictly as per law.

9. Writ petition is disposed of, accordingly.

ANDHRA PRADESH HIGH COURT

TABLE OF JUDGMENTS AND ORDERS

J.V. Sharma & Ors vs. Government of India & Ors.

WP (C) NO. 21479 OF 2007
HIGH COURT OF ANDHRA PRADESH
1.05.2009 (INTERIM ORDER)
CORAM: B. PRAKASH RAO, R. KANTHA RAO, JJ.

SUMMARY

The main writ petition has been filed in the nature of a PIL by retired officers from the State Forest Department, seeking a writ of mandamus declaring that the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) is illegal and unconstitutional.

The application for interim directions filed by the same petitioners sought a stay on the implementation of the FRA until the disposal of the writ petition. By an earlier order dt. 19.8.2008 the High Court had passed directions restricting the operation of the FRA to the extent that before the certificate of title is issued, orders from the Court would have to be obtained.

Subsequently, a number of tribals and other traditional forest dwellers, the intended beneficiaries of the legislation, had sought impleadment as respondents. They, in turn, urged the Court to permit the unhindered implementation of the FRA, along with the Central and the State governments. This is a decision of the Court on the interim application of the forest dwellers for modification of the previous order.

The Court took note of the material placed on record by the Tribal Welfare Department of the State government that out of a total of 3,26,328 claims received under FRA, the District Level Committee had approved 1,23,195 claims for grant of title. This approval was given after going through a detailed process of determination and on-site verification, through Committees at the Village, Sub-Division and District level. The Court also observed that it is a well established principle that where a legislation is under challenge on ground of constitutional validity or any other ground, the Courts will be slow in granting directions against the implementation of the legislation.

The Court was of the view that a denial of the laudable objective of the FRA would prejudice the forest dwellers sought to be protected, and if there are defects in

implementation, there are sufficient safeguards in the process for correcting the same, which the petitioner can avail of.

Accordingly, the Court issued directions modifying its previous interim order dt. 19.8.2008, to the effect that the authorities would be permitted to issue certificates of title to eligible forest dwellers under the FRA, subject to the final result of the main writ petition.

EDITOR'S NOTE

This order of the Andhra Pradesh High Court went a long way in alleviating the early apprehensions of various stakeholders that the implementation of the FRA would lead to rampant illegalities and deforestation. Since then, the main writ petition has been transferred to the Supreme Court of India, and is pending adjudication as TC(C) No. 41 of 2015.

ORDER

(the order of the Court was pronounced by B. Prakash Rao, J.)

1. In the main writ petition filed by the petitioners as Public Interest Litigation, where they sought for a writ of mandamus declaring the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (Act No. 2 of 2007) and in particular chapters 2 to 4 of the Said Act as illegal and unconstitutional, an interim applications has been filed in WPMP No. 23208 of 2008, where a Division Bench of this Court passed an order on 19.8.2008, which reads as under;

> "Heard the learned Advocates,
>
> There is no dispute that after hearing the concerned parties on the same subject, a Division Bench of Madras High Court has passed the following order on 30-04-2008.
>
> > "(a) if claims are made for community rights or rights to forest land and applications are submitted as per sections 3 and 4 of the Act read with Rules 11 and 12 of the Rules, then the process of verification of the claim after intimation to the concerned claimant shall go on, but before the certificate of title is actually issued, orders shall be obtained from this Court.
> >
> > (b) As regards felling of trees for providing diversion of forest land under Section 3 (2) of the Act is concerned, the process shall go on till the clearance of such development projects and also the Gram Sabha's recommendation is obtained, but before the actual felling of trees, orders shall be obtained from this Court"

It has been submitted by Sri A. Rajashekar Reddy, learned Asst. Solicitor General that the Union of India would like to challenge the validity of the said order before the Hon'ble Supreme Court. However, he has submitted that as on today the said order is in force.

In view of the above fact, the afore stated interim order is also passed in this application.

> It is, however, clarified that during the pendency of the litigation no member of a

forest dwelling scheduled Tribe or other traditional forest dweller shall be evicted or removed from forest land under his occupation till the recognition and verification procedure is completed.

In view of the above order, the application stands disposed of."

2. Subsequently, the matter underwent adjournments for the purpose of filing counter affidavits. The main ground urged in the writ petition is that having regard to the National Forest Policy, which contemplates maintenance of forestry to the extent of 1/3rd of the total land area in the country, the provisions of the Act and the conferment or recognition of the certificates for those alleged to be in possession defeats the very policy. Further, these provisions also run counter to various other enactments like Wild Life Protection Act, 1972, Forest Conservation Act, 1980 etc. The petitioners gave a detailed count as to the policy and objects thereunder, hence, with these and other grounds, the petitioners sought to assail the validity of the legislation.

3. Further it was also pointed out that even the procedure as contemplated and the powers conferred on the Gram Sabha, Sub Divisional level Committee, District level Committee, is only a make believe one and one cannot accept the consideration of the relevant aspects vis-a-vis the objects and the National Policy and therefore any such unguided, uncontrolled powers on those authorities, is bad.

4. Pending writ petition, the petitioners sought interim directions against the respondents, not to give effect to the provisions of the said legislation. However, following the interim orders granted ins similar writ proceeding by the Division Bench of Madras High Court dated 30.4.2008, the aforesaid interim orders dated 19.8.2008 have been passed. During the course of hearing, the learned counsel for the petitioner pointed out that subsequently in the said writ petition before the Madras High Court, orders have been passed in an interim application on 30.4.2008. The operation portion of which reads as under;

"Therefore, we issue the following directions:

(a) If claims are made for community rights or rights to forest land and applications are submitted as per sections 3 and 4 of the Act read with Rules 11 and 12 of the Rules, then the process of verification of the claim after intimation to the concerned claimant shall go on, but before the certificate of title is actually issued, orders shall be obtained from this Court.

(b) As regards felling of trees for providing diversion of forest land under Section 3(2) of the Act is concerned, the process shall go on till the clearance of such development projects and also the Gram Sabha's recommendation is obtained, but before the actual felling of trees, orders shall be obtained from this Court"

5. Therefore, it is the contention on behalf of the petitioners that unless and until the main questions are gone into and appropriate steps are taken for protecting the forestry, any consideration for grant of certificates is no use and further under the guise of grant of these certificates, several ineligible and influential persons are getting into the said land at the cost of forestry and real eligible persons.

6. The respondents herein have filed an interim application in WPMP No. 2566 of 2009 seeking a direction to permit them to issue certificate of title to the eligible Forest Dwelling Scheduled Tribes and other Traditional Forest Dwellers under the Act. It is contended in the affidavit filed along with the said application sworn by Mr. Asoke Kumar Tigidi, Principal Secretary to the Government, Tribal Welfare Department that

after making a detailed exercise and enquiry with the assistance of the concerned department and on receipt of the total application of 3,26,328 with their respective claims to cover 11,22,408 acres spread in 22 districts and after making a survey, there is a due recommendation by the Grama Sabha to the Sub Divisional Level Committees and out of the total claims the Grama Sabhas have rejected 43,829 claims and recommended to the District level Committee for approval of 1,23,195 and rejected 10,530 claims. The District level Committee approved 1,14,329 claims and rejected 6,058 claims. It was contended that elaborate enquiry was conducted with participation of Forest and other authorities and with the assistance of NGOs and therefore now the entire exercise is over, permission as per the orders of this Court passed earlier as mentioned above, be granted.

7. Opposing the application and also opposing modification in regard to the earlier orders passed by this Court, the learned counsel for the writ petitioners submitted that the petitioners have not given any details or particulars, much less the procedure followed before making any such finalization and that in view of the absence of any such details, the writ petitioners are not able to point out the various defects. In fact, it is his contention that there was no survey nor any verification much less there is due identification of the individuals in possession entitled for any such certificates vis-a-vis to establish the factum of possession by them, therefore, the question of grant of certificates, at this stage, does not arise and further it was stated that if all the particulars are furnished to the writ petitioners, they would be in a position to reply pointing out the defects, ineligibilities or to submit any other such objections.

8. We have heard Mr. G Vidyasagar, learned counsel appearing for writ petitioners, learned Advocate General and Mr. Balagopal, learned counsel appearing for other respondents, in detail and at length.

9. During the course of the arguments, it was pointed out that having regard to the pendency of similar matters in other High Courts and applications filed seeking for transfer before the Supreme Court, the main writ petition cannot be heard and orders are being awaited. In view of the same, we refrain from going into the merits in the writ petition. However, falling back, consideration of the interim applications filed from both the sides and taking into consideration the earlier orders of this Court, passed by following the orders passed by the Division Bench of Madras High Court, the main aspect which requires to be pondered over is whether the respondent authorities need to be given permission for grant of certificates of title, as sought for in the application filed by them, since according to them the entire exercise is over. Prima facie, it is to be seen that the writ petition is filed in a Public Interest with the main above object of protecting the forestry in general, spread all over India and affect of the provisions of the said legislature vis-a-vis the grant of certificates of title to those alleged to be in possession and deprivation of the forestry to the country as a whole, that apart, the entire procedure and the conferment of powers on authorities as contemplated according to the petitioner is not sufficient enough to protect the rights of the individuals who are really entitled to and to protect the forestry in general. Therefore, though initially the petitioners sought the interim direction not to give effect to the provisions of the said legislation, this Court passed the aforesaid orders following the orders passed by the Division Bench of the Madras High Court.

10. It is now well established that if a legislation is under challenge on the ground of unconstitutional or otherwise, normally the Courts will be slow in granting any such directions as against the implementation of the legislation in exercise of powers conferred under Article 226 of the Constitution of India. However, apparently it is only due to the pendency of similar matters and orders passed by the other High Court, the

same was followed.

11. In the end, the Division Bench of Madras High Court and as well this Court did make an observation that as and when the certificates are to be granted, necessary permission has to be obtained from this Court. It is at this stage now where the application has been filed by the authorities seeking for such permission, the question is as to the scope of the enquiry to be made while granting the permission. According to the respondent authorities, every enquiry has been made and verification etc vis a vis possession and of the claims have been received through at different levels of Grama Sabha, Sub Divisional Level Committee and District Level Committee and ultimately the individuals have been identified who are entitled to certificates. There is no dispute on the part of the writ petitioner as to the participation as well by several NGO organizations in the process, apart from the concerned authorities. Even the provisions of the Act, do, specifically provide for such exercise with the assistance and participation by all authorities like Revenue, Forest, etc. However, even though entire such exercise was done at several district places, there appears to be no attempt on the part of the writ petitioner to put their claims/objections of whatsoever nature in the entire process, be that as it may, since the petitioners themselves are not carrying any such rights or certificates of title under the provisions or much less denial thereof, we are of the view that in the entire process as stated on oath by the authorities, there is no reason, at this stage to doubt the same. Further it is found there have been several claims running into thousands at different parts of 22 districts and particulars of those claims have been verified and processed through and ultimately restricted to those who are found to be eligible. Even an attempt by this Court to verify correctness of those claims individually by going through, would be much against the well established principles while exercise of the jurisdiction under Article 226 of the Constitution of India, therefore this Court would not venture to make any attempt to go into or conduct an enquiry as regards correctness thereof. However, it would suffice in the interest of justice to permit the petitioners to seek for all those details or particulars, as they may require directly from the concerned authorities or by filing appropriate applications and even by invoking the provisions under Right to Information Act. All those claims are now arising in almost 22 district of the State of AP and therefore the entire records would be available at the three tier authorities in the respective district which can be availed of by the writ petitioner.

12. We also take note of the fact that entire exercise as per the provisions of the Act is a basis i.e., a three tier system primarily at the Grama Sabha, secondly at Sub Divisional Level Committee and ultimately at District level Committee consisting of various authorities and it is always open for the writ petitioners to seek for information and particulars, if any ineligible person or individual is sought to be given any such certificate, it can raise all objections, which, we are sure the concerned authorities before whom such objections are filed, be it Grama Sabha, Sub Divisional Level Committee or District Level Committee, would certainly enquire into and would pass appropriate orders in accordance with law.

13. However, having regard to the very laudable object to protect the possession of such individuals which law tries to take care of, any denial thereof, would only prejudice to them, therefore we are of the opinion that there is no basis, as such for any apprehension on the part of the writ petitioner to assail that the entire exercise is farce one or certificate of identity by the authorities are false or in any way tainted, unless and until such thing has been specifically pointed out.

14. We are sure that if any such defects or ineligibility aspects are pointed out the same would be taken into consideration and appropriate orders would be passed by the authorities. Further we reiterate that in view of the safeguards provided under the

very provisions and also interim orders granted earlier protecting those who are in possession, it is needless to make any further apprehension for causing inconvenience or loss, as such.

15. In view of the aforesaid reasons, the WPMP No. 2566 of 2009 is order as under;
a) The authorities are permitted to issue certificate of title to the eligible forest dwelling Scheduled Tribes and other Traditional Forest Dwellers under the Act.

b) Any grant of such certificates will be subject to the result in main writ proceedings challenging the legislation,

c) Further the said certificates are also subject to their enquiry or verification on the objections pointed out by the petitioners or otherwise,

d) Petitioners are permitted to seek details and particulars and obtain the necessary copies in different places and raise their objections,

e) On receipt of such objections, the authorities, especially the District Level Committee concerned shall go into the same, enquire, verify the correctness and pass appropriate orders on merits and in accordance with law,

f) The certificates granted above, shall be subject to the orders that may be passed as mentioned in clause (e) above.

g) Further the person in possession of any of the lands shall not in any way disturb or evicted till the disposal of the writ petition.

Podium Devaiah & Ors. vs. Government of India & Ors

WP 2133 OF 2009
HIGH COURT OF ANDHRA PRADESH
18.04.2011
CORAM: C.V. NAGARJUNA REDDY, J.

SUMMARY

The Petitioners filed this writ petition claiming they are Scheduled Tribes, and seeking protection under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA), as also proper disposal of their applications for recognition of forest rights, and protection from dispossession.

A counter affidavit was filed by the respondent State government challenging the status of the tribe in the state of Andhra Pradesh. It argued that the petitioners belonged to the 'Guttikoyas' community which is recognised as a Scheduled Tribe by the government of Chhattisgarh, but is not one of the recognised Scheduled Tribe communities in the State of Andhra Pradesh. Therefore they are not entitled to invoke provisions of the FRA.

The Court was of the view that whether or not the petitioners can be recognized as a Scheduled Tribe in Andhra Pradesh needs to be adjudicated by the competent authority, namely, the Forest Rights Committee. Accordingly, the petition was disposed of with a direction to the Forest Rights Committee (arrayed as respondent No. 3) to dispose of the Petitioners' applications filed for recognition of forest rights within a period of 3 months, after following procedure under the Act and Rules. It was further directed that the Petitioners were not to be evicted till the procedure was complete.

EDITOR'S NOTE

This judgment is representative of a series of judgments and orders which have been issued by the High Court of Andhra Pradesh in response to writ petitions filed by claimants under the FRA, primarily seeking protection from dispossession, and directions that due process under the Act and Rules be followed. The Court has, by

and large, been consistent in providing this minimal protection to such petitioners.

ORDER

1. At the interlocutory stage, the writ petition is taken up for hearing and disposal with the consent of the learned counsel for the parties.

2. The petitioners claim to belong to Scheduled Tribe. They filed the writ petition for a mandamus to declare the action of the respondents in trying to dispossess them from the forest lands situated in Chukkalapadu (unsurveyed and unrecognised village) without passing orders on their applications, dated 01.12.2008 filed for granting forest rights under the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and Rules, 2007 made thereunder (for short 'the Act' and 'the Rules' respectively) as illegal and arbitrary.

3. In the counter affidavit filed by respondent No. 4, it is inter alia stated that the petitioners belong to Guttikoyas community, which is recognised as Scheduled Tribe by the Government of Chhattisgarh and that the said community is not one of the recognised Scheduled Tribe communities in the State of Andhra Pradesh and therefore they are not entitled to invoke of the provisions of the Act for recognition of forest rights.

4. The question whether the petitioners can be recognised as Scheduled Tribe community in the State of Andhra Pradesh or not needs to be adjudicated by the competent authority, namely, the Forest Rights Committee, shown as respondent No. 3, in the writ petition. The fact that the petitioners submitted their applications under the provisions of the Act is not disputed by the respondents. If the competent authority felt that the petitioners are not eligible for recognition of forest rights) it can pass an appropriate order on the petitioners' applications. But, on the purported ineligibility of the petitioners, the competent authority cannot keep the applications pending.

5. As rightly pointed out by Sri Mummaneni Srinivasa Rao, learned counsel for the petitioners, Chapters III and IV of the Act deal with recognition of the forest rights in favour of the Scheduled Tribes and other Traditional Forest Dwellers. Therefore, it is incumbent upon the competent authority to dispose of the applications filed for recognition of the forest rights. Under sub-section (5) of Section 4 of the Act, till the recognition and verification procedure is completed, no member of a forest dwelling Scheduled Tribe or other traditional forest dweller shall be evicted or removed from the forest land under his occupation.

6. In the light of the above, the writ petition is disposed of with the direction to respondent Nos. 3 and 4 to dispose of the petitioners' applications filed for recognition of forest rights within a period of three months from the date of receipt of a copy of this order, after following the procedure prescribed under the provisions of the Act and the Rules. Needless to observe that the procedure includes issuance of notice to the petitioners and giving them an opportunity of being heard before passing appropriate orders on their applications. Till this procedure is completed, the petitioners shall not be evicted from the lands in their occupation.

7. As a sequel to disposal of the writ petition, the interim order, dated 09.02.2009, granted by this Court in WPMP No. 2704 of 2009 shall stand vacated and WPMP No. 2704 of 2009 and WPMP No. 2483 of 2009 are disposed of as infructuous.

Minor Forest Produce Gatherers Committee, Pullangi Panchayat & Anr. vs. Government of Andhra Pradesh & Ors.

WP NO. 12493 OF 2012
HIGH COURT OF ANDHRA PRADESH
26.4.2012 (INTERIM ORDER)
CORAM: G.V. SEETHAPATHY, J.

SUMMARY

The Petitioners are tribals of Pullangi Grampanchayat, Maredmilli Mandal, in East Godavari District. They argue that they have been selling hill Brooms (Konda Chipuru) which is a minor forest produce collected by them, in the open market for a long time, but are being prevented from doing so by the State government functionaries. They argue that they have absolute rights to collect, sell and transport such minor forest produce under the Panchayats (Extension to Scheduled Areas) Act, 1996 (PESA), the A.P. Panchayat Raj Act, 1998, as well as the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA).

At a preliminary hearing of the writ petition, the Court directed that notice be issued to the State respondents, and further observed that the petitioners are entitled to collect and sell and transport the minor forest produce under PESA. Accordingly, an interim order was passed restraining the respondent State government from interfering with the collection and sale of hill brooms by the petitioners, until further order.

EDITOR'S NOTE

While this order makes no reference to the FRA, it is important to note that it is still in operation, and has been relied upon by subsequent petitioners advancing similar writ petitions before the High Court of Andhra Pradesh and Telangana, with positive results.

ORDER

1. Learned counsel for the petitioners would submit that under the guidelines of the Panchayats (Expansion to the Scheduled Areas) Act, 1996 and also the A.P. Panchayat Raj Act, 1998 petitioners, who are tribals, were entitled to collect the minor forest produce and sell the same and that the officials of the forest department are preventing the tribals from collecting the minor produce and as such the tribals are deprived of their livelihood.

2. In the circumstances, respondents are restrained from interfering with the collection of the minor forest produce, namely hill brooms (konda chipuru) by the tribals of Pullangi Panchayat and sell the same until further orders.

Ravva Somaraju & Ors. vs. Goverment of India through MoTA & Ors.

WP NO. 26246 OF 2010
HIGH COURT OF ANDHRA PRADESH
22.01.14
CORAM: A. RAMALINGESHWARA RAO, J.

SUMMARY

The petitioners argue they are Scheduled Tribes residing and doing agricultural operations in the forests since the time of their forefathers. The villages they reside in are un-surveyed and unrecognised forest villages. The State government avers that they are "Gotii Koyas" who have migrated from Chhattisgarh, and are "not wholly tribes". This writ petition challenged the action of the respondent State government in trying to dispossess the petitioners from the forest lands, without following the procedure in the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA).

The Court found that there are conflicting claims regarding the status of the petitioners and accordingly passed an order that the petitioners were "given liberty to establish their identity, status, and right to the land claimed by them before the respondent under the provisions of the Act 2 of 2007 and that the exercise be completed within 3 months". If petitioners are aggrieved, they can seek appropriate remedies under law. The Court further directed that till the completion of enquiry the petitioners shall not be dispossessed from the lands in their occupation.

EDITOR'S NOTE

This decision, while issuing essentially the same directions, makes no reference to the 2011 decision of the same Court in the case of *Podium Devaiah vs. Govt. of India & Ors.* (extracted elsewhere in this compendium). It is a sobering reflection on the intractable problem of hundreds of tribals who have fled the political unrest in neighbouring Chhattisgarh into forests across the border in Andhra Pradesh, and have not been able to receive relief despite protective legislations such as FRA and orders of the Court.

ORDER

1. This batch of writ petitions were filed challenging the action of the respondents in trying to dispossess the petitioners from the reserved forest lands situated in reserved forest i.e., in between Burguvada and Darapalli forest area (Un-surveyed and Un-recognized village) 5 kms away from Mettapalli Gram Panchayat, V.R. Puram Mandal; Pedda Narsingpeta Area Forest (Unsurveyed and unrecognised village) Venkatayapalem Panchayathi, Kunavaram Mandal; Penagadapa Area forest (Un-surveyed and un-recognized village) Pengadapa Panchayathi, Kothagudem Mandal; and 5 KMs far to the (un-surveyed and un-recognised village) Marayagudem Panchayathi, Dummugudem Mandal of Khammam district, without following the procedure prescribed under the Forest Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, and the Rules made thereunder.

2. It is the case of the petitioners that they are all Scheduled Tribes residing in the forest area since the time of their forefathers by doing agricultural operations. Act 2 of 2007 was enacted recognizing their rights over forest and without following the procedure prescribed under the said Act, they are being dispossessed from their lands to a far away place, which is un-surveyed and un-recognised village. They are eking out their livelihood by collecting minor forest produce.

3. The respondents filed a counter stating that the petitioners are Scheduled Tribes residing in the plain areas of Bhadrachalam (South & North) Forest Divisions, but they are not wholly tribes as contended by them. The petitioners are residing in the reserved forest area since 2007 only and they are not in occupation of any forest land from the time of their forefathers as alleged by them. As per the road map for implementation of ROFR Act, 2006, the last date for receipt of the claims by the Forest Rights Committee was 31.05.2008 and none of the petitioners have made any claim before the Forest Rights Committee constituted under the said Act of 2006. It is the case of the respondents that there is no reserved forest within the vicinity of the Gram Panchayats as mentioned by the petitioners and no un-surveyed and un-recognised villages in Bhadrachalam Revenue Division. The petitioners have migrated from adjacent areas of Chhattisgarh State and they are called Gotti Koyas. The Gotti Koyas are not one of the recognized Scheduled Tribes by the Government of Andhra Pradesh. There is a lot of difference between the Scheduled Tribes living in the Khammam District and Gotti Koyas who have migrated from Chhattisgarh with regard to their nomenclature, customs, appearance, dressing, life style and food habits. The petitioners are not enrolled in any of the villages and there is no proof of identity also.

4. Heard the learned counsel for the petitioners and the learned Government Pleader for the respondents.

5. In view of the conflicting claims with regard to the status of the petitioners as Scheduled Tribes within the State of Andhra Pradesh, the petitioners are given liberty to establish their identity, status and right to the land claimed by them before the respondents under the provisions of Act 2 of 2007 and if the petitioners are successful in this regard, the respondents may consider their case under the provisions of the Forest Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. The entire exercise shall be completed within a period of three months from the date of receipt of a copy of this order and if the petitioners are aggrieved, they can seek appropriate remedies available to them under law. Till the completion of the enquiry, the petitioners shall not be dispossessed from the lands in their occupation.

6. Subject to the above observation, these writ petitions are disposed of. Pending

miscellaneous petitions, if any, in this batch of writ petitions, shall stand dismissed in consequence. No costs.

Sunkisala Venkaiah & Ors. vs. The Govt. of Andhra Pradesh

WP NO. 15719 OF 2012
HIGH COURT OF ANDHRA PRADESH
11.06.2015
CORAM: C.V. NAGARJUNA REDDY, J.

SUMMARY

The writ petitioners sought protection of their forest rights, including right to cultivation of crops on forest land in their possession, under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA). The petitioners also sought a writ of mandamus directing the State-respondent not to dispossess them from their land. Towards this end they relied upon an order dated 1.05.2009 passed by the High Court in WP No. 21479 of 2007.[10]

The respondent State government opposed the claims of the petitioners, arguing that they have been cultivating the forest lands illegally and in violation of the provisions of the Andhra Pradesh Forest Act, 1967 and the Forest Conservation Act, 1980. It was also argued that the representation for the grant of pattas under the FRA was made after the prescribed date, namely, 31.05.2008.[11]

The Court directed that eligibility for grant of the pattas under the FRA must be made by the competent authority, since the representation made by the petitioners is pending. The Court directed that since the petitioners are in possession of the lands, they should not be dispossessed from the lands in their respective occupation till a decision is taken by the competent authority on the claim as per the provisions of the FRA & FR Rules.

[10] *J.V. Sharma & Ors. vs. Government of India & Ors.* Order dated 1.05.2009 in WP No. 21479 of 2007, Andhra Pradesh High Court. Full order is placed elsewhere in this compendium.

[11] This is an erroneous argument. There is no cut-off date under the FRA for submission of claims, which has been reiterated by the nodal Ministry on numerous occasions.

EDITOR'S NOTE

It is a matter of grave concern that the State government took a position in the Court that the "prescribed date" for submission of claims under FRA is 31.5.2008, and opposed the writ petition on the ground that the petitioner has missed this deadline. Fortunately the Court did not accept this argument, and proceeded to issue directions protecting the right of the petitioners to due process under the FRA, as well as protecting their possession of the land until the final decision.

ORDER

1. This Writ Petition is filed by as many as 183 persons, who claim to be in possession of Acs. 2-00 cents each of the forest land situated in Sree Ramanjaneyapuram Thanda, Mannesultan Palem Village of Bellamkonda Mandal, Guntur District, from time immemorial, stating that they have been raising crops such as Mirchi, Vegetables and other seasonal crops; that they are eligible for grant of pattas under the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (for short 'the Act'); that in WP No. 21479 of 2007, filed as a piece of Public Interest Litigation, a Division Bench of this Court has passed an order on 01-05-2009, directing the respondents not to evict or disturb them pending the Writ Petition; and that pending consideration of their request for issue of pattas, respondent No. 3 is making hectic efforts to dispossess them from the lands in their occupation. The petitioners have, therefore, sought for a writ of Mandamus to declare the action of respondent No. 3, in trying to dispossess them from the forest lands, as illegal and arbitrary.

2. A detailed counter-affidavit is filed by respondent No. 3. It is inter alia stated therein that it may be true that the petitioners are cultivating forest lands, but, such cultivation is illegal and in violation of the provisions of the Andhra Pradesh Forest Act and Forest Conservation Act; that as the petitioners did not fulfil the eligibility criteria under the Act, their claims were not considered; that under the provisions of the said Act, all the claimants other than Scheduled Tribes must prove that they have been living in the forest land for three consecutive generations i.e., for 75 years as on 13-12-2005 and that they were in possession of the land as on 31-12-2007; and that as the petitioners failed to produce such evidences, their claims cannot be considered. The counter-affidavit further averred that the claims of the petitioners were not considered at Grama Sabha Level and also by the Sub-Divisional Level Committee constituted under the Act, as they did not fulfil the eligibility criteria and that therefore, eviction notices were issued to them by the Forest Range Officer, Guntur, under Section 20 of the A.P. Forest Act, 1967, duly following the prescribed procedure.

3. At the hearing, Smt. Vijayalakshmi, Deputy Forest Range Officer, is present along with the file. She has explained that the petitioners have neither made applications nor approached the Grama Sabha/Forest Rights Committee with the request for grant of pattas before 31-05-2008, which is the last date prescribed for making claims. She has, however, admitted that on behalf of the petitioners, a representation was made for grant of pattas and that the same was received by the Divisional Forest Officer-respondent No. 3 on 19-12-2011. She has further explained that as the said representation was made far too belatedly i.e., beyond 31-05-2008 and no evidence was sent to show that they, being non STs, have been in possession of the forest lands for the last three consecutive generations i.e., not less than 75 years, the said representation was not considered.

4. The questions whether the petitioners are eligible for grant of pattas under the Act or not

and their claims were made within the prescribed time or not need to be decided by the competent authority. Since a representation was, admittedly, made by the petitioners, which was received on 19-12-2011, it is incumbent upon respondent No. 3 to consider the same, take a decision thereon as per the provisions of the Act & the Rules made thereunder and the route map prepared under the Act and communicate the same to the petitioners. If the petitioners feel aggrieved by the decision that may be taken by respondent No. 3, they are entitled to avail appropriate legal remedies.

5. As the respondents have not specifically denied the plea of the petitioners that they are in possession of the lands, they shall not be dispossessed from the lands in their respective occupation till decision is taken by respondent No. 3 and communicated to the petitioners. Respondent No. 3 shall take such decision and communicate the same to the petitioners within two months from the date of receipt of this order.

6. Subject to the above directions, the Writ Petition is disposed of.

7. As a sequel to disposal of the Writ Petition, WPMP No. 20284 of 2011, filed by the petitioners for interim relief, is disposed of as infructuous.

BOMBAY HIGH COURT

TABLE OF JUDGMENTS AND ORDERS

Bonda Samsa Vali & Ors. vs. State of Maharashtra & Ors.

WP NO. 231 OF 2009
HIGH COURT OF BOMBAY, AURANGABAD BENCH
29.04.2010
CORAM: NARESH H. PATIL AND N.D. DESHPANDE, JJ.

SUMMARY

The petitioners sought permission to file an application with the concerned Tahsildar for the purpose of getting themselves rehabilitated in forest land, as they belong to a Scheduled Tribe.

The Court permitted them to file applications before the appropriate committee, without expressing its views on merits. It also directed an early disposal.

ORDER

(the Order of the Court was delivered by Naresh H. Patil, J.)

1. Heard.

2. The petitioners desire to file an application with the concerned Tahsildar for the purposes of getting themselves rehabilitated in forest land as they claim themselves to be tribal under Government scheme.

3. Without addressing the merits of the claims of the petitioners, we observe that petitioners are entitled to file such applications before the appropriate committee. If such applications are filed, the committee shall consider such applications in tune with the scheme of the Central Government and assess the evidence and bona fides. Thereafter, the committee shall pass appropriate order and dispose of the applications as early as possible. The writ petition is disposed of.

Arjun Ratansing Jadhav vs. State of Maharashtra & Ors.

CRIMINAL WRIT PETITION NO. 681/2013
HIGH COURT OF BOMBAY, AURANGABAD BENCH
23.10.2013
CORAM: K.U. CHANDIWAL AND A.I.S. CHEEMA, JJ.
CITATION: 2013 SCC ONLINE BOM 1382

SUMMARY

The petitioner had collected and transported minor forest produce (gum) from Chalisgaon Forest Area for which the contract and pass was obtained. This was seized and sealed by the respondents. While the petitioner had a license for the gum, that found in his possession exceeded the amount permitted in the license, and was of a different quality. The gum was accordingly seized by forest officials and criminal proceedings were initiated against him under various provisions of the Indian Forest Act, 1927 (1927 Act). Moreover, this gum had been stored at his residence and not a state designated godown. These actions were alleged by the State government to be in violation of the 1927 Act.

The writ petition claims that these acts of the forest officials are illegal under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA). The petitioner did not claim to be an eligible right holder but that he bought the gum from the right holders (under the FRA), who are forest dwellers in the Chalisgaon forest area.

The Court rejected all prayers, including this one, as the petitioner could not establish that the proceedings for determination of forest rights under the FRA had been initiated, nor that he had lawfully purchased the seized minor forest produce from the right holders. The Court held that since the Petitioner could not show that the gum seized from his residence was the same that he transported from Chalisgaon area, the action of the respondent State government in seizing it and initiating criminal proceedings cannot be faulted.

Accordingly, the writ petition was dismissed.

EDITOR'S NOTE

Certain observations have been made by the Court regarding the applicability of the FRA in lands outside the jurisdiction of the Panchayat and in protected areas. However, these are in the nature of *obiter dicta*, since the finding of the Court on facts - namely, that the source of the gum was not FRA right holders - has already been decided against the petitioners. These observations do not, for this reason, constitute a legal precedent.

JUDGMENT

(the Judgment of the Court was delivered by A.I.S. Cheema, J.)

1. Heard. Rule. Rule made returnable forthwith and heard finally with consent of both sides.

2. In nutshell, the case of petitioner is that, he had taken contract of collection of gum from Chalishgaon Forest area for the period 26.11.2008 to 30.6.2009. He had got a pass issued to transport the gum from Chalisgaon to village Pal in Taluka Raver, District Jalgaon and transported the gum. The forest officials at Pal seized the gum at Pal and sealed the same in two rooms of the house of petitioner. Petitioner claims, this act of the forest officials is illegal.

3. The petitioner has supported his claim referring to various documents filed on record. Respondents have filed affidavit-in-reply and opposed the claims made by the petitioner. The learned counsel for petitioner, on the basis of the contentions raised and documents, has submitted as follows :

   (a) The petitioner was the highest bidder in auction for collection of gum from 26.11.2008 to 30.6.2009 from Chalisgaon forest area. As per the procedure, he was required to store the gum collected at a particular godown, which was allotted to him by the forest officials. He was allotted godown at Hirapur, Taluka Chalisgaon. As per the procedure, he received transit passes to carry gum from the forest range up to the given godown. The passes are pointed out as "Annexure C" from the record. It has been submitted for the petitioner that, he had requested the Range Forest Officer, Chalisgaon and was given transit pass/ order, permitting him to carry 22 quintals of Salai gum and 15 quintals of ordinary Kad gum from Hirapur godown to village Pal as per order dated 21.2.2009 (Annexure D) and the transit pass dated 11.3.2009 (Annexure E). According to the petitioner, on the basis of such pass (Annexure E), the gum was transported to village Pal at his residence and kept in two rooms.

   (b) It has been submitted that, on 6.4.2009, respondent No. 4 came to the residence of petitioner and carried out two panchanamas (Annexure F) and the gum stored in two rooms was seized and the rooms were sealed. On 9.4.2009, again a panchanama was done and the gum attached was weighed and found to be 3089 kgs. of Salai gum and 220 kgs. of Kad gum. The Range Forest Officer forwarded report dated 20.4.2009 to Assistant Conservator of Forest, reporting that there was no permission for storing of the said gum and truthfulness of the claim that the gum was brought on Government pass was required to be verified (Annexure G). Submission is that, the petitioner was issued another order dated 9.7.2009 (Annexure H) that the gum has been illegally collected and so, the same should be handed over to the Range Forest Officer. The petitioner moved an appeal (Annexure J), which can be said to

be representation to higher authorities of the respondent No. 4, claiming that the action of seizure was illegal and the gum should be handed over to the petitioner. The appeal-cum-representation was rejected on the ground that appeal was not maintainable (Annexure K). The petitioner claims that, the gum is a minor forest produce and under the jurisdiction/ control of respective village panchayats; and forest officials have no control over the same.

(c) According to the learned counsel for the petitioner, being aggrieved by the order dated 9.7.2009 (Annexure H), earlier Writ Petition No. 6265/2010 (later converted into Criminal Writ Petition No. 525/2012) was filed before this Court. At the time of hearing, it transpired that, principles of natural justice had not been followed while passing the impugned order and the A.P.P. submitted that show-cause-notice would be served and the points raised by the petitioner would be considered by the Deputy Conservator of Forest concerned. Consequently, the then impugned order dated 9.7.2009 was quashed and set aside and the matter was remanded to the Deputy Conservator of Forest, Yawal Forest Region at Jalgaon with certain directions. The petitioner then refers to the further developments of issue of notice to him, dated 29.10.2012; his reply dated 19.11.2012 and detailed reply dated 30.11.2012. It has been submitted that, the petitioner had then filed Writ Petition No. 3643/2013 to quash and set aside the enquiry on the ground of delay and violation of directions of the Court. Respondents stated that, decision would be taken within four weeks and the Writ Petition No. 3643/2013 came to be disposed of accordingly.

(d) According to the petitioner, the Range Forest Officer then conducted an enquiry and submitted report dated 3.4.2013 (Annexure S). Some statements were also recorded. According to the petitioner, empty formalities were completed by recording statements and respondent No. 4 passed order dated 23.7.2013 (Annexure T), and the petitioner has been directed to hand over the gum alleging that the same has been collected from adjacent forest area.

This order dated 23.7.2013 is now challenged by the petitioner, claiming that it has been wrongly held that the gum was not the same which was transported from Chalisgaon. Even otherwise, according to the learned counsel, in the area of Pal, "The Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 ("Forest Rights Act" in short) has been enforced on 31.12.2007 and the rights to minor forest produce vest in the Gramsabha. It is submitted by learned counsel for the petitioner that, gum is only of Kad and ordinary type and Pal is a tribal forest area, where no auction is held. Since Chalisgaon was non-tribal forest area, there auction had been held. Pal falls within scheduled forest area under the Forest Rights Act and the tribal people in the area are entitled to collect the gum from the Pal forest area. Learned counsel submitted that, the gum was transported from Chalisgaon and even otherwise, petitioner can purchase such gum from the local tribals at Pal also and so, according to him, the seizure could not have been done. It is claimed that, the seized gum by now has become useless due to fungus and respondents are liable to pay rent for the gum stored as well as compensation.

4. Against the claim of the petitioner, the learned A.P.P. for respondents has relied on the affidavit-in-reply filed by the Assistant Conservator of Forest and referring to the documents filed on record, learned A.P.P. claims that the petition has no substance and should be rejected. Case put up and arguments for respondents are as follows :

(a) The petitioner was given contract to collect ordinary and Kad gum at Chalisgaon Range in Jalgaon Forest Division. Ordinary gum includes Dhawada, Babool, Khair, which are edible gums, but Salai gum is not edible as it is used for making pastels (Dhoop Batti) and so it is not ordinary gum. Village Pal is remote place in Raver

Forest Range of Jalgaon district. The petitioner was transporting gum from Jalgaon Forest Division to Yawal Forest Division, and so he was required to get godown approved at Pal from Deputy Conservator of Forest, Yawal Division. It is accepted that, on 6.4.2009 the house of petitioner was searched and it was found that, 3089 kgs. of Salai gum and 220 kgs. of Kad gum was there, but it is claimed that the gum was freshly collected and was moist. The same was seized and panchanamas of seizure and sealing of rooms were carried out. It is accepted that, on 9.4.2009 again panchanama was done and the gum was actually weighed and found that there was 3089 kgs. of Salai gum and 220 kgs. of Kad gum. The same was kept in the custody of petitioner. Range Forest Officer, Raver reported that the truthfulness of the claim that the gum was brought on Government Pass was required to be verified. It is submitted by the learned A.P.P., that the gum which was seized at the house of petitioner, was different as it was wet and quantity was also different. According to the respondents, the petitioner was in illegal possession of Salai and Kad gum. The Deputy Conservator of Forest, Yawal Division, under powers as per Section 72(1)(c) of Indian Forest Act, 1927 (Forest Act for short) was entitled to search the gum which had been stored.

(b) The affidavit for respondents claims that the transit permit was of 22 quintals of Salai gum and 15 quintals of ordinary and Kad gum whereas what was found was 3089 kgs. of Salai gum and 220 kgs. of Kad gum. According to the respondents, Maharashtra Minor Forest Produce (Regulation of Trade) Act, 1969 is applicable only to Tendu and Apta and the petitioner is wrongly referring to the said Act. The Transfer of Ownership of Minor Forest Produce in Scheduled Areas Act, 1997 does not apply in the present matter as Chalisgaon does not fall under the scheduled area.

(c) According to learned A.P.P., the gum which was seized by respondent No. 4 from the house of petitioner, had been spread out for drying, as can be seen from the panchanama. Apparently it was wet. The gum which was collected in the Chalisgaon range had been transported to Hirapur godown on 21.1.2009 and 25.1.2009 as per the passes at Exhibit C. It is argued that, such gum could not have remained moist for 3-4 months when gum was seized vide panchanama dated 6.4.2009. Learned A.P.P. submits that, the forest officials rightly claimed that, the gum found in the Yawal Forest Division from the house of petitioner was not the same and that it had been illegally collected from Yawal Division where there are ample Salai and Kad trees. It has been submitted that, Yawal Forest Division has many Salai, Dhawada, Khair, Kad trees, from which gum is extracted. According to respondents, there was illegal extraction in the area by making notches and removing of barks whereby the trees were being damaged and so, forest cases were required to be filed as because of such activities the trees die after some days. Respondents claim that, as per Section 78 of the Bombay Forest Rules, 1942, if a forest produce is transported, it is necessary that the pass is examined and the articles are stored in depots for the purpose. The learned A.P.P. has submitted that, the impugned order has been passed after considering all relevant factors and the petition deserves to be rejected. Reliance has been placed on Section 69 to claim that, whenever question arises whether forest produce is the property of the Government the same has to be presumed to be the property of the Government till the contrary is proved. According to learned A.P.P., the claim of the petitioner that the gum seized was transported from Chalisgaon needs to be rejected for want of proof of actual transporting and due to the difference in quantity. According to learned A.P.P., the argument of learned counsel for petitioner that Pal being in scheduled area, the gum can be purchased from local tribals also, is not maintainable as the petitioner has all along claimed that this gum was brought from Chalisgaon in Jalgaon Forest Range and no documents have been shown of

purchase from local tribals in Pal area. According to learned A.P.P., although transit pass was taken from Chalisgaon, there is no evidence of actual transportation else the pass would have got endorsed on the way as required.

5. We have perused the impugned order dated 23.7.2013 of the Deputy Conservator of Forest, Yawal Division (Exhibit T). The Deputy Conservator of Forest considered the concerned documents and orders in Writ Petition filed earlier and gave opportunity to the petitioner. The concerned documents which are also part of present record, were discussed. He also obtained an enquiry report from Range Forest Officer (Annexure S in the present matter) and has dealt with the specific averments made by the petitioner, and recorded his reasons. After considering the material, he has recorded findings as follows :

"(i) Salai gum 3089 kg. and Kad gum 220 kg. which was seized on 6.4.2009 in the residential premises of petitioner and quantity of gum which was shown to Forest Officials vide TP No. 093555 dt. 11.3.2009 2200 kg. of salai gum and 1500 kg. Kad and sada gum. The quantity of gum seized is in excess of that shown as per Transit Permit. The seized gum was wet and was spread for drying.

(ii) The petitioner was granted a contract and was authorized to collect gum from Chalisgaon Range of Jalgaon Forest Division for the period 2008-09. He has signed an agreement with Dy. CF, Jalgaon.

(iii) On 11.3.2009 while transporting gum material from Hirapur (Chalisgaon) to Pal he has not produced T.P. at Forest check post at Bhusawal. The petitioner himself was present with the vehicle. As responsible govt. contractor of gum he should have himself shown the T.P. at Forest check post Bhusawal of Jalgaon Division. It seems that he purposefully avoided.

(iv) When he was transporting the gum material to Pal which is in the jurisdiction of Yawal Forest Division he should have applied for approval of godown to Dy. Conservator of Forest, Yawal/ R.F.O. Raver in writing. At least he should have intimated in writing to concerned R.F.O. Raver and got his stocks verified. It seems that he purposefully avoided it. Enquiry carried out by R.F.O. Raver also inferred that the gum material seized seems to be collected from adjoining forest areas around Pal village. This has been substantiated by seizure of illegal gum vehicles and Forest Officers registered for illegally making notches on Salai and other gum exuding trees in forest areas of Yawal Forest Division and in Pal forest round. Deputy Conservator of Forest Jalgaon Division letter vide No.1655 dt. 15.6.2009 also clarified that the gum material seized at residential premises of petitioner is not the same as collected by the petitioner in Chalisgaon Range considering the difference in quantity.

(v) The petitioner has collected gum from Chalisgaon Range of Jalgaon Division in the month of January 2009. He transported the gum material on 4.3.2009 as per transit permit issued by R.F.O. Jalgaon. Gum material was seized from petitioner's residential premises on 6.4.2009. After a period of 2 months from collection the gum will not remain wet. The petitioner Shri A.R. Jadhav, R/o Pal, Tal. Raver has failed to prove substantially the ownership of gum material seized from his residential premises on 6.4.2009 by Forest Officials irrespective of all the opportunities given to him. Mere possession of Transit Permit does not prove his ownership beyond doubt. There are reasonable grounds to believe that he has not transported the gum material collected by him in Chalisgaon Range to Pal, Tal. Raver which is very remote place in Tribal areas and is far from market. He purposefully avoided verification of vehicle carrying gum (forest produce in Transit) permit as per provision of Indian Forest Act 1927, and provision of Section 41. There are grounds on record to believe

that petitioner had malafide intention and was found to possess 3089 kg. Salai and 220 kg. of Kad, sada gum collected by illegal means from forest areas around Pal. This has been confirmed by the enquiry conducted by RFO Raver.

(vii) Bombay Forest Rules 1942 Section 78 prescribes Depots and their purposes to which Forest produce should be taken for examination previous to the grant of a pass in respect thereof.

(viii) As per provisions of Indian Forest Act 1927, Section 69 which states as under; Sec. 69 - Presumption that the Forest Produce belongs to Government - When in any proceedings taken under this Act, or in consequence of anything done under this Act a question arises as to whether any Forest Produce is the property of Government, such produce shall be presumed to be the property of Government until the contrary is proved.

In view of facts and circumstances mentioned above, the gum seized at residential premises of the petitioner Salai gum 3089 kg. and Kad, Sada gum 220 kg. is Govt. property as per provisions of Sec. 69 of Indian Forest Act 1927 explained earlier."

6. The petition itself shows, that when the petitioner got the tender for collection of gum in Chalisgaon area, as per procedure, he was required to deposit the same at particular godown allotted by the forest officials and was required to take transit pass even within the Chalisgaon forest range as can be seen at Exhibit C. Thus, he is aware that it is necessary to have pass for transporting and need to keep the forest produce at specified place after collection. Respondents are referring to the Bombay Forest Rules, 1942. Chapter VI deals with "Transit of Forest Produce". Rules show that no forest produce shall be moved into or from or within district except as provided in the Chapter, without a pass from some officer or person duly authorized. The chapter deals with not only Forest Passes but also Forest Depots. Petitioner claims that, from the forest division of Chalisgaon, the gum was brought to Pal, Taluka Raver vide Pass (Exhibit E). This pass specifically describes the forest produce as "Salai Gum" - 22 quintals and "ordinary and Kad gum" as 15 quintals. Even the route is specified as Chalisgaon, Pachora, Bhusawal, Faizpur, Nhavi and via Mahemandli. No material is there to show that although transit pass (Exhibit E) was taken, the gum mentioned therein was actually transported to Pal as on the way there is Bhusawal Forest Check Post and there is no record that the petitioner got endorsed the transit pass at Bhusawal Forest Check Post. The learned counsel for petitioner has submitted that, there was nobody at the Forest Check Post and so the pass was not shown. However, there is no material to show that any effort was made to inform the authorities that there was nobody at the Check Post, so the goods have been transported further. Even when approaching remote area of Pal, the petitioner did not get the godown (or place for storage) approved for keeping the forest produce as per rules referred above.

7. The panchanamas recorded (Exhibit F), which are dated 6.4.2009, show that, when the forest officials carried out the inspection, it was found that, while some gum was stored in bundles, some of it had been spread out on the floor. The report of the Deputy Conservator of Forest having enquired into the matter, discussed the material and found that the gum found in the house of petitioner was wet. The gum as regards collection at Chalisgaon Range, was in the month of January 2009. Petitioner claims that he transported the gum in March 2009 and the same was seized on 6.4.2009. Forest officials, in discharge of their duty and experience, claim that, after a period of two month from collection, the gum will not remain wet. The learned A.P.P. says that, this is one of the reasons why forest officials have found that the gum seized at the residence of petitioner at Pal is not the same for which the pass was taken at Chalisgaon.

8. Although Pass (Exhibit E) relied on by the petitioner himself mentions that the goods were "Salai gum" to the extent of 22 quintals and "ordinary and Kad gum" to the extent of 15 quintals, (which is also the description in the passes at Exhibit C), at the time of arguments, the learned counsel for the petitioner claimed that even Salai gum is ordinary gum. He has thus tried to justify the quantity found in the house of petitioner. However, the petitioner did not object to the type of gum recorded in the documents at Chalisgaon. Even at the time of panchanamas in April 2009 he does not appear to have disputed when it was being recorded that Salai gum is found although he was present and even signed the panchanamas. As such, now he cannot claim that even Salai gum is ordinary gum. The affidavit on behalf of respondents, in para 7, claims that, ordinary gum includes Dhawada, Babool, Khair, which are edible gum, but Salai gum is not edible as it is used for making pastels. The affidavit claims (in para 19), that in the Yawal Forest Division, there are various gum producing trees viz. Salai - 7,17,802, Dhawada - 18,34,029, Khair - 3,15,936, Kad - 12,996. Thus, the affidavit is that, these are gum from different trees. In the transit pass (Exhibit E), "Salai" was shown separately and "ordinary and Kad gum" was shown separately. Record shows that, although petitioner claims that he transported 2200 kgs. "Salai gum" and 1500 kgs. of "ordinary and Kad gum", what was seized at his residence was 3089 kgs. of "Salai gum" and 220 kgs. of "Kad gum". It is apparent that, the Salai Gum seized at his house was much more than what he claimed to have transported from Chalisgaon forest area. There is substance in the submission on behalf of respondents that the gum seized at the residence of petitioner at Pal is not from authorized source and the petitioner has not been able to satisfy that it was the gum transported by him from Chalisgaon area.

9. Petitioner submitted that, gum is minor forest produce. The learned A.P.P. accepts this. It is further submitted on behalf of petitioner that, Pal is in scheduled area. Even this is not in dispute. It is then argued by the learned counsel for petitioner that, looking to the provisions of Forest Rights Act, the right of ownership of the minor forest produce vests in the Gramsabha of Pal and so, the petitioner can acquire such gum even from the local traditional forest dwellers and scheduled tribes. This argument needs to be discarded as, soon after the panchanamas dated 6.4.2009, when the respondents issued order dated 9.7.2009 (Annexure H) to the petitioner, informing that the gum is not one which has been collected from Chalisgaon and has been illegally collected, the petitioner had taken up representation to superiors vide Exhibit J. In this representation dated 24.7.2009 and even subsequently, the petitioner has all along claimed that it was the same gum which he had collected in the Jalgaon Forest Division from Chalisgaon and had claimed that he had transported the same and so, he was legally in possession. In the representation dated 24.7.2009 (Annexure J), petitioner did not claim that the gum had been purchased locally from persons who have acquired forest rights under the Forest Rights Act, 2006. It is rightly argued by the learned A.P.P. that the petitioner has even otherwise failed to show any document of locally purchasing at Pal. According to the respondents, as per Section 4 of Forest Rights Act, there is recognition and vesting of forest rights mentioned in Section 3 in forest dwelling Scheduled Tribes and other traditional forest dwellers. As per Section 6, the Gramsabha is the authority to initiate the process for determining the nature and extent of individual or community forest rights or both that may be given to forest dwelling scheduled tribes and other traditional forest dwellers within the local limits of its jurisdiction. Petitioner has not shown document to show purchase from any such Scheduled Tribes as traditional forest dwellers.

10. Respondents claim that, outside the jurisdiction of the Panchayat, the rights still remain with the Government. Pal village is adjoining forest area belonging to the forest as well as Wildlife Sanctuary Area. Section 4(1) of The Maharashtra Transfer of Ownership of Minor Forest Produce in the Scheduled Areas and the Maharashtra Minor Forest Produce (Regulation of Trade) (Amendment) Act, 1997 reads as under:

"4. Ownership of Minor Forest - Procedure to vest Panchayat.

(1) The ownership of Minor Forest Produce found in the Government lands in the Scheduled Areas, excluding the National Parks and Sanctuaries, shall vest in the Panchayat within whose jurisdiction such area falls.

Explanation.- The expressions "National Parks" and "Sanctuaries" used in this section shall have the same meanings respectively, assigned to them under the Wild-life (Protection) Act, 1972."

11. Thus, areas of National Parks and Sanctuaries are excluded. Again, Panchayat also has to adhere to the prescriptions contained in the Working Plan, Management Plan or Working Scheme under Section 5. Respondents are claiming that the gum seized is illegally obtained from adjoining forest of Pal and in the circumstances, is suspect. Respondents, in the circumstances, rely on presumption under Section 69 of the Indian Forest Act, 1927 to claim that until contrary is proved, the forest produce shall presume to be the property of the Government. Keeping in view the particulars as to how illegal extraction of gum leads to death of trees, if petitioner has to succeed, reliable proof has to be there. The same is wanting.

12. For reasons discussed, it cannot be found that the petitioner is able to show that the gum seized from his residence at Pal was one which he transported from Chalisgaon area. In the absence of showing legal source of acquiring of the minor forest produce, the action of the respondents cannot be faulted with. The impugned order (Annexure T) cannot be said to be illegal or arbitrary.

13. There is no substance in the Writ Petition. The same is rejected. Rule is discharged.

14. Heard. Interim relief dated 6th September 2013 is extended till 23rd November 2013.

Kashtakari Sangathana & Ors. vs. Assistant Conservator of Forests, Dahanu & Ors.

WRIT PETITION NO. 7705 OF 2011
BOMBAY HIGH COURT
19.12.2014 (INTERIM ORDER)
CORAM: A.S. OKA AND A.S. GADKARI, JJ.

SUMMARY

The writ petition had been filed by Kashtakari Sangathana, an organisation dedicated to the uplift and protection of tribals and forest dwellers in Dahanu district, seeking protection from eviction and dispossession of the tribals and forest dwellers in the land in question. It was argued that they are claimants under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) but the respondent State government authorities are attempting to dispossess them on the ground that the forest lands fall within the limits of the Dahanu Municipal Council where the FRA is not applicable.

While issuing notice to the respondents on 12.10.2011, the Court had passed an order protecting the petitioners from dispossession in the following terms:

"No coercive action, in the meantime, be taken against the petitioners."[12]

During the course of the proceedings, the Nodal Agency for the implementation of the FRA, Ministry of Tribal Affairs Government of India, issued a series of Circulars in exercise of its powers under Section 12 of FRA, clarifying thereby that the Forest Rights Act is applicable to claimants in respect of forest lands wherever they may be located; no exception is made for municipal areas.[13]

Accepting the submission made by the said Ministry on affidavit, the Court issued

[12] Order dt. 12.10.2011 in WP No. 7705 of 2011, Bombay High Court.

[13] See, for instance, Circular dated 29th April 2013 bearing F. No. 19020/02/2012-FRA issued by the Ministry of Tribal Affairs, Government of India. Subsequently, detailed Guidelines were issued vide Circular dt. 5.3.2015 bearing No. 19020/02/2012-FRA (Vol.II) by the said Ministry giving the procedure for application of FRA to municipal and urban areas.

***rule nisi* in the proceeding. It further reinforced its previous order protecting the residential structures of the petitioners from demolition until the final disposal of the writ petition. It also put the onus on the petitioners not to make any major alterations or additions in the structures, or create third party rights without the permission of the Court, during this time.**

EDITOR'S NOTE

Although this is an interim order and for this reason does not operate as a binding precedent, the directions and observations made by the Court are important in the context of the implementation of the FRA in forest lands inside municipal areas across the country.

ORDER

1. Heard the learned counsel appearing for the Petitioners, the learned AGP for the First, Second and Fourth Respondents and the learned counsel appearing for the Fifth and Sixth Respondents.

2. We have perused the affidavit of Shri Uttam Kumar Kar, Under Secretary to the Government of India, Ministry of Tribal Affairs, Government of India, New Delhi. The specific contention raised in paragraph 10 of the affidavit is that the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (for short "the said Act") is also applicable to the Municipal areas. Time was granted to the learned AGP to take instructions and to make a statement. However, he has not received any instructions.

3. The case made out by the Petitioners is that the structures in respect of which impugned orders have been passed are situated within the limits of Dahanu Municipal Council.

4. Considering the issues raised and the stand taken by the Union of India, this Petition needs final hearing. Accordingly, we issue rule. The concerned counsel representing the Respondents waive service.

5. The Petitioners have been protected as regards their residential structures by the order dated 12th October, 2011. By way of interim relief, we direct that the demolition of the residential structures of the Petitioners which are subject matter of the orders dated 13th December, 2010 (Exhibit H-1 to H-13 to the Petition) shall not be carried out till the final disposal of the Petition, subject to condition that the Petitioners shall not carry out any major additions or alterations to the residential structures and shall not create third party interests therein or part with possession thereof without prior permission of this Court.

CHHATTISGARH HIGH COURT

TABLE OF JUDGMENTS AND ORDERS

Geeta Yadav vs. State of Chhattisgarh & Ors.

WPC NO. 771 OF 2012
HIGH COURT OF CHHATTISGARH
03.09.2015
CORAM: PRITINKER DIWAKER, J.
CITATION: 2015 SCC ONLINE CHH 167

SUMMARY

The writ petition was filed in 2012 seeking protection of rights under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA), since the petitioner had filed a claim before the Gram Sabha but even while it was pending, efforts were made by the respondent forest authorities to dispossess her. By an interim order, she was protected from eviction during the pendency of the case.

During the pendency of the writ petition, it appears her application was decided by the Gram Sabha, and the petitioner sought permission to withdraw this writ and approach the Sub Divisional Level Committee (SDLC) in appeal.

In the process, she sought two concessions from the Court, which were granted. One, she sought a direction to the SDLC that her appeal will not be rejected on the ground of delay (the statute provides that an appeal be filed within 60 days, while in the present case already 3 years had elapsed) which prayer was granted by the Court on condition that the appeal be filed within four weeks from this day.

Second, she sought a continuation of the interim protection against eviction granted to her. In this regard, the Court extended the protection by one month, observing that thereafter it shall be the prerogative of the SDLC to decide on this in accordance with law. With these directions the writ petition was permitted to be withdrawn.

EDITOR'S NOTE

Although a brief decision, it is significant for the reason that the Court saw fit to

permit the petitioner to file an appeal against the order of the Gram Sabha before the SDLC after an elapse of over three years, even while the statute provides only 60 days.

ORDER

1. The petitioner appears to have filed an application before the Gram Sabha under the Forest Rights Act ("Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (hereinafter referred to as 'the Act. 2006') for grant of lease of the land in question. During the pendency of his application when an attempt was made by the forest authority to dispossess him, this petition was filed.

2. While entertaining the writ petition, on 30.04.2012 interim protection was granted in favour of the petitioner directing respondents not to evict him from the forest land under the occupation of the petitioner.

3. Counsel for the petitioner submits that during the pendency of the writ petition, his application has been decided by the Gram Sabha vide order dated 20.08.2012 and therefore he may be permitted to withdraw this petition with liberty to file the appeal before the Sub Divisional Level Committee under Rule 14 of the Rules, 2008 framed under the Act, 2006. He further submits that as the petitioner was prosecuting present writ petition, his appeal may be treated as time barred, and therefore, appellate authority be directed to decide the appeal to be filed by the petitioner ignoring the point of limitation. It has also been argued that stay operating in favour of the petitioner may be directed to continue till he files the appeal along with an application for interim relief and such application for interim relief is decided.

4. State counsel has no objection to the proposition put forth by the petitioner.

5. The petitioner is permitted to withdraw this petition with the aforesaid liberty.

6. In the eventuality of filing an appeal before the appellate authority assailing the order dated 20.08.2012 by the petitioner within four weeks from today, it is expected from the appellate authority to decide the said appeal ignoring the point of limitation. The petitioner would be further at liberty to file an application seeking interim protection from the appellate authority and it would be for the appellate authority to decide the said application in accordance with law.

7. Till one month from today the interim order granted in favour of the petitioner on 30.04.2012 shall remain in operation.

8. It is made clear that nothing has been observed on merit aspects of the case and the competent authority would be at liberty to decide the appeal and any other such application strictly in accordance with law.

9. The petition is accordingly dismissed as withdrawn with the aforesaid liberty.

HIGH COURT OF DELHI

TABLE OF JUDGMENTS AND ORDERS

Priya Parameswaran Pillai vs. Union of India & Ors.

WP(C) NO. 774 OF 2015
HIGH COURT OF DELHI
12.03.2015
CORAM: RAJIV SHAKDHER, J.
CITATION: 2015 SCC ONLINE DEL 7987; (2015) 218 DLT 621

SUMMARY

The petitioner, a lawyer and civil rights activist associated with Greenpeace India Society, was working with forest dwelling communities in the Singrauli Coal belt in Madhya Pradesh. She was to travel to the United Kingdom to address an All Party Parliamentary Group (APPG) comprising of British Parliamentarians regarding violation of various environmental laws in India, and also the degradation of the existing wildlife, water and air pollution in the region because of the work in the area by the Coal companies. Upon reaching the Delhi Airport, the immigration authorities refused to allow her to board the flight, and her passport was endorsed "off load". She sought reasons from the Ministry of Home Affairs, Government of India for preventing her from travelling, but no official response was received from the Government, although subsequently she learnt that a "Look Out Circular" (LOC) had been issued against her.

The petitioner approached the Delhi High with a writ petition citing that her fundamental rights under Articles 19(1)(a), 19(1)(g) and 21 of the Constitution have been violated. The petitioner argued that the LOC was issued without following the due procedure of law. She further argued that imposing restrictions on her travel abroad is a violation of her fundamental rights to travel, free speech and expression and to practice her profession and/ or occupation. The petitioner submitted that she cannot be categorized as anti - national because she seeks to assist tribal communities to claim their rights under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA).

The respondents argued that the petitioner would create a "negative image" of India and was therefore prevented from travelling outside India to articulate her views to British Parliamentarians.

FINDINGS OF THE COURT

The Court examined a number of issues in detail, such as whether the right to travel abroad is a fundamental right, whether the Office Memorandum under which the LOC was issued constitutes a "law", whether the issue of such LOC against the petitioner was justified, and whether there was any violation of her fundamental rights through the actions of the respondents.

Relying upon the decisions in *Maneka Gandhi*[14] and *AK Gopalan*[15], the Court held that when a person's right to life under Article 21 is deprived in accordance with procedure established by law, this means "enacted law" which must be just and reasonable.

The Court disagreed with the contention of the respondents that by testifying before the APPG the petitioner would create a negative image of India, thereby creating an atmosphere which retards foreign investment in India. The Court observed that there has always been a counter viewpoint on developmental issues and that:

> **"The mere fact that such debates obtain, or such debates metamorphose into peaceful protests, cannot be the reason for curtailing a citizen's fundamental rights. In this case, Ms. Pillai's right to travel abroad and interact with relevant stake holders (i.e., the British Parliamentarians), to persuade them, to have entities incorporated in their country, to fall in line, with the developmental ethos, which is close to her ideology and belief, cannot be impeded only because it is not in sync with policy perspective of the executive." (@ para 38)**

The Court also held that the executive may or may not agree with the views of the petitioner regarding adverse impact on the rights of the tribal communities due to coal mining. However, that by itself cannot be a reason to prevent the petitioner from exercising her fundamental right to travel abroad, and thereby, in effect, disable her from expressing her views on the subject.

The Court held that the detention of the petitioner at the airport was a violation of her fundamental rights under Article 21 and 19(1)(g) of the Constitution, and therefore illegal. Nor can the action of the respondents in issuing an LOC against the petitioner be categorized as a reasonable restriction in terms of Article 19(2).

Accordingly, the Court quashed the LOC issued against the petitioner, and directed the respondent authorities to remove the endorsement "off-load" made on the petitioner's passport and to also remove her name from the data base maintained by them relating to persons who cannot leave the Country.

EDITOR'S NOTE

Although the questions of law arising in the present case do not relate to the FRA, it is an important decision upholding the right of citizens to be critical of the development paradigm of the government of the day, and affirming that such right is part of the fundamental right to life as also the right to freedom of speech and expression.

[14] *Maneka Gandhi vs. Union of India* (1978) 1 SCC 248.

[15] *AK Gopalan vs. State of Madras & Ors.* 1950 SCR 88

JUDGMENT

1. Every once in a while, citizens going about their usual and ordinary business, get entangled with the State apparatus; sometimes for good reason and at times unjustifiably so. In such a situation, an aggrieved citizen's remedy, quite naturally, is to approach the courts of law for appropriate relief. These remedies at most times are financially debilitating and not within the means of every aggrieved party.

   (a) The instant matter is a case in point. The petitioner (hereinafter referred to as Ms. Pillai) chose to travel to the United Kingdom, in the early hours of the morning of 11.01.2015, by an Air India flight bearing no. AI-115. She was, however, stopped at the immigration for reasons that I shall, shortly, advert to in the course of my discussion.

   (b) Suffice it to state (at this stage), the concerned immigration officer proceeded to endorse, Ms. Pillai's passport with an annotation "off load". Having not been supplied with any reasons, an indignant Ms. Pillai shot off (in my view quite correctly as would be evident from facts delineated hereafter) a letter of even date i.e., 11.01.2015 to the Secretary, Government of India (GoI), Ministry of Home Affairs seeking to know the reasons which had impelled the authorities concerned to detain her at the airport. Though there was no official response to her communication dated 11.01.2015, the media was rife with reports, that a Look-Out-Circular (LOC) had been issued qua her. Resultantly, Ms Pillai dispatched yet another letter dated 12.01.2015 to the same officer, seeking to know, inter alia, as to whether, what was being bandied about, in the press, was factually correct.

   (c) Ms. Pillai's communications received no response.

2. Being aggrieved, Ms. Pillai has moved this court under Article 226 of the Constitution.

3. The broad plank of her challenge is pivoted on the assertion that these actions of the respondents are violative of her fundamental rights. Article 19(1) (a), 19(1) (g) and 21 have been invoked by Ms. Pillai, to assail the actions of the respondents, which she categorises, if one were to sum her submissions, as egregiously illegal.

4. Ms. Pillai's curriculum vitae, broadly, reads as follows : She avers that she is a civil rights activist, who works in public spaces. Her core area of work relates to environmental issues. She is a lawyer by profession; and is currently employed with Greenpeace India Society, as a Policy Officer.

5. It appears of late she has been working in Mahan in the Singrauli Coal belt, in the State of Madhya Pradesh. As an activist working in Mahan, it appears, she has associated herself with the local tribal communities, which according to her, seek to resist the possibility of a coal mine being operated in the area. The opposition, evidently, albeit nonviolent, appears to be focussed against the proponent of the proposal; a company by the name of Mahan Coal Ltd, which seeks to open a coal mine in the concerned area.

   (a) Mahan Coal Ltd., apparently, is a joint venture company, formed and incorporated at the behest of two entities by the name of Hindalco and ESSAR Power Ltd. It is averred that ESSAR Power Ltd. is a wholly owned subsidiary of ESSAR Energy; a company incorporated and registered in United Kingdom (in short, UK). It is claimed that till very recently, ESSAR Energy, was also listed on the London Stock Exchange.

   (b) It is asserted that Mahan, is home to the oldest and largest surviving Sal forest in Asia. The assertion made in the writ petition is that opening of a mine in Mahan had

the potentiality of displacing the forest / tribal communities, which in turn, could impact lives of thousands of people who, depend on forest produce. There is also an assertion that such an activity could, also degrade, the existing wild life found in the area and lead to water and air pollution in the region.

(c) It is to talk on these aspects with British Parliamentarians that, Ms. Pillai was invited by Greenpeace UK. Accordingly, a request for visa was sent by Greenpeace UK, on 27.11.2014, on behalf of Ms. Pillai. In its communication, Greenpeace UK, indicated that all expenses would be met by it, which included expenses qua travel, insurance and medical insurance.

(d) Consequent thereto, Ms. Pillai was issued a visa by the British High Commission, for a period of 6 months.

(e) Based on the above, Ms. Pillai's air ticket was booked with Air India. Her seat was confirmed by the Airline, on flight no. AI 115, which was to fly out of Delhi on Sunday, 11.01.2015, at 06.50 am.

6. As indicated at the very outset, Ms. Pillai was detained at the airport, just before she was to board her flight. She was accosted by Mr. V.K. Ojha, an Immigration Officer employed with respondent no. 2 i.e., Bureau of Immigration.

7. It is averred that Mr. Ojha after consultations with the officers at the Special Assistance Counter asked Ms. Pillai to accompany him to another place for further confabulations; albeit within the airport complex. It is at this point in time that Ms. Pillai was informed that she could not travel out of India. Resultantly, her baggage was retrieved from the aircraft and an endorsement to the effect, "off load" was made on her passport.

8. On Ms. Pillai seeking information as to why she had been detained, she was asked to speak to Mr. V.K. Ojha's superior, one, Ms. Sushma Sharma. It is averred that Ms. Sushma Sharma received a fax from an unknown source, whereupon she confirmed that Ms. Pillai had been detained since her name stood included in the "data base" of individuals, who are not allowed to leave the country. Apparently, no further information was supplied to Ms. Pillai as to why and how her name got included in the said data base.

9. Being unhappy with her situation, Ms. Pillai, as indicated above, wrote a letter on that very date i.e., 11.01.2015 to the Secretary, Ministry of Home Affairs wherein, she recounted her ordeal.

10. The said communication was followed by a letter dated 12.01.2015 whereby, she sought clarification from Secretary, Ministry of Home Affairs, as to whether an LOC had been issued in her name. This clarification was sought as media reports were suggestive of the fact that this was the precise reason which the "official sources" had trotted out, for her detention at the airport.

11. In addition, Ms. Pillai, by this very communication, most emphatically sought the details of the LOC, if any, issued, along with information, as to the authority which had directed its issuance and, the reasons, which had led to its issuance. Ms. Pillai, briefly, also touched upon the fact that she had not been convicted in any criminal case, and all that she proposed to do, was to give a speech to the Members of the British Parliament.

12. None of the aforementioned communications of Ms. Pillai received a response. Resultantly, the captioned petition came to be moved on 28.01.2015 when, notice

was issued in the matter. Since respondents had received, advance notice, they were represented by counsels. Respondents' counsels accepted notice and were accordingly given a week's time to file a counter affidavit. The returnable date fixed in the matter was 06.02.2015. Despite opportunity, no counter affidavit was filed.

13. However, on 06.02.2015, respondents were represented by Mr. Sanjay Jain, learned ASG who requested for further time being granted till 10.02.2015, to enable filing of a counter affidavit in the matter. The request was acceded to. Liberty was consequently granted to the petitioner to file a rejoinder before the next date of hearing.

14. Since the counter affidavit was not filed within the prescribed time, counsels for the petitioner pleaded that they could only bring the rejoinder to the court. Counsels were agreed though, that both, counter affidavit and rejoinder could be taken on record. Accordingly, the needful was done. Submissions in the matter were heard on 18.02.2015 and 19.02.2015. Written submissions on behalf of the petitioner were placed on record on 19.02.2015. The respondents as requested were given two days to file written submissions in the matter. This did not happen. Upon a request being made, on mentioning, written submissions of respondents were taken on record on 23.02.2015, in the presence of counsels for the opposite side.

SUBMISSION OF COUNSELS

15. On behalf of Ms Pillai, arguments were advanced by Ms. Indira Jaising, learned senior counsel, assisted by Ms. Vrinda Grover, Ms. Amrita Chakravorty, Mr. Bhavook Chauhan, Ms. Sonakshi Malhan and Mr. Ratna Appanendra, Advocates. Respondents were represented by Mr. Sanjay Jain, learned ASG, who was assisted by Mr. Neeraj Jain and Mr. Anirudh Shukla, Advocates.

16. Ms. Jaising's submissions can be briefly paraphrased as follows :

(a) The LOC issued in the matter which, as per the counter affidavit, is dated 10.01.2015, has been issued without due authority of law. There being no restriction imposed upon Ms. Pillai to travel outside India by any court, she could not be prevented from travelling outside the country for the stated purpose, which was to meet the British Parliamentarians with respect to work carried out by her with tribal communities, in Mahan.

(b) The detention of Ms. Pillai, on 11.01.2015, had violated her fundamental right to travel, free speech and expression and to practice her profession and / or occupation. Consequently, the action of the respondents contravened her fundamental rights under Article 21, 19(1)(a) and 19(1)(g) of the Constitution.

(c) The only legal recourse open to the respondents whereby, if at all, they could have lawfully prevented Ms. Pillai from exercising her constitutional right of free travel, was to exercise powers conferred under the provisions of: The Passports Act, 1967 (in short the Passports Act).

(c)(i) This power could if, at all, be exercised by the constituted authority or the Central Government or the designated officer perhaps only in terms of and in consonance with the provisions of Section 10 of the Passports Act.

(c)(ii) Apart from the powers contained in the aforementioned Section, which includes the power to vary, impound or revoke the passport, emergent power is found in Section 10A of the Passports Act to suspend the passport or travel documents, which are otherwise likely to be impounded or caused to be impounded

or revoked under the provisions of clause (c) of sub-section(3) of Section 10, provided it is deemed necessary in public interest to do so. Such a suspension shall run for a period of four (4) weeks. The suspension can thus, be carried out by the Passport Authority, only if it deems it necessary to do so in the interest of the sovereignty and integrity of India, security of India, friendly relations of India with any foreign country, or in the interest of the general public.

(c)(iii) Even in such situations, the affected party has to be given an opportunity of hearing within a period not exceeding eight (8) weeks, reckoned from the date of passing of such an order. In other words, fetter, if any, on the constitutional right of a citizen to travel abroad can be imposed by a duly constituted authority and, that too, only in accordance with the aforementioned provisions[16].

(d) The ostensible basis on which LOCs generally and, in particular, in this case, have been issued by the respondents, is sourced in O.M. dated 27.10.2010 (in short 2010 O.M.) which, in turn, is said to be based on the directions issued by this Court in the following judgments: *Vikram Sharma vs. Union of India*, [171 (2010) DLT 671] and *Sumer Singh Malkan vs. Assistant Director & Ors.* [II (2010) DM 666].

(d)(i) A perusal of the said judgments would show that while they discuss as to the appropriate authority which can issue an LOC and, the entity, which can make a request for issuance of an LOC, they do not, address the question as to the legal basis for issuance of an LOC. The power to issue an LOC should be rooted in a substantive law, such as, the provisions of Section 41 of the Code of Criminal Procedure, 1973 (in short the Cr. PC). In other words, the 2010 O.M. is not backed by authority of law. The said O.M. which is in the nature of an executive instruction is not law "within the meaning of Article 13(3)(a) of the Constitution"[17] .

(e) The respondents by their own admission have invoked the provisions of clause 8(j) of the 2010 O.M. which, empowers them to issue an LOC; albeit in exceptional cases, "without complete" or even in cases where no details are available, only against persons falling in the following categories:

> "counter intelligence suspects, terrorists, anti-national elements, etc. in larger public interest". Therefore, in such like cases, the safeguards contained in the 2010 O.M., can, in a sense, be side-stepped provided the person against whom an LOC is issued, falls in the categories prescribed therein.

(e)(i) Ms. Pillai has been categorized as one indulging in anti-national activities. The recourse to clause 8(j) of the 2010 O.M. is flawed as the expression, 'anti- national' has to be interpreted in the context of those expressions preceding it, that is, in consonance with, the principle of *ejusdem generis*.

(e)(ii) Expression of opinion on economic activities of the Government or investment decisions of a particular multinational corporation qua coal mines in India to the extent it impacts tribal communities of the area or, the environment cannot be construed as an anti-national activity, if read, in the context of the preceding expressions; obtaining in clause 8(j). The logical corollary of which, is that, anti-national activities can only be construed as those activities which impinge upon sovereignty or integrity of India. The two examples given in clause 8(j) of the 2010 O.M., such as, counter intelligence suspects and terrorists, fall in this category.

[16] See *Hukam Chand Shyam Lal vs. Union of India*, (1976) 2 SCC 128

[17] See *Bijoe Emmanuel and Ors. vs. State of Kerala and Ors.*, (1986) 3 SCC 615

(e)(iii) This argument was, however, advanced *dehors* the submission that an LOC is an administrative instruction not backed by authority of law, and that, the grounds set out therein, whereby restrictions on travel could perhaps be imposed, had to abide by the mandate of Article 19(2) of the Constitution. Since the expression, 'anti-national' or 'national interest' does not find mention in Article 19(2) of the Constitution, the last category in clause 8(j) of 2010 O.M. being: "anti-national elements, etc. in larger national interest" - does not qualify as a "reasonable restriction" within the meaning of Article 19(2) of the Constitution[18].

(f) The respondents had failed to show as to how the purpose of Ms. Pillai's visit which, involved speaking with British Parliamentarians qua rights of tribal communities, in Mahan, would constitute a threat to the sovereignty and integrity of India. Espousing a cause of particular section of people could not be considered as anti-national or creating disaffection amongst people at large[19].

(g) The right to travel abroad is a fundamental right which, stands subsumed in the right to life and personal liberty guaranteed under Article 21 of the Constitution. No citizen of the country can be deprived of this right except according to the procedure established by law[20].

(h) Ms. Pillai has a fundamental right to express her opinion on crucial economic policies of the Government which may differ from the dominant opinion and would include the right to propagate an alternative opinion. This opinion can be expressed at seminars, by publishing articles and including, in the manner, sought to be done in the instant case by meeting with parliamentarians of foreign countries. Ms. Pillai had proposed to travel to the UK to highlight the role of a British company, i.e., Essar Energy. Such a meeting could, by no stretch of imagination, have had an impact on the friendly relations between India and Britain as it pertained to a contestation between a British Company and the local population situate in Mahan; none of which impinged upon the relationship between Britain and India. A State cannot impose travel restrictions on its citizens without due authority of law[21].

(i). The respondents had failed to provide any material which would substantiate their claim that Ms. Pillai's association with Greenpeace India Society, as an employee posed a threat to India's sovereignty and integrity. The respondents have not imposed a ban on Greenpeace India Society and, is thus, not an unlawful association whose activities can be prohibited under the Unlawful Activities (Prevention) Act, 1967. The Greenpeace India Society is an organisation registered under the laws of India and, is thus, free to carry out its activities within the parameters of an enacted law. Though respondents have put Greenpeace International on its "watch-list", no material was placed on record by the respondents in that respect, as is evident from the decision of this court dated 20.01.2015, rendered in WP(C)5749/2014, titled: *Greenpeace India Society vs. Union of India*.

(j) Restrictions on criticism of Government policies or programmes whether in India or abroad can if, at all, apply to Government servants. In support of this submission,

[18] See *S. Rangarajan vs. P. Jagjivan Ram*, (1989) 2 SCC 574

[19] See *Sree Rama Rao vs. Telugu Desam a Political Party and Ors.*, AIR (1984) AP 353

[20] See *Maneka Gandhi vs. Union of India*, (1978) 1 SCC 248

[21] See *Dr. D.C. Saxena vs. Hon'ble Chief Justice of India*, (1996) 5 SCC 216, *Nandini Sunder vs. State of Chhattisgarh* (2011) 7 SCC 547 and *Mahanadi Coalfields vs. Mathias Oram* (2010) 11 SCC 269.

reliance was placed on Rule 7 of All India Service (Conduct) Rules, 1968 and the judgment of the Supreme Court in the case of *Vijay Shankar Pandey vs. Union of India*, (2014) 10 SCC 589.

(k) The fact that Ms. Pillai's air ticket was bought by Greenpeace UK, which is an entity, separate and distinct from Greenpeace International, would not constitute a violation of the provisions of the Foreign Contribution (Regulation) Act, 2010 (in short the FCRA). The expenses incurred on behalf of Ms. Pillai would not constitute foreign contribution within the meaning of Section 2(h) of the FCRA. If at all, the expenses towards air tickets would come within the definition of "foreign hospitality", under the provisions of Section 2(i) of the FCRA. In case the respondents seek to prohibit acceptance of foreign hospitality by Ms. Pillai from Greenpeace UK, they are required to pass an order under Section 9(e) of the FCRA and seek information in terms thereof and for the grounds stated therein. In the present case, no such order was admittedly been passed by the respondents.

(l) The fundamental right to free speech can only be restricted by a duly enacted law which must pass muster of the test of reasonable restrictions, as contained in Article 19(2) of the Constitution[22].

(m) The ostensible reason given by the respondents for preventing Ms. Pillai from travelling outside India, and thus, in effect, articulating her views to British Parliamentarians is that it would create "negative image" of India overseas, which in effect would whittle down Foreign Direct Investment (FDI), in India, so very much needed, in manufacturing and infrastructure sectors and, in addition, could also lead to sanctions. None of these reasons can be classified as anti-national activities.

(n) The petitioner, who bears true faith and allegiance to the Constitution of India and, seeks to secure for its citizens justice, social, economic and political, cannot be categorized, as anti-national because, she seeks to assist tribal communities to claim their rights under the Forest Rights Act, 2006 (in short the Forest Rights Act).

(o) The restrictions put on Ms. Pillai which, in sum and substance, affect her freedom of expression, is violative of the International Covenant on Civil and Political Rights (in short the ICCPR) to which India is a party. Reliance in this regard was placed on General Comment no. 34 of the Human Rights Committee of the UN, in relation to Article 19 of the ICCPR. It was also stated that said covenant stands subsumed in the Municipal Law of the country via the provisions of Section 2 of the Protection of Human Rights Act, 1993.

(p) The maintenance of a secret data base by respondent no. 3 i.e., the Intelligence Bureau, amounts to unlawful surveillance and, is thus, violative of right to privacy guaranteed under Article 21 of the Constitution[23].

(q) The stand of the respondents that Ms. Pillai would be allowed to travel if, she were to furnish an undertaking that she will not speak on the subject matter referred to above, to British Parliamentarians, amounts to prepublication censorship and, in that sense, is an unconstitutional condition attached to her otherwise constitutional

[22] See *Pravasi Bhalai Sangathan vs. Union of India*, (2014) 11 SCC 477

[23] See *Kharak Singh vs. State of Uttar Pradesh*, (1964) 1 SCR 334, People's Union of Civil Liberties vs. Union of India and Anr., (1997) 1 SCC 301

right to travel abroad, which is guaranteed under Article 21 of the Constitution[24].

(xviii). The counter affidavit filed on behalf of the respondents is not declared as mandated by law, as the source of information, based on which averments had been made therein are not disclosed. It is not understood as to the basis on which it is asserted by the deponent that Ms. Pillai was acting contrary to national interest. The affidavit filed on behalf of the respondents thus deserves to be ignored[25].

17. On the other hand, Mr Sanjay Jain, learned ASG, defended the stand of the respondents and made submissions, in line with the stand taken in the counter affidavit. Mr Jain's submissions thus, broadly, alluded to the following:

(a) The respondents' action of issuing LOCs in general, as also in this particular case, is backed by the necessary authority, which is contained in the 2010 O.M. The said O.M. has its genesis in the Ministry of Home Affairs, Government of India letter dated 05.09.1979, followed by O.M. dated 27.12.2000. The 2010 O.M., in that sense, refined the guidelines in the light of directions issued by this court in Vikram Sharma's case and those issued by the Division bench of this court in Sumer Singh Malkan's case. The contention advanced on behalf of the petitioner is, therefore, without basis.

(b) In so far as Ms Pillai was concerned, she was already an LOC subject and, accordingly, an LOC dated 10.10.2014 had been issued qua her on an earlier occasion. As regards the recent incident, whereby she was detained at the airport on 11.01.2015, a numbered LOC was opened by the Assistant Director of IB, on 10.01.2015. The purpose with which the said LOC was issued, was to prevent Ms Pillai from leaving India since, she proposed to testify before the All Party Parliamentary Group (APPG) on Tribal People, comprising of British Parliamentarians, which without doubt, would have "negatively" projected the image of the Government of India.

(c) The investigating agencies have, from time to time, issued LOCs either against persons who are involved in crime, or against those, whose activities are found to be prejudicial in national interest. Though Ms Pillai, has been permitted to travel out of India, on at least eight occasions, between January, 2007 and June, 2012, this time around she was detained, as the purpose of her visit was to depose before a formal committee of the British Parliament, with a defined motive of impacting India's image abroad, at a time, when it was looking to attract FDI, in infrastructure and manufacturing sector.

(d) Greenpeace International UK office, has taken keen interest in fomenting ground level protest via Greenpeace India, because of which at least 13 foreign activists working for Greenpeace International have been blacklisted, as they were found to have acted in violation of Visa rules, in view of their involvement in training, motivating and organizing Greenpeace India's activists at field level, to protest, in close proximity to thermal plants and coal mine locations. These protests have marred India's energy security interest.

(e) The main objective of the foreign and Indian activists associated with Greenpeace International and Greenpeace India, is to step up agitations in coal producing regions, such as Mahan, in Singrauli district, in the State of Madhya Pradesh. For this

[24] See *St. Xavier Education Society, Ahmedabad vs. State of Gujarat*, (1974) 1 SCC 717

[25] See *Amar Singh vs. Union of India and Ors.*, (2011) 7 SCC 69

purpose, a front, in the form of an entity by the name of, Mahan Sangharsh Samiti (MSS) was created, which is funded by Greenpeace India and that Ms Pillai has been posted there to organize the villagers.

(f) Greenpeace India's funding was curtailed by Ministry of Home Affairs in 2014, based on specific intelligence inputs. The inputs received show that Greenpeace India plans to "take-down" nearly 40000 MW thermal projects. These protests are funded through foreign sources. In this behalf specific reference was made to paragraph 22 of the counter affidavit, which set out the possible locations in which thermal plants are likely to come up. Reference was also made to protests organized at two nuclear sites, located at Kundakulam, in Tamil Nadu and Fatehbad, in Haryana. There is also a generic reference qua protests organized in respect of genetically modified food trials and with regard to India's tea export industry.

(g) The funding pattern of Greenpeace International is opaque, as it claims that it collected donation in small amounts from persons of different nationalities located all over the world. It is because of this reason, and its activities, that it has been placed in the proscribed list of donors under Section 46 of the FCRA; in other words, in respect of each foreign donation, Greenpeace International would have to seek permission of MHA. It is thus, placed in a category which is known as "Prior Reference Category".

(g)(i) The Indian arm of Greenpeace International, i.e., Greenpeace India and Greenpeace Environment Trust, having violated Indian income tax laws, have been issued notices by the authorities under the Income Tax Act, which involve amounts equivalent to Rs. 3.8 crores.

(h) Since, Greenpeace India's funding had been curtailed, and prior clearance is required for donations received by Greenpeace International, Greenpeace, UK has been used to engineer protests in Mahan. As a part of this plan, in the first instance, steps were taken to garner funds and organize visits of Ms Pillai and, one, Mr Akshay Gupta, along with five (5) activists of MSS, to meet-up with British Parliamentarians. Because others were not able to obtain visas in time, Ms Pillai, attempted to embark alone on a trip to UK Based on specific intelligence input, as to the purpose of her visit, she was detained at the airport.

(i) APPG is headed by, one, Mr Martin Horwood and cochaired by a person of Indian origin, by the name of Virendra Sharma, who is the chair of APPG, on Indo-British relations. Both persons are the members of the British Parliament. Mr Martin Horwood is a liberal democrat, whereas Mr Virendra Sharma is from the Labour Party. As would be evident, APPG is a formal committee of a foreign Parliament. The decision of Ms Pillai to depose before such a committee, with respect to the concerns of tribal communities, in Mahan, would only damage the country's image and consequently hamper its economic interest. Unlike other prominent civil rights activists, Ms Pillai has taken a decision to vent her ire and/or articulate her views against State policy before a Committee, comprising of British Parliamentarians; an act which can only be construed as an anti-national activity.

(j) It has been a core foreign policy objective of countries, such as, the USA, UK and other European countries to issue annual reports, of their assessments, of specific human rights violation in other countries. In preparation of these reports, the testimonies of global NGOs and think-tank experts are recorded, including testimonies of human rights activists, originating from the country concerned. Reports, incorporating such testimonies, are prepared on religious freedom, as well

as tribal and indigenous people.

(k)(i) The United States has in place, a statute, titled as: International Religious Freedom Act, 1998, which empowers its government to impose sanctions against a Country of Particular Concerns (CPC). India has come perilously close to being declared a CPC, in the reports generated by the US Commission on International Religious Freedom and the US State Department, of April and July, 2014 respectively. These reports have in fact rated India one notch above the CPC level.

(k)(ii) Similarly, the APPGs of the British Parliament have directed their focus on tribal people since, 2012. As a matter of fact, the UK APPG report on religious freedom, issued in 2014, alleges a violation of religious freedom in India. Similarly, the European Parliaments' Working Group Report on Religious Freedom of February, 2014, places India in the lowest category as a CPC alongside Pakistan. Within the CPC, India has been labelled as, a serious violator of religion and belief. There are indications that UK Parliament's APPG report will use Ms Pillai's testimony to rate India, at a low level, exposing it to the potentiality of being governed by a sanction regime.

(k)(iii) Similarly, the US President is empowered under the law obtaining in that country to issue, trade, arms and investment sanction against CPC countries.

(k)(iv) These reports on religious freedom, tribal people, indigenous people, human trafficking and dalit rights generated by various Commissions and Countries feed on each other, and thereby, create a circular documentation.

(k)(v) In 2006, European Parliament has already passed six (6) resolutions against India on dalit rights and one on violence against women. The content of these resolutions is suggestive of the fact that Government of India and the Parliament of India have not been able to protect dalits and women, and therefore, a call is made to European Union to factor in these aspects in their trade negotiation with India and Indian companies. These reports are used as instruments of foreign policy to impede India's growth prospects at a time when it is actively pursuing economic growth and development, which requires a massive flow of FDI.

(k)(vi) That these instruments have been used effectively against countries, is apparent, from sanctions made against countries, such as Iran, Russia and North Korea.

(k)(vii) One of the important elements in the creation of such documentation/ report is the in-person testimony of local activists, which adds to the credibility of its content qua the reports. The respondents are handicapped, in as much as, while reports generated under the aegis of United Nation can be contested, such like reports, created by formal committees of countries, like, US, UK and the European Parliament, cannot be contested as no opportunity is provided to the Government of India, or its Embassies/High Commissions, to record their opinion in the matter.

(l) The testimony of Ms Pillai, before a formal Committee of British Parliament, would have a cascading effect, globally, which would only serve the foreign policy interest of other nations.

(l)(i) Ms Pillai's deposition would thus, be prejudicial to "national interest". Therefore, the LOC issued qua Ms Pillai is directed "not to limit all her freedoms but was focussed only on the proposed activity", which involved deposition before a foreign parliament.

(l)(ii) In other words, if Ms Pillai were to give an undertaking that she would not depose before the Committee of British Parliamentarians, the LOC issued qua her could be lifted.

REASONS

18. Having heard the learned counsels of the parties, what has emerged from the record is as follows:

(a) An LOC was issued qua Ms Pillai on 10.10.2014, followed by a fresh LOC, which got issued on 10.01.2015. These LOCs have not been served on Ms Pillai. As a matter of fact, she had no notice of an LOC having being issued vis-à-vis her till she was detained at the airport on 11.01.2015, at a point in time when she intended to board Air India flight AI-115.

(b) The resultant events led to her passport being endorsed with the annotation "off-load".

(c) The respondents have claimed that the LOC is a secret document and, hence, cannot be handed over to Ms Pillai, or for that matter, to any person against whom the same has been issued. However, in order to trigger issuance of an LOC, it requires a duly authorized originator to send a request in the proforma stipulated under the 2010 O.M., to the Bureau of Immigration.

(d) The affidavit filed on behalf of the respondents, records that the originator of the LOC was a Joint Director in IB, and that, a "numbered LOC was opened by the Assistant Director of IB, on 10.01.2015, to prevent her (Ms Pillai) from leaving India since, she would project the image of Indian Government "negatively" at the international level.

(e) Ms Pillai's communication of 11.01.2015 and 12.01.2015, addressed to the Secretary, Ministry of Home Affairs, did not receive any response.

(f) That the stated reason for issuing the LOC, was that, Ms Pillai's testimony before a formal Committee of British Parliament, carried with it the possibility of it being incorporated in the report of the APPG on tribal people, which could in turn compromise country's economic interest as it may lead to trade and investment sanctions.

(g) That while reports generated under the aegis of the United Nations can be contested by Government of India, by putting across its point of view, the same opportunity is not available to it, vis-à-vis the reports generated by the APPGs and Commissions of countries, such as, US, UK and other European countries.

(h) Ms Pillai though, has denied in the pleadings that she intended to depose before the British Parliament. It is her stand that all that she intended to do, was to meet-up with British Parliamentarians to exert necessary moral pressure on a British entity, i.e., Essar energy, which, according to her had a say in the working of a joint venture company, by the name of Mahan Coal Limited; an entity that proposed to open up a mine in Mahan to the detriment of the tribal communities located therein.

(i)(a) Mahan Coal Limited, is a joint venture company formed and incorporated with the aid and assistance of Hindalco and Essar Power Ltd. Essar Power Ltd., is a wholly owned subsidiary of Essar Energy, which as indicated above, is a company incorporated and registered in UK

19. In view of the aforesaid facts, the following issues arise for consideration:

(a) Whether the right to travel abroad is a fundamental right protected by Article 21 of the Constitution? And if so, could the violation of that right impact the freedom of speech and expression of a citizen protected under Article 19(1)(a) of the Constitution?

(b) Whether the 2010 O.M. would constitute a "law" within the meaning of Article 13(3)(a) of the Constitution?

(c) Whether the issuance of an LOC qua Ms Pillai was justified in the given facts and circumstances?

(d) Whether the consequent detention of Ms Pillai on 11.01.2015, at the airport, resulted in violation of her fundamental right, under Article 21, and 19(1)(a) of the Constitution?

ISSUE NO.(I)

20. In so far as the first issue is concerned, the answer to the same is fairly simple, in view of the law laid down by the Supreme Court, both pre and post, the enactment of the Passports Act, i.e., the 1967 Act. The Supreme Court in the case of *Satwant Singh Sawhney vs. D. Ramarathnam, Asstt. Passport Officer, Government of India, New Delhi & Ors.*, (1967) 3 SCR 525, dealt with a matter where the petitioner, before it, assailed the decisions of the Assistant Passport Officer, New Delhi and the Regional Passport Office at Bombay, whereby he had been asked to surrender passports issued by the said authorities. The challenge was laid by the petitioner by way of a petition under Article 226 of the Constitution. The majority judgement of the Supreme Court dealt with the case purely "on the high plain of fundamental rights and their breach" as described, so felicitously, in the dissenting judgement of Hon'ble Mr Justice Hidayatullah. The majority judgement, quite strikingly, did not allow facts, bad as they were, to muddy the discernment of the width and the amplitude of the rights of the petitioner under Article 21 of the Constitution. In their discussion, the learned Judges, while citing with approval their earlier decision in *Kharak Singh vs. State of UP*, (1964) 1 SCR 332, made the following vital observations:

"....This decision is a clear authority for the position that "liberty" in our Constitution bears the same comprehensive meaning as given to the expression "liberty" by the 5th and 14th Amendments to the US Constitution and the expression "personal liberty" in Art. 21 only excludes the ingredients of "liberty" enshrined in Art. 19 of the Constitution. In other words, the expression "personal liberty" in Art. 21 takes in the right of locomotion and to travel abroad, but the right to move throughout the territories of India is not covered by it inasmuch as it is specially provided in Art. 19...."

(emphasis is mine)

21. Thereafter, upon a brief discussion qua the judgements of various High Courts, such as Kerala, Bombay, Mysore (as it then was) and Delhi, the majority judgement concluded as follows:

"....For the reasons mentioned above we would accept the view of Kerala, Bombay and Mysore High Courts in preference to that expressed by the Delhi High Court. It follows that under Art. 21 of the Constitution no person can be deprived of his right to travel except according to procedure established by law. It is not disputed that no law was made by the State regulating or depriving persons of such a right..."

(emphasis is mine)

22. The issue came up for consideration, once again, as indicated above, post the enactment of the Passports Act (i.e., 1967 Act) before the Supreme Court in the case of *Maneka Gandhi vs. Union of India* & Anr; Hon'ble Mr Justice Bhagwati, writing for himself, Justice Untwalia and Justice Fazal Ali, inter alia, opined that fundamental rights conferred by Part III of the Constitution were not distinct or mutually exclusive. Each freedom had different dimensions and merely because the limit of interference, with one freedom, was satisfied, the law, so brought into play, was not freed of the necessity to meet the challenge of another guaranteed freedom. In this regard, the court relied upon the minority view, in the case of *AK Gopalan vs. State of Madras*, 1950 SCR 88, and distinctly observed in this behalf that the majority view in the said case stood overruled in view of the decision in *RC Cooper vs. Union of India*, (1970) 3 SCR 530.

23. As regards its view with regard to the decision rendered in *Satwant Singh Sawhney case*, the learned judges opined as follows:

> "…. The expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19. Now, it has been held by this Court in Satwant Singh's case that 'personal liberty' within the meaning of Article 21 includes within its ambit the right to go abroad and consequently no person can be deprived of this right except according to procedure prescribed by law. Prior to the enactment of the Passports Act, 1967, there was no law regulating the right of a person to go abroad and that was the reason why the order of the Passport Officer refusing to issue passport to the petitioner in Satwant Singh's case was struck down as invalid. It will be seen at once from the language of Article 21 that the protection it secures is a limited one. It safeguards the right to go abroad against executive interference which is not supported by law; and law here means 'enacted law' or 'State Law'. Vide AK Gopalan's case. Thus, no person can be deprived of his right to, go abroad unless there is a law made by the State prescribing the procedure for so depriving him and the deprivation is effected strictly in accordance with such procedure. It was for this reason, in order to comply with the requirement of Article 21, that Parliament enacted the Passports Act, 1967 for regulating the right to go abroad. It is clear from the provisions of the Passports, Act, 1967 that is lays down the circumstances under which a passport may be issued or refused or cancelled or impounded and also prescribes a procedure for doing so, but the question is whether that is sufficient compliance with Article 21. Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirements ? Obviously, procedure cannot be arbitrary, unfair or unreasonable. This indeed was conceded by the learned Attorney General, who with his usual candour frankly stated that it was not possible for him to contend that any procedure howsoever arbitrary, oppressive or unjust may be prescribed by the law…."
>
> (emphasis is mine)

24. Having regard to the above, it is quite clear, that it can no longer be argued that the right to travel abroad is not a fundamental right. It is, as a matter of fact, a second generation right which flows from the right to life and personal liberty conferred on the citizens, under Article 21, which can be taken away only by procedure, as established in law. While, it may be true that the right to go abroad is not included the right to freedom of speech and expression - in some cases, the curtailment of right to travel abroad could impact, a citizen's right of free speech and expression. [see *Maneka Gandhi case* paragraph 29 at page 307 and paragraph 34 at page 311].

ISSUE NO.(II), (III) AND (IV)

25. In order to answer these issues, I would for a moment assume that the issuance of an LOC is rooted in the power of the executive to take action *dehors* a statutory enactment, as long as the power enacted by the State (in this case the Union of India), falls within one of the legislative entries, included in the Constitution; provided it does not contravene the provisions of the Constitution, in particular, Part III of the Constitution or takes away rights of citizens under existing law. [See *Maganbhai vs. UoI*, (1970) 3 SCC 400].

26. I must, however note, before I proceed further that, Ms Indira Jaising has argued, with much vehemence, that the respondents' stand, that the, power to issue an LOC can be traced to the 2010 O.M., or, those which precede the said O.M., is unsustainable, as it cannot be described as "law", within the meaning of Article 13(3)(a) of the Constitution. This submission, I must confess, has much merit in view of the decisions of the Supreme Court both in Maneka Gandhi case as well as in the case of *AK Gopalan*. Both judgements take the view that "law" referred to in Article 21, would mean "enacted law".

27. The reason I do not wish to elaborate on this issue any further, is that, while this submission was advanced by Ms Indira Jaising (both during the course of hearing, as well as in the form of written submission), in the petition, there is no relief sought to strike down the 2010 O.M. One of the reasons, perhaps for this would be that Ms Pillai was never furnished a copy of the LOC. The factum of issuance of an LOC got officially known to her only when she approached this court by way of the instant petition. Nevertheless, during the course of the proceedings, no leave was sought to seek an amendment in the writ petition.

28. Be that as it may, as indicated above, while Ms Jaising's point is taken that an LOC can be issued, if at all, in circumstances, delineated in Section 10(3)(h) of the Passports Act, there may arise certain situations, outside the scope of the said Act, which may require, the executive of the day, to take recourse to an LOC, under circumstances which are not covered by a statutory enactment. As adverted above, the State, is not denuded of its executive powers only because there is no statute to back the exercise of such a power. The caveat being, if a challenge is laid to the exercise of such power, on the anvil of the Constitution, say under Article 21 and 19, the State would have to make good its case that the exercise of power was under a valid law and, in doing so, it did not violate any constitutional provisions. At that stage, the court may have to enquire and rule whether the kind of impediment that issuance of an LOC envisage requires enactment of law.

29. As an illustration, I may only advert to the provisions of Section 41 of the Cr.PC., which, inter alia, empowers a police officer to arrest a person, without the order of a Magistrate and arrest warrant, upon receipt of a reasonable complaint or credible information or even reasonable suspicion that he has committed a cognizable offence. Whether an LOC issued to effectuate such a purpose, would require a further support of an enactment would require consideration as it could be argued that it is only in aid of the power contained in the statute, i.e., the Cr.PC. I would thus leave the discussion on this issue to a better and more evolved wisdom of another court.

30. Suffice it to state that in this particular case, a decision on the aforesaid aspect may not be necessary, in view of the circumstances which have obtained in the instant matter.

31. The stand of the respondents that they had prevented Ms Pillai from leaving the country as she intended to testify before an APPG of British Parliamentarians, which

in turn, would have "negatively" impacted the image of India - in my view, is a stand, which is completely untenable.

32. The reasons for the same are as follows: First and foremost, Ms Pillai has clearly contested this attribution vis-à-vis her, which is that, she intended to testify before a formal Committee of British Parliamentarians. It is her stated stand that she intended to meet a Group of British Parliamentarians, in London, to speak about violations of environmental laws, in Mahan Coal block; in particular, with respect to the provisions of the Environment Protection Act, the Forest Protection Act, the Forest Rights Act, the Wild Life Protection Act, which amongst other areas, are operable, in that area as well.

33. This conversation, Ms Pillai says she needed to have with the British Parliamentarians, so that they could call upon Essar Energy, a British company, having a major financial stake in Mahan Coal Ltd., to fall in line with the legal regime of our country.

34. There is nothing on record to show that Ms Pillai intended to do anything more than this. The argument of the respondents that Greenpeace UK and Greenpeace International were fomenting protests in the country with respect to various public projects, especially, in the field of thermal and nuclear power generation, is not backed with actionable material. The record would show that while the respondents may have regulated the inflow of funds to Greenpeace International, by having it put in the "prior approval" category, there is no such directive issued either qua Greenpeace UK, or Greenpeace India. Ms Pillai, is admittedly, employed with Greenpeace India.

35. The only violation which is brought to fore, in the counter affidavit, qua Greenpeace India, is one concerning certain notices issued by the Income Tax Authorities; which have clearly, some revenue implications. However, the alleged violation of tax laws, which I am informed is contested, would not, in my opinion by itself, be demonstrative of the fact that the activities carried out by Greenpeace India, via its employees, agents and servants, is inimical to the economic interest of the country. While there is no gainsaying that economic security, as against physical security of a nation in today's time and space, is equally vital, if not more - nothing, which is placed before me, in the form of affidavit, or is found in the record, which was shown to me in court, would have me, presently, come to a conclusion that the activities of Ms Pillai, in particular, or those of the organizations, with which she is associated, are activities, which have the potentiality of degrading the economic interest of the country.

36. The sense that I get, upon perusal of the stand taken by the respondents in their pleadings, is that, they do not approve of the view expressed by civil right activists, in forums outside the country, which tend to portray, according to them, an inaccurate picture of the state of human rights in the country. In other words, the respondents are concerned by the fact that such portrayal generates an atmosphere, which retards investment of foreign funds, in vital infra structural projects.

37. Whether this concern of the respondents is valid or not, in my opinion, is not the issue. The reason for the same is, that, developmental activities, not now, but for ages have always had a counter point. The advancement in knowledge base, and the ability of common citizen to access information vis-à-vis public projects, has only made dissent more strident and vigorous. Whether one model of development has to be rolled out as against the other, is an on-going debate. This debate impinges upon all kinds of developmental projects, which includes project, such as, mining, setting up of nuclear plants, construction of roads through forests, acquisition of land for housing projects/ industries, construction of highways, roads, dams and bridges etc. none of which have stopped if, the executive of the day, is convinced of their need and necessity.

38. The mere fact that such debates obtain, or such debates metamorphose into peaceful protests, cannot be the reason for curtailing a citizen's fundamental rights. In this case, Ms Pillai's right to travel abroad and interact with relevant stake holders (i.e., the British Parliamentarians), to persuade them, to have entities incorporated in their country, to fall in line, with the developmental ethos, which is close to her ideology and belief, cannot be impeded only because it is not in sync with policy perspective of the executive.

39. Ms Pillai, as the facts in this case would reveal, believes that the rights of tribal communities residing in Mahan would get impacted if, a coal mine, were to be opened in that area. This, is a view, which the executive may or may not agree with. That by itself, cannot be a reason to prevent Ms Pillai from exercising her fundamental right to travel abroad and, thereby, in effect, disable her from expressing her views on the subject. In today's time and space, because of advent of technology, and especially, the internet, the universe has been reduced to a global-village. What occurs in a remote part of any country, gets immediately known the world over, either via television or through social media.

40. Therefore, the argument of the respondents that they would not permit Ms Pillai to travel out of India, for the stated purpose, but otherwise, would place no impediment in her travel, is clearly flawed. Ms Pillai, need not travel abroad to express her view point. She can transmit her views via technological devices available to her, without having to move out of the country.

41. But that is not the point in issue. The point in issue is, why must the State interfere with the freedom of an individual, as long as the individual concerned operates within the ambit of laws framed by the legislature.

42. The core aspect of democracy is the freedom of an individual to be able to freely operate, within the framework of the laws enacted by the Parliament. The individual should be able to order his or her life any way he or she pleases, as long as it is not violative of the law or constitutes an infraction of any order or direction of a duly constituted court, tribunal or any statutory authority for that matter. Amongst the varied freedoms conferred on an individual (i.e., the citizen), is the right of free speech and expression, which necessarily includes the right to criticise and dissent. Criticism, by an individual, may not be palatable; even so, it cannot be muzzled. Many civil right activists believe that they have the right, as citizens, to bring to the notice of the State the incongruity in the developmental policies of the State. The State may not accept the views of the civil right activists, but that by itself, cannot be a good enough reason to do away with dissent.

43. The argument advanced before me by the learned ASG that reports generated by APPG, which include inputs of civil right activists (I have deliberately not used the word "testimony" as Ms Pillai has denied that she intended to depose before any Committee of British Parliamentarians), cannot be contradicted as the response of the State is not sought by these bodies; does not impress me. The State has at its command a posse of sophisticated foreign service officers, who are skilled in the art of diplomacy and foreign affairs. They are trained to deal with negative connotations or, fall out of any discussion, that any individual or entity, may have with another State actor.

44. Therefore, the learned ASG's attempt to draw a distinction between the reports which are generated under the aegis of the United Nations and those which are generated by Committees and Commissions of countries, such as, US, UK and the European Parliament, is really a distinction without a substantial difference.

45. Therefore, having regard to the aforesaid discussion, in my view, there was no basis for the respondents to issue an LOC qua the petitioner. That being so, the decision taken to detain the petitioner at the airport on 11.01.2015, in my opinion, was illegal being violative of the Ms Pillai's right under Article 21 and 19(1)(a) of the Constitution.

46. The actions of the respondents do not fall within the ambit of reasonable restriction, as articulated in Clause (2) of Article 19. Clause (2) of Article 19 protects a "law" which imposes reasonable restrictions on the exercise of rights conferred upon a citizen under Article 19(1)(a), in the interest of: sovereignty and integrity of India, the security of State, friendly relations with foreign States, public order, decency, morality or in relation to contempt of court, defamation or incitement to an offence. As indicated above, even if I were to assume that 2010 O.M. has the status of law, qua which I have a serious doubt, the action of the respondents in issuing an LOC vis-a-vis Ms Pillai cannot be categorized as a reasonable restriction, as it is not a restriction which falls in any of the limitations articulated in clause(2) of Article 19.

47. In order to understand the scope and amplitude of the expression "reasonable restriction", it would be relevant to briefly advert to the circumstances in which the amendments were made in clause (2) of Article 19 of the Constitution. Clause (2) of Article 19, as found in its present form has its roots in the 1st (first) and the 16th (sixteenth) Amendment to the Constitution carried out in 1951 and 1963. Prior to these amendments, the freedom of speech and expression was subject to, only, the following qualifications: i.e., the government's authority to legislate in respect of aspects concerning, libel, slander, defamation, contempt of court, or any matter offending decency and morality, or that which undermines the security or tends to overthrow the State.

48. Evidently, taking a cue from the above, the three State Governments, that is, the Government of Bihar, East Punjab and Madras (as they were then constituted) took recourse to these qualifications in Article 19 to enact laws, which were challenged in court in three separate cases, on the ground, that they put, a fetter, on the freedom of speech and expression guaranteed by the Constitution[26].

49. In the first, case, the Bihar Government exercised its power under the Press (Emergency Powers) Act, 1931, to demand, financial security qua a pamphlet issued by an entity by the name of Bharti Press, which contained (according to the Patna High Court), a clear invitation to the readers to join total and deadly struggle, to bring about revolution, by violence, resulting in complete annihilation of those, whom the author of the pamphlet considered, as oppressors[27].

50. The Patna High Court rejected the Bihar Government's contention that the pamphlet incited violence; a decision which was unanimously upheld by the Supreme Court in *State of Bihar vs. Shaila Bala Devi*, 1952(3) SCR 654[28].

51. In the second case, the Government in East Punjab had imposed pre-censorship on an English language weekly in the guise of maintaining public safety and order by taking recourse to the provisions of the East Punjab Public Safety Act, 1950[29].

[26] Working a Democratic Constitution, The Indian Experience: Granville Austin

[27] ibid

[28] ibid

[29] ibid

52. In the third case, the Madras Government, likewise, had banned entry into the State of a journal entitled: "Crossroads" with the aid of the Madras Maintenance of Public Safety Act, 1949[30].

53. The Supreme Court struck down the provisions of the East Punjab Public Safety Act, 1950, and the Madras Maintenance of Public Safety Act, 1940 vide two separate judgements titled: *Brij Bhushan vs. State of Delhi*, AIR 1950 SC 129 and *Romesh Thappar vs. State of Madras*, (1950) 1 SCR 602[31].

54. Because of the observations made by the Court (which incidentally were judgements delivered by the same Bench), the Parliament moved to introduce the expression "reasonable restriction" in clause (2) of Article 19. The Parliament thus carried out the First Amendment which permitted the Government to impose reasonable restrictions on freedom of speech and expression both retroactively and prospectively[32].

55. The 16th Amendment Act was passed, similarly, in the background of series of events, which included the Chinese incursion in North-east, beginning in 1960, the assertion of a separate Sikh State by Master Tara Singh, in mid 1961, and the call by DMK, for an entity, separate from India, which was referred to as Dravidanad[33].

56. What is of relevance though is the interpretation that the Supreme Court gave to the expression "security of the State" in *Romesh Thappar vs. State of Madras*. In the said case, the Supreme Court observed that the expression "security of the State" is one which has reference to "those aggravated forms of prejudicial activities" which tend to endanger the very existence of the State. The Madras maintenance of Public Safety Act, 1949, which had as its object public safety and order, was declared unconstitutional, as it did not fall within the scope and ambit of the expression "Security of the State". This led, inter alia, to the insertion of the expression "public order" in clause (2) of Article 19.

57. In the context of the above, let me examine the submissions of Mr Jain, the learned ASG, which is pivoted on the rationale (albeit an erroneous one) that Ms Pillai's interface with British Parliamentarians, will impinge upon security interest (read economic Interest) of the State; as it has anti-national connotation. The power to impose such a fetter on Ms Pillai's right to travel abroad, and the consequent impediment on her exchange of views with British Parliamentarians, was traced by Mr Jain to clause 8(j) of the 2010 O.M. Clause 8(j) of the 2010 O.M. reads as follows:

> "(j) In exceptional cases, LOCs can be issued without complete parameters and/ or case details against CI suspects, terrorists, anti-national elements etc. in larger national interest...."

58. It was therefore asserted before me that Ms. Pillai could be categorized as an "anti-national element" in the larger national interest. According to Mr Jain, since the intended activity of Ms Pillai had the potentiality of degrading the image of India in the eyes of foreign nations, leading to a regression in the country's economic activities and endeavours, her journey out of the country could legitimately be interdicted to prevent her from espousing views which were against national interest or, in other words, views which impinged upon the security of the State. The submission, therefore,

[30] ibid

[31] ibid

[32] ibid

[33] ibid

was that, since the respondents considered Ms Pillai's intended conversation/ speech with the British Parliamentarians against the national interest, it necessarily, was grounded, in larger public interest.

59. The difficulty in accepting this argument is three-fold. First, reasonable restrictions spoken of in clause (2) of Article 19 do not advert to anti-national activities. Pertinently, the word anti-national does not find a place in most dictionaries; it is in effect a combination of two words. If one were to deconstruct the meaning of the word anti-national, one would perhaps have to look to the meaning of the word, "Nationalism". The nearest equivalent to the word 'Nationalism' would be patriotism. Patriotism as a concept would be linked to nationhood. Nationhood has several attributes which are, inter alia, inextricably connected with symbols, such as : the National Flag; the National Anthem; the National Song; and perhaps, the common history, culture, tradition and heritage that people of an organized State share amongst themselves.

60. In respect of each of these attributes of nationhood, there may be disparate views amongst persons who form the nation. The diversity of views may relate to, not only, the static symbols, such as, the National Flag and National anthem, etc. but may also pertain to the tradition and heritage of the Nation and the manner in which they are to be taken forward. Contrarian views held by a section of people on these aspects cannot be used to describe such section or class of people as anti-national. Belligerence of views on nationalism can often lead to jingoism. There is a fine but distinct line dividing the two. Either way, views held, by any section or class of people, by itself, cannot be characterized as anti-national activities.

61. For anti-national activities to be brought within the limitation of clause (2) of Article 19, it would have to have a close nexus with the security of the State. Security of the State as indicated in *Romesh Thappar*'s case can only be an "aggravated form of prejudicial activities" which endangers the very existence of the State or in the very least, I would think, threatens the life and limb of its citizens. Therefore, if the expression, "anti-national elements" found in clause 8(j) of the 2010 O.M. is to be brought within the four corners of clause (2) of Article 19, its meaning will have to be confined to activities of persons who fall in the category of "counter intelligence suspects" and/ or terrorists. The endeavour of Ms. Pillai to engage with British Parliamentarians on the issues relating to developmental activities in the Mahan coal block area, cannot be construed as an anti-national activity of the kind envisaged under clause 8(j) of the 2010 O.M.

62. Therefore, the action of the respondents, in issuing an LOC qua Ms. Pillai with the object of preventing her from propagating and disseminating her views on developmental activities in the Mahan coal block area, cannot be construed as a reasonable restriction, which would pass muster of the provisions of clause (2) of Article 19 of the Constitution. That the right to freedom of speech and expression includes the right to propagate ones views, which cannot be stifled or impeded, except on grounds alluded to in clause (2) of Article 19, is a constitutional principle recognized by our courts in a long line of judgements[34]. It is a right so well entrenched in our Constitution that, it cannot be dislodged, at this point in time of our nation's history.

63. Second, even if I were to accept that respondents could have issued an LOC for the stated purpose, by sourcing its power under clause 8(j) of 2010 OM, the exercise of the power in Ms Pillai's case was fatally flawed. A plain reading of clause 8(j) would show that the expression "anti-national" takes colour from the preceding term and/or expressions

[34] See *Life Insurance Corporation of India vs. Prof. Manubhai D. Shah* (1992) 3 SCC 637

found in clause 8(j). The clause by itself shows that it is a power which is exercisable by the State in exceptional cases, where it is entitled to side-step even the guidelines and parameters laid down in the O.M. itself. The power vested on respondents being rare and exceptional it, necessarily, is required to be confined to persons falling in specific categories, such as counter intelligence suspects, terrorists, and anti-national elements. The expression anti-national is followed by the abbreviated form of the word etcetera. Therefore, quite clearly the word anti-national, contextually can only take colour from the words preceding it. To rule otherwise would result in allowing for a situation where any and every activity could be brought within the purview of clause 8(j). This being an exceptional power conferred on the State, which is to be exercised in the larger national interest, it cannot be given a meaning wider than the purpose for which the power is vested in the State functionaries.

64. Therefore, to my mind, a person falling in the category of an anti-national element, in the absence of any other guideline contained in the 2010 O.M., can only be that person, who projects, a present and imminent danger to the national interest. Travelling abroad and espousing views, without any criminal intent of the kind adverted to above, cannot, in my opinion, put Ms Pillai in the category of an anti-national element.

65. Third, what inhibits me from accepting the submission advanced on behalf of the ASG, is that, if the view advanced on behalf of the respondents is accepted, it would result in conferring un-canalised and arbitrary power in the executive, which could, based on its subjective view, portray any activity as anti-national. Such a situation, in a truly democratic country, which is governed by rule of law, is best avoided.

66. I must indicate herein that in the writ petition there is a disclosure of the fact that in respect of the protest led by Ms Pillai, in the Mahan coal block area, a criminal case has been lodged in Mumbai, in which she has been enlarged on bail. The order granting bail has not put any condition in place. There is no condition put by court with regard to restraint on travel. These facts have not been disputed by the respondents in their counter-affidavit. There is also no case set up by the respondents that recourse to any provisions of the Passports Act has been taken vis-a-vis Ms Pillai. Quite clearly, therefore, there is no impediment put in place by any court or statutory authority on Ms Pillai's right to travel abroad and propagate her views, on issues referred to above.

67. The attempt of the respondents to link Greenpeace India with Greenpeace UK and Greenpeace International, by adverting to the screen shots of the latter's website, in my opinion, cannot carry their case any further. According to the respondents, the website of the Greenpeace International shows Greenpeace India and Greenpeace UK as its affiliates. It is sought to be suggested that since Greenpeace India is affiliated to Greenpeace International, the illegality attached to the conduct of the latter, should apply to the former as well as Greenpeace UK In my view, monitoring and regulation of funds received by Greenpeace International by itself cannot lead to any conclusion, at least at this stage, of alleged illegality having been committed by the said organization. Therefore, one cannot conclude that Greenpeace India has committed any illegality. Thus the attempt to inveigle Ms Pillai, in the illegality argument, via this route, must fail. The submission that Greenpeace International had intended to incur expenses qua Ms Pillai's travel and accommodation, is clearly unsustainable as there is no bar in Ms Pillai receiving "foreign hospitality" as against "foreign contribution". This is clear on a conjoint reading of the provisions of Sections 9(e), 6, 2(1)(h) and 2(1)(i) of the FCRA. Therefore, the submission made in this behalf is, in my view, being misconceived is, accordingly, rejected.

68. Therefore, having regard to the aforesaid discussion, in my opinion, the prayer made in

the writ petition for quashing and setting aside the LOC issued qua Ms Pillai, is liable to be granted. It is ordered accordingly. Accordingly, the following consequential prayers are also granted. Respondent no. 2 shall expunge the endorsement "off-load" made on Ms. Pillai's passport. Furthermore, respondents shall also remove Ms Pillai's name from the "data base" maintained by them, pertaining to those individuals, who are not allowed to leave the country. This is, in so far as prayers made in clause A (i) to (iii) are concerned.

69. As regards prayer clause B, no submissions were made during the course of the arguments, nor are any specifics alluded to in the instant case. The prayer is, accordingly, declined.

70. As regards prayer clause C, while Ms Jaising had in the passing, argued that respondents by their action had tarnished the reputation of Ms Pillai by bracketing her as anti-national, the necessary ingredients for grant of compensation have not been adverted to with, specificity, in the body of the writ petition. Even if I were to take a broad view of the pleadings, it may not be appropriate to embark upon an exercise of ascertaining damages claimed by Ms Pillai, while exercising writ jurisdiction. It would, however, be open to Ms Pillai to take recourse to an appropriate civil remedy to agitate her rights in that behalf. Needless to say, if such an action is taken recourse to, the respondents will have a right to defend the same, in accordance with law.

71. The writ petition and the pending application are disposed of in the aforementioned terms. The costs will follow the result of the petition.

GAUHATI HIGH COURT

TABLE OF JUDGMENTS AND ORDERS

Janjati Baribidhasta & Ors. vs. Union of India & Ors.

WP(C) NO. 1973 OF 2008
HIGH COURT OF GAUHATI
23.05.2008
CORAM: B.K. SHARMA, J.

SUMMARY

A total of 228 petitioners (members of a Scheduled Tribe community) who were in possession of forest land since 1992, were under the apprehension of an eviction. The petitioners had filed this writ petition for protection under Section 10 of the Assam Land Revenue Regulation Act, 1886, and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA).

The Court took note of the fact that the same petitioners had been previously evicted on 28.05.2006, but had returned to the same land. The State government's argument that this demonstrates they are illegal encroachers, found favour with the Court.

Despite this finding, the Court directed that the petitioners may not be evicted from the land except by following due procedure of law, if not already followed. It further observed that it is not expressing its views on the merits of the case. Accordingly, the writ petition was disposed of.

EDITOR'S NOTE

An early decision of the Gauhati High Court, it presages subsequent judgments of the Court which adopted a decidedly stern approach towards "encroachers" on forest land. For reasons which still remain to be explored, the paradigm shift in the perception of the law towards such "encroachers", and their recognition as "right-holders" has not found favour with the High Court, in contrast with other constitutional courts.

ORDER

1. Heard Mr. DR Gogoi, Learned counsel for the petitioner as well as Ms. R Chakraborty, learned State Counsel, for the respondents. I have also heard Mr. B. Das, learned CGSC for the respondent No. 1.

2. This writ petition has been filed on the apprehension that the respondents might evict the petitioners from the land stated to be in their possession. The description of the land is given in paragraph 7 of the writ petition. The land is situated in the village- Tinkopani in the district of Tinsukia. Altogether, 228 writ petitioner are involved. They are stated to be of the Schedule Tribe community. As per the averments made in this writ petition, they are in occupation of the land.

3. The petitioners are stated to be in occupation of the land since 1992. In paragraph 8 of the writ petition, it has been stated that the petitioners were once evicted from the land on 28.5.2006. However, they have once again settled down in the same very land. Upon a reference to Section 10 of the Assam Land Revenue Regulation and Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forests Rights) Act 2006, it is the case of the petitioners that they are entitled to certain protection and cannot be evicted from the land.

4. Ms. Chakraborty, learned State Counsel as well as Ms. Das, learned for the respondent No. 1 submits that admittedly the petitioners are unauthorised occupants of the land in question. They were already evicted from the land on 28.5.2006 and thus they are illegal encroacher of the land in question.

5. Without expressing any opinion on the merit of the respective case of the parties, I dispose of the writ petition providing that the petitioners may not be evicted from the land except by following the due procedure of law if not already followed.

6. Writ petition is disposed of.

Shri. Baburam Narzar & Ors. vs. State of Assam & Ors. etc

WP(C) 5043 OF 2008, ETC.
HIGH COURT OF GAUHATI
22.10.2009
CORAM: H.N. SARMA, J.

SUMMARY

The writ petitions, relating to the common question of law, were disposed of in a common judgment. The petitioners are members of the "Bodo" tribe, a Scheduled Tribe community, and registered in the voter list as inhabitants of these villages. They were shifted twice from their original villages because of ethnic clashes. After their return, the Sashastra Seema Bal (SSB) officials asked them to vacate the place and demolished their houses. The petitioners claimed to be entitled to grant of pattas and lease over land under Section 3 of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA).

The authorities not having recognized the said right, the petitioners had filed these writ petitions to stop the evictions. They argued that under Section 3 of FRA, they have rights to grant of pattas over the land occupied by them, and that being forest dwellers, they have no other source of livelihood.

The respondent State government categorically argued that the petitioners are neither the residents nor forest dwellers of the forest village, and the land was encroached by the petitioners. It was also argued that rehabilitation by the State Government does not mean that their rights have been accepted and confirmed. The encroached land falls within the reserve forest, so the petitioners have no rights and should be evicted.

The Court deliberated that the FRA was enacted to provide a framework for recognising forest rights to Scheduled Tribes and other traditional forest dwellers, whose rights could not be recorded despite residing in forests for generations. The FRA also provides a framework for recording of evidence for such recognition.

After examining the facts and provisions of FRA in detail, the Court arrived at the conclusion that the petitioners did not fall within the categories of persons described under Section 2(c) and 2(o) of the FRA. As they have not been able to

establish they are "forest dwellers", the petitioners were found to be encroachers on the forestland, and therefore, the actions of the authorities, in taking necessary steps for the eviction of the petitioners from the forest land, was held not to be illegal or without jurisdiction. Accordingly, no interference was called for against such action of the State authority.

DIRECTIONS ISSUED

Considering the circumstances of the case the Court observed that the State government could rehabilitate the petitioners in some other area, not being forest land, as they have been rendered homeless.

JUDGMENT

1. The subject matter of challenge and the reliefs sought for in both the writ petitions being common leading to determination of common question of law, both the matters were heard analogously and are being disposed of by this common judgment.

2. Heard Mr. A Dasgupta, Learned Counsel for the petitioner and Mr. D Das, learned Standing Counsel, Bodoland Territorial Council as well as the learned Central Government Counsel for the respondents.

3. Writ Petition (C) No. 5043/08 has been filed by a group of 25 petitioners alleging that they belong to Scheduled Tribe (Bodo) ('ST') community of Assam residing in Saralpara forest village under the Haltugaon forest division in the district of Kokrajhar, Assam and their names have been entered in the voter list of 30 No. Kokrajhar (East) ST Legislative Assembly Constituency as inhabitants of Saralpara village. The petitioners were the victims of ethnic clashes of 1996 that took place between the Boro and Adivasi people and they shifted to Naharani Relief Campus near Bhutan Border established by the state authorities. Subsequently, they came back to their place of residence at Saralpara village in the year 1998. Due to re-eruption of ethnic clashes they were again shifted to Naharani relief camp and thereafter to Lahoripara relief camp. Upon prevailing harmony between the two rival groups, the petitioners and other group of persons returned to their original place of residence and constructed their thatched houses and started their normal avocation. On 22.9.2008, some officials of SSB department came to their place and asked them to vacate the said place and also demolished some of the thatched houses, constructed by them.

4. The petitioners claim that they are forest dwellers and they have no other source of livelihood other than the forest land under their occupation. They have acquired rights under Section 3 of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 ('the Act') which includes granting of patta and lease over the land occupied by the petitioners including the right of settlement. But the authorities not having recognized the said right, the petitioners have filed this writ petition praying to stop the eviction of the petitioners from their dwelling houses and agricultural land situated in the No. 1 Sonapur of Saralpara forest village and to allow the petitioners to reside peacefully in the Saralpara forest village as forest dwellers and to settle the land under their occupation, in their name.

5. WPC No. 3840/08 has been filed by a group of seventeen petitioners alleging that they are traditional forest dwellers residing in the forest village of Ultapani area in the Kokrajhar district of Assam. Being the victim of ethnic clashes between the Boro and Adivasis in

1996 they took shelter in the relief camp in the Saralpara forest village in the district of Kokrajhar. Subsequently, they were shifted to the Bismuri relief amp in the same district as the earlier camp was attacked by some armed miscreants. The petitioners and other similarly situated persons were granted rehabilitation grant at the rate of Rs. 10,000 each and were asked to shift to their original residential place. Accordingly, the petitioners constructed their dwelling houses in their original place of residence at Ultapani area of Kokrajhar but they have been evicted by the forest personnel from their dwelling houses. The petitioners allege that the action of the Government by rehabilitating them in different forest villages indicate that the Government Had setup different villages for settlement of the petitioners and accordingly they are not liable to be evicted. The petitioners have filed this writ petition praying for a declaration that they are entitled to stay in different forest villages like Saralpara and Ultapani in the district of Kokrajhar, Assam and they have acquired necessary rights recognized under the aforesaid Act.

6. The petitioners further allege that they are also entitled to get protection under the Assam Forest Regulation, 1891 as forest villagers apart from the rights under the Act. The various requests of the petitioners to include them as forest villagers and the related rights not having been accepted by the authorities, they have filed the writ petition with the prayers to stop eviction of the petitioners from their dwelling houses and for adequate compensations and to allow to rebuild their residential houses in forest villages within the Kokrajhar district.

7. Controverting the claim of the petitioners counter affidavits have been filed in both the cases by the respondent Nos. 2 and 4 in WP(C) No. 3840/08 and a separate counter has been filed the respondent Nos. 6 and 7 in WP(C) No. 5043/08.

8. The respondents categorically deny the petitioners to be the residents of Sonapur No. 1 Saralpara forest village and the Saralpara Forest Village is inhabited only by the people of Nepali community. It is further contended that there is no village in the name of Sonapur No. 1 as per forest record and the names of the petitioners do not find place in the revenue record of Saralpara Forest village. It is also stated that under the Haltugaon Forest division, there are twenty-five Nos. of forest villages and the Saralpara forest village was established way back in the year 1909 which is fully inhabited by the people belonging to the Nepali community which is also confirmed by the revenue record. The respondents allege that the petitioners have recently encroached the forest land in the year 1990 itself and they are not forest dwellers and are not entitled to any protection under the Act as they do not fulfil the conditions prescribed under the Act.

9. Mr. A. Dasgupta, Learned Counsel for the petitioners has strenuously submitted that the petitioners are the victim of circumstances and they being subjected to ethnic clashes/ disturbances that took place in the area between the Adhivasis and tribal people and accordingly they were provided shelter in different relief camps established by the State authorities. It is further urged that the petitioners belongs to the recognized Scheduled Tribes and they being in occupation of their land within the forest village for a long period of time, they are entitled to the protection granted under the Act. Learned Counsel has referred to such protection and various rights and recognition thereof as provided under Sections 3 and 4 of the Act. It is contended that in spite of petitioners having fulfilled the necessary conditions precedent as prescribed under Section 4 of the Act, the State respondents have failed to discharge their obligation to recognize the petitioners as forest dwellers.

10. Submission made on behalf of the petitioner have been strictly resisted by the respondents contending that the petitioners are the recent encroachers in the area

and no semblance of rights as forest dwellers could be acquired by the petitioners entitling their protection under the Act. It is also contended that the State Government has already paid pecuniary compensation to the petitioners for their rehabilitation in their original places and that does not mean that their rights as forest dwellers have been accepted and confirmed. The petitioners have not satisfied the requirements as forest dwellers either under the Act or under the provision of Assam Forest Regulation and they being mere encroachers of the forest land, no such right in their favour can be recognized. The land encroached by the petitioners falls within boundary of reserved forest and hence they are not entitled to continue their possession therein and are liable to be evicted. Under Forest Conversation Act, 1980 none of the activities as alleged by the petitioners are permissible nor any person other than the recognized forest villagers are entitled to claim any right of settlement or construction of residential houses within the reserved forest area. In this backdrop of facts, the action taken by the respondent authorities to evict the petitioners from the forest land is fully justified, contended by the Learned Counsel for the respondents.

11. Submissions of the Learned Counsel for the parties have received due attention of the court. From the materials available on record and the proved facts, it is established that neither the petitioners nor their ancestors were/are the residents under the forest, village area or any other forest village under the Haltugaon Forest Division. The area in question falls within the Chirang Reserve Forest which was constituted as reserve forest land by the Government vide Notification published in the year 1898. The Haltugaon Forest Division covers the original area of 59,632 hectares. The Saralpara village covers an area of 10,000 hectares and out of which almost 3,000 hectares are under encroachment. The Saralpara forest village was established way back in the year 1999. The name of the forest villagers can be found in the Jamabandi which is an authenticate revenue record prepared by the Revenue authority. Neither in the revenue record nor in any other document the names of the petitioners are found as forest villagers.

12. The Act (Act 2 of 2007) was enacted to recognize and vest the forest rights and occupation in forest land in forest dwelling Scheduled Tribes and other traditional forest dwellers who have been residing in such forests for generations but whose rights could not be recorded; to provide for a framework for according the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land.

13. The basis of submission for claiming the rights acquired by the petitioners, as made by Mr. Dasgupta, Learned Counsel for the petitioners flows from the provision of Section 4 of the Act. In order to appreciate the submission of the learned Counsel, let us have a close scrutiny of the relevant sections of the Act, which are quoted below:

    "2. (c) "forest dwelling Scheduled Tribes" means the members or community of the Scheduled Tribes who primarily reside in and who depend on the forests or forest lands for bona fide livelihood needs and includes the Scheduled Tribe pastoralist communities;

    (d) "Forest land" means land of any description falling within any forest area and includes unclassified forests, undemarcated forests, existing or deemed forests. protected forests, reserved forests, Sanctuaries and National Parks;

    (f) "forest villages" means the settlements which have been established inside the forests by the forest department of any State Government for forestry operations or which were converted into forest villages through the forest reservation process and includes forest settlement villages, fixed demand holdings, all types of taungya settlements, by whatever name called, for such villages and includes lands for

cultivation and other uses permitted by the Government.

(o) "other traditional forest dweller" means any member or community who has for at least three generations prior to the 13th day of December, 2005 primarily resided in and who depend on the forest or forests land for bona fide livelihood needs."

14. The forest rights of forest dwelling Scheduled Tribes and other traditional forest dwellers on all forest land are mentioned in Section 3 of the Act which are as follows:

"(a) right to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood by a member or members of a forest dwelling Scheduled Tribe or other traditional forest dwellers;

(b) community rights such as nistar, by whatever name called, including those used in erstwhile Princely States, Zamindari or such intermediary regimes;

(c) right of ownership, access to collect, use, and dispose of minor forest produce which has been traditionally collected within or outside village boundaries;

(d) other community rights of uses or entitlements such as fish and other products of water bodies, grazing (both settled or transhumant) and traditional seasonal resource access of nomadic or pastoralist communities;

(e) rights including community tenures of habitat and habitation for primitive tribal groups and pre-agricultural communities;

(f) rights in or over disputed lands under any nomenclature in any State where claims are disputed;

(g) rights for conversion of Pattas or leases or grants issued by any local authority or any State Government on forest lands to titles;

(h) rights of settlement and conversion of all forest villages, old habitation, unsurveyed villages and other villages in forests, whether recorded, notified or not into revenue villages;

(i) right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use;

(j) rights which are recognized under any State law or laws of any Autonomous District Council or Autonomous Regional Council or which are accepted as rights of tribals under any traditional or customary law of the concerned tribes of any State;

(k) right of access to biodiversity and community right to Intellectual property and traditional knowledge related to biodiversity and cultural diversity;

(l) any other traditional right customarily enjoyed by the forest dwelling Scheduled Tribes or other traditional forest dwellers, as the case may be, which are not mentioned in Clauses (a) to (k) but excluding the traditional right of hunting or trapping or extracting a part of the body of any species of wild animal;

(m) right to in situ rehabilitation including alternative land in cases where the Scheduled Tribes and other traditional forest dwellers have been illegally evicted or displaced from forest land of any description without receiving their legal entitlement to rehabilitation prior to the 13th day of December, 2005."

15. Sub-section 3(2) provide certain exception as regards use of forest land as contemplated under the Forest (Conservation) Act, 1980, for the purpose of setup schools, hospital, anganwadis, fair price shops, etc., Section 4 of the Act provided for recognition of and vesting of forest rights in forest dwelling Schedule Tribes and other traditional forest dwellers.

16. Under Section 4(1) of the Act, the Central Government recognize and vest forest rights in forest dwelling Scheduled Tribes and other traditional forest dwellers notwithstanding anything contained in any other law for the time being in force, and subject to the provisions of this Act.

17. From a close scrutiny of the relevant provision of the Act, it transpires that in order to claim the forest rights as contained in Section 3 of the Act and for recognition of such rights as contained in Section 4 of the Act, a person must fall within the category of such person under the definition as contained in Section 2(c) and Section 2(o) of the Act. But in the averments made in this two writ petitions and the counter affidavits as well as other documents made available before me, do not disclose that the petitioners falls within the aforesaid category of persons as define under Section 2(c) and 2(o) of the Act.

18. The necessary conditions precedent for recognition of the rights under the Act as "forest dwellers" as contained in Section 3 of the Act not having been fulfilled by the petitioners, they could not satisfy then-claims as "forest dwelling Schedule Tribes" or "other traditional forest dweller" within the meaning of the Act. In such a situation, the recognition of their rights under Section 4 of the Act does not arise.

19. The petitioners being found encroachers of the forest land, actions of the authorities in taking necessary steps for their eviction from such forest land cannot be termed as illegal or without jurisdiction and accordingly no interference is called for against such action of the authority. No declaration under Sections 3 and 4 of the Act can be given in favour of the petitioners, on the basis of the proved facts of the case.

20. However, in view of the circumstances to which the petitioners are subjected, I would observe that it would be open for the State respondents to rehabilitate the petitioners in some other areas, other than forest land as per the prevailing policy of the State Government. Since the petitioners have been rendered homeless, such consideration may be taken by the authority in an expeditious manner.

21. Both the writ petitions stand disposed of with the above order.

22. Interim order(s), if any passed earlier, stands vacated.

23. No costs.

Shri. Vijoy Tachang & Ors. vs. State of Arunachal Pradesh & Ors.

WP(C) NO. 20 (AP) OF 2009
HIGH COURT OF GAUHATI, ITANAGAR BENCH
07.04.2010
CORAM: P.K. MUSAHARY, J.

SUMMARY

BRIEF FACTS

The petitioners are members of the indigenous Nyishi tribe of Arunachal Pradesh, and the land in question was possessed by them, along with other members of the tribe, as customary common forest land, within the traditional and customary boundaries of the village for the seasonal use for cultivation. One of the respondents (respondent 7) who was a politician and also married to a Cabinet Minister, was granted a Land Possession Certificate (LPC) by the Deputy Commissioner without following any procedure, particularly without obtaining a No Objection Certificate (NOC) from the Divisional Forest Officer concerned.

Respondent No. 7 in turn, after receipt of the LPC, "donated" the aforesaid land in favour of the Tourism Department for the construction of a tourist lodge, and also obtained the contract for such construction. The tourism department had forcibly dispossessed the petitioners from their lands, and respondent no. 7 started the construction work of the tourist lodge.

The petitioners filed this writ petition for setting aside and quashing the LPC in favour of respondent no. 7 inasmuch as the same has been issued in complete violation of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA), and also for handing over the possession of the said forest land to the petitioners.

It may be noted that these petitioners had filed a writ petition previously seeking the same relief, but the same was withdrawn with permission to approach the competent authorities under the FRA. When the State authorities failed to take any decision on their applications, they approached the High Court again.

FINDINGS OF THE COURT

The Court held that it must be accepted that the lands in question are within a notified Reserve Forest, within the knowledge of the State authorities, including the Respondent-Deputy Commissioner. The Court found that the Forest Department had not issued any NOC for granting the LPC to respondent no. 7 as required by State law, nor was prior approval of the Central government under Section 2 of the Forest Conservation Act, 1980, obtained for the construction of a tourist lodge on the forest land.

On the other hand, the petitioners who are illiterate indigenous people and have been living on the land since the days of their forefathers, are being dispossessed, while a lady with affluence and political clout is making financial gain. It was observed that:

> **"the court cannot close its eyes and ears to protect the unprivileged and disadvantaged tribesmen like the petitioners who are not in a position to establish their right and interest. The State must provide protection to these people under the 2006 Act which has recognized the rights of the forest dwelling scheduled tribes and other traditional forest dwellers, which has come into force with the publication of the same in the official gazette of the Govt. of India on 2nd January, 2007."**

Placing the burden upon the State authorities the Court directed:

(i) The respondent authorities to cancel all LPCs in favour of respondent 7 within 30 days;

(ii) The respondent government may consider the case of respondent 7 for the grant of LPC in strict compliance with the FCA, FRA, and State laws, along with the petitioners;

(iii) If on enquiry it is found that there have been any illegal dispossessions then the respondent authorities are to take necessary steps to restore the physical possession of the same forthwith;

(iv) The State respondents are to obtain expert opinion on the ecological impact of the project.

EDITOR'S NOTE

Taking a markedly different approach to previous decisions, the High Court in its directions not only exhibited its deprecation of the conduct of the respondents, it also directed that a copy of the judgment be forwarded to the Ministry of Environment and Forest, which was not a party respondent, for necessary action. This was clearly done to alert the Central government to the violations under the 1980 Act.

JUDGMENT

1. The petitioners, members of indigenous Nyishi tribe of Arunachal Pradesh take on the misplaced elitist discriminatory favourism shown in the matter of settlement of

some plots of land situated in and around the notified Reserved Forest by issuing Land Possession Certificate (LPC) to an affluent lady who often moves in the corridor of power, being the elected member of the local Zilla Parishad and also wife of a powerful minister in the State at the relevant time, who in her bid to project herself as a generous person, donated the land to a Govt. Department for construction of tourist lodge near a wild life sanctuary. The simple living unsophisticated poor tribal counterpart cultivators like the petitioners, who are born to and living in the forest for generations, are now being ousted and uprooted from their land due to elitist antipathy while allowing the said lady-respondent for non-forest use. The petitioners complain blatant infraction of forest and wild life conservation laws in the backdrop narrated as under:

1.1 The petitioners have been living in the Golosso village for last 20/25 years and they have their cultivable land in and around the Seijusa Reserved Forest, which they have been enjoying as their private as well as community land since the days of their forefathers. They are dependent on the forest land and various projects by cultivating the said forest land for their livelihood and various other needs. The said lands were possessed by the petitioners along with other members of the tribe as customary common forest land within the traditional and customary boundaries of the village for seasonal use for cultivation. The Village council authority and Chairperson of local Gaon Panchayat under which/whom the village Golosso falls issued certificates to the effect that the petitioners have been possessing their respective plots of land under the Reserved Forest for last more than 10/1 5 years.

1.2 The Union of India enacted "The Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (hereinafter referred to as the "2006 Act" only), which was published in the Gazette of India dated 2.1.2007 to recognise and vest the forest rights and occupation in forest land in forest dwelling Scheduled tribes and other traditional forest dwellers, who have been residing in such forests for generations but whose rights could not be recorded and also to provide for a frame work for recording the forest rights so vested. The petitioners, under the provisions of the aforesaid 2006 Act, applied to the Government of Arunachal Pradesh for recognition of their rights over the forest land. They also applied for issuance of Land Possession Certificate (LPC) furnishing all supporting documents but the respondent authorities kept the matter pending.

1.3 The State Govt. issued Government circular as far back as on 19-12-1998 providing inter alia that no person would be given LPC in respect of land possessed by him which falls under the Reserved Forest Area and whoever desires to obtain such LPC, he has to obtain "NOC" from the Divisional Forest Officer (DFO) concerned.

1.4 The respondent No. 7, Smt. Maya Dolo, was favoured with LPC issued by the respondent-Deputy Commissioner without following any procedure, particularly without obtaining any "NOC" from the DFO concerned. By order dated 31.10.2007, 27.11.2007, 24.12.2007, 26.12.2007 and 23.2.2008, the Deputy Commissioner, East Kameng District, Seppa surreptitiously issued 10 (ten) LPCs in favour of the respondent No. 7 for an area covering 36.88 hectares. The question of granting LPC in favour of the respondent No. 7 was raised in the floor of the Assembly on 11.9.2008.

1.5 The respondent No. 7 after receipt of the LPC, donated the aforesaid land in favour of the Tourism Department and the Tourism Department in its turn, by a correspondence dated 14.10.2008, directed the Executive Engineer, WRS, East Kameng District to undertake a project for construction of a tourist lodge for development of tourism infrastructure at Golosso village near Phakui Wife Life Sanctuary at Seijusa on the foresaid land of respondent No. 7.

1.6 The petitioners alongwith other villagers filed representation on 24.10.2008 before the State Chief Secretary seeking cancellation of the LPC issued in favour of the respondent No. 7 but to no effect. The tourism department forcibly dispossessed the petitioners from their lands and started the construction work of tourist lodge. The petitioners lodged an FIR on 8.11.2008 with the Seijusa Police Station against the illegal dispossession. They also submitted a joint representation before the SDO, Seijusa against the said illegal dispossession. They received no protection from the respondent authorities and therefore, they had to file writ petition being WP(C) No. 496 (AP) 2008 before this Court challenging the illegal dispossession and construction of tourist lodge over the lands of the petitioners. The said writ petition was dismissed with liberty to the petitioners to approach the Court by filing an appropriate writ petition challenging the validity of issuance of the LPC in favour of respondent No. 7.

1.7 The petitioners have filed the present writ petition for setting aside and quashing the LPCs issued in favour of the petitioners inasmuch as the same have been issued in complete violation of the 2006 Act and also for handing over the possession of the said forest land to the petitioners.

2. The claims of the private respondent No. 7 are as follows:

2.1 She is a native of Golosso village under Seijusa Circle by virtue of her marriage with Shri Kameng Dolo, son of Late Yape Dolo who expired in the year 1996. Kameng Dolo's parents had veneers-cum-saw mill and immovable assets at Golosso and Seijusa Circle. She has been living at Golosso for last 25/30 years.

2.2 The State of Arunachal Pradesh became a Union Territory on 20th January, 1972 and became a State in the year 1987. After 1962 Chinese aggression but before 1968, ex-army men were also given settlement at Seijusa. Some Arunachalees were also settled at Seijusa. There are many people, who are in possession of LPC at Seijusa and she is one of them.

2.3 According to the respondent No. 7, in the State of Arunachal Pradesh, there are 4(four) types of land namely:

(1) Private land (owned by inheritance or by purchase).
(2) Community land.
(3) Government land (owned by acquisition or by donation).
(4) Forest land acquired as per provisions under the Forest Act.

2.4 There was no system in the State for issuing written documents for ownership of private land before attaining the Statehood. The Government of Arunachal Pradesh introduced the system of LPC only in the year 1988. The LPCs are issued only in respect of private lands.

2.5 The land in question is a private land which the respondent No. 7 inherited and she planted blue pine trees but it become unsuccessful.

2.6 As a matter of fact, some of the petitioners were brought by her to the village to help her family to cultivate on her family land and the petitioners have no right, title or interest in the land in question.

2.7 Over and above, she raises preliminary objection as to the maintainability of the present writ petition, as it is hit by principle of res judicata inasmuch as the petitioners approached this Court earlier by filing WP(C) 496 (AP) 2008, which was dismissed on 8.1.2009 with a direction to the Chief Secretary to the Government of Arunachal Pradesh to consider the representation made by the petitioners and dispose of the

same in accordance with law.

3. Raising the preliminary issue, Mr. Apang, learned Counsel for respondent No. 7 submits that the present writ petition is not maintainable as it involves disputed question of facts, which cannot be enquired into by a writ Court and adjudicated upon. The present writ petition is also, premature as the same has been filed before any order has been passed by the State Chief Secretary in compliance to the order dated 8.1.2009 passed in WP(C) 496 (AP) 2008. Reliance has been put on *State of UP and Anr. vs. U.P. Rajya Khanij Vikas Nigam Sangharsh Samiti and Ors.* reported in (2008) 12 SCC 675 Further the petitioners have no locus standi to challenge the LPCs issued in favour of respondent No. 7 in respect of her private land over which, they have no right, title or interest. The petitioners have filed this writ petition without furnishing any particulars like location, boundary etc. of the land over which, they want to establish their right, title or interest and as to how the respondent No. 7 has encroached upon their lands. The present writ petition is civil in nature and a PIL in character, which cannot tie entertained in the present from and therefore, the same is liable to the dismissed.

4. Countering the preliminary issues raised by the respondent No. 7 as above, it has been submitted by Mr. A. Kashyap, learned Counsel for the petitioners that there is no disputed question of facts in so far as the land in question falls under the notified Reserved Forest and the petitioners have been dispossessed from the land under their occupation thereby affecting their right, title and interest over their private and community land. The petitioners had approached this Court for ventilating their private rights and interest over the land and as such, it cannot be said that the present writ petition has been filed in the nature of PIL. While disposing of the earlier writ petition filed by the petitioners, liberty was granted to them to approach this Court with such other application as may be permissible in law and as such, it is argued by Mr. Kashyap that the present writ petition is not hit by the principle of *res judicata*. The petition cannot be termed as premature simply because the respondent-Chief Secretary has failed to dispose of the representation as directed by this Court. The preliminary objections as raised by respondent No. 7 are not sustainable under the law inasmuch as the same have been raised only to defeat the interest of justice.

5. Before going to the merit, it is necessary to answer the aforesaid preliminary objections. I have perused the order dated 8.1.2009 passed by this Court in WP(C) 496 (AP) 2008, which has been annexed as Annexure III to the affidavit-in- opposition filed by the respondent No. 7. The operative portion of the aforesaid order is quoted below to appropriate the real position:

> **"What is, however, extremely important to note is that the petitioners have not sought for any relief against the issuance of Land Possession Certificate. In such circumstances, the directions, which the petitioners have sought for, cannot be granted in favour of the petitioners inasmuch as granting any relief, as has been sought for, would amount to giving them a relief, which they have not even sought for.**
>
> **In view of the above, I do not find that this writ petition can be maintained for the purpose of merely stopping construction of the tourist lodge, particularly, when no relief against issuance of the Land Possession Certificate has been sought for by the petitioners in this writ petition.**
>
> **In view of the above and in the interest of justice, this writ petition is not admitted and the same shall accordingly stand dismissed. The petitioners shall, however, remain at liberty to approach this Court with such other application(s) as may be permissible in law.**

Before parting with this writ petition, the Chief Secretary to the Government of Arunachal Pradesh, is hereby directed to consider the representation made by the petitioners and dispose of the same in accordance with law...."

6. By virtue of the liberty granted in the aforesaid order, the petitioners have filed the present petition for a direction to set aside and quash the LPC issued by the respondent authorities in favour of the respondent No. 7 in violation of the provisions under 2006 Act and procedure prescribed by the Government. There is no difficulty to discern that the petitioners have been allowed by the Court in the earlier proceeding to agitate their grievance against the alleged illegal issuance of LPC and in that view of the matter, there is no scope for coming of a conclusion that the present writ petition is premature, hit by principle of res judicata and without any locus standi. Accordingly, the preliminary objection stands rejected.

7. On the merit of the case, Mr. Kashyap, learned Counsel for the petitioners makes the following submissions:

   (i) The land in question falls under Seijusa Reserved Forest, which was notified under Khellong Forest Division by the Government as Reserved Forest under the Assam Forest Regulation, 1891 read with Section 3 of the NEFA, Regulation, 1965.

   (ii) The LPCs were issued in favour of the respondent No. 7 without "NOC" from the Forest Department which is in violation of the 2006 Act and also public policy of the Government by playing fraud in collusion with the district revenue authorities which are liable to be cancelled.

   (iii) The donation of the land in question to a particular department for construction of tourist lodge near the Phakui wild life sanctuary cannot be permitted inasmuch as the land in question is being used/utilized for non-forest purpose and causing disturbance/pollution in the wife life sanctuary.

   Any order obtained by playing fraud is non-est in the eye of law and such order is liable to be cancelled as held in *Papaya Shastri vs. Government of Andhra Pradesh* reported in AIR 2007 SC 1545.

8. Countering the arguments advanced by the petitioners, Mr. Apang, learned Counsel for the respondent No. 7 submits that:

   (a) Petitioner No. 1, Shri Sakam Paffa has withdrawn from this case by filing MC No. 64 (AP) 2009 and this proves that the present petition has been filed with oblique motive. Moreover, many of the signatories of the representation submitted before the Chief Secretary for cancellation of LPC in favour of the respondent No. 7 that they have not written such complaint. Some of them have stated that they have been misguided and lured for contract work.

   (b) As per the records available in the affidavit of respondent Nos. 5 and 6, there are as many as 181 individuals, who have been issued LPC covering the land measuring 1300 hectares. in the said area. This proves that the respondent No. 7 is not the only person in whose favour the LPCs have been issued.

   (c) The LPCs were issued in favour of the petitioners after observing due procedure and on the basis of NOC issued by the Forest Department. The LPCs were issued in a form not prescribed under the notification of 19.12.1988 but on that score only the LPCs cannot be said to be illegal. It is only an irregularity which can be cured. In support of this submissions, he relies on the decisions rendered by the Apex Court in *State of M.P. and Ors. vs. Lalit Kumar Verma* reported in (2007) 1 SCC 575 and *Secretary*

State of Karnataka and Ors. vs. Uma Devi (s) and Ors. reported in (2006) 4 SCC 1.

(d) The 2006 Act has not yet been given effect in the State of Arunachal Pradesh and as such, there was no question of application of the aforesaid provisions of the said Act. There was, therefore, no illegality or irregularity in issuing the LPCs in question in favour of the respondent No. 7.

(e) The Government of India having not been made a party, no effective order/ direction could be issued and as such, the present petition is liable to be dismissed for nonjoinder of necessary party. In this regard, he relies on *C.K. Prahalada and Ors. v. State of Karnataka and Ors.* reported in (2008) 15 SCC 577.

9. Ms. G. Dekar, learned Addl. Sr. Govt. Advocate, supporting the impugned action of the respondent authorities in issuing the LPCs in favour of respondent No. 7, submits that the respondent DFO, Khellong Forest Division issued "NOC" on 6.8.2007 for implementation of certain schemes in the forest land after having met the requisite terms and conditions. Based on "NOC" issued by the respondent DFO, the LPCs "were issued in favour of the respondent No. 7 as she was found to be in possession of the land in question as inherited from the parents of her husband. The respondent No. 7 donated the land measuring 2.70 hectares free of cost to the tourism department in the larger interest of the public and the Govt. has undertaken construction of tourist lodge as a measure of development of tourism infrastructure on the land donated by the respondent No. 7 near Phakui wild life sanctuary at Seijusa covered by the LPCs in question. Referring to the averments made in paragraph 5 of the affidavit-in-opposition filed by the respondent Nos. 3 and 4, it is submitted that the land in question, in the present writ petition, does not fall under Reserved Forest. Moreover, since as per the traditional tribal right, the respondent No. 7 is in possession of the said land, she applied for LPC to record her right in the revenue records as provided under the Government Circular issued in that regard. Based on averments made in paragraph 15 of the said affidavit, it is also submitted by Ms. G Dekar learned Addl. Senior Govt. Advocate that the area in question does not fall under Reserved Forest and there is no ceiling limit for issuing LPC by the authorities concerned.

10. The crux of the matter as could be understood from the pleadings and arguments advanced by the parties is whether:

(1) The lands in question in respect of which LPCs have been issued in favour of the respondent No. 7 are included in the notified Reserved Forest.

(2) If the lands in question are covered or included in the reserved forest, whether the competent/authorized Forest Officer issued any "NOC" enabling the district revenue officer/district authority to issue the LPCs in question, and

(3) Whether the LPCs in question were issued bona fide and without affecting the interest of the petitioners.

11. In regard to first question, I would like to refer to notification No. FOR. 34/54 dated 1.7.1966 issued by the Advisor to the Governor of Assam (Annexure-A/1 of the rejoinder to affidavit-in-opposition of respondent No. 3) whereby the Government declared Papum Forest as Reserved Forest. For better appreciation of the factum of notifying the said Forest Reserved, it is necessary to extract the said notification hereunder:

ANNEXURE-A

The 1st July, 1966

No. FOR. 34/54.-In exercise of the power conferred by Section 17 of Assam Forest Regulation, 1891 (VII of 1891), read with Section 3 of the North East Frontier Agency (Construction of References to State Government) Regulation, 1965 (No. 4 of 1965) the Government of Assam hereby declares that the land described in the Schedule hereto annexed shall be a Reserved Forest from the date of publication of this Notification.

SCHEDULE

DISTRICT KAMENG (NEFA)		
NAME OF FOREST	APPROXIMATE AREA IN ACRES	DESCRIPTION OF BOUNDARIES
Papum	2,62,880.0 Acres or= 1,06,387.53 Hectare as Communicated vide CCF No. Stat. 123/77/6011-26 Dt. 25.6.77.	North- From the confluence of Papum Pani River and one of its tributaries about 4th Mile East of the Junction of Papum Pani and MiriIpathar rivers East-ward along the right bank of the Passu Pani river to its source and across the ridge East-ward to the source of Par river. Thence along the left bank of the Par Nadi to its confluence with one of its tributaries between Tani and Legi village.
	illegable 3.8.77	East-Thence south-ward along this tributary to its source and across the ridge South-wards to peak 7,590. Thence southwards along the ridge to the confluence of Poma and Papum rivers. Thence along the Burai river to the point where it crosses that inner line. South- Thence along the inner line Westward to the point where it crosses the Phakui river near Seijusa.
	Corrected as per Correspondence No. FOR 34/54 Dt. 26.8.73 (P 91/C of file KD/107/70) illegable 26/9/74	West-Thence along the right back of the Pakhui river till it reaches the confluence with one of its tributaries which crosses the Sema Kalanggania Pakhui river. Thence North-ward along the right bank of this tributary to its source and across the ridge to the source of one of the tributaries of the Passu Pani river. Thence along the right back of this tributary to the starting point.

Sd/- PN Luthra
Adviser to the Governor of Assam.

12. The said notified area previously come under the territorial jurisdiction of DFO, Khellong Forest Division, Bhalukpong and the land in question in respect of which the LPCs have been issued to respondent No. 7 comes under Seijusa Forest Range. The said Seijusa Forest Range was bifurcated into two independent Forest Ranges namely

Seijusa Range and Namorah Range vide Government Order No. FOR 160/67 dated 15-9-1969 issued by the Advisor to the Governor of Assam, Shillong (Annexure-A/2 to the aforesaid rejoinder). The official respondents including the respondent DFO concerned have not denied the issuance of the aforesaid notification constituting the Papum forest as Reserved Forest. It is rather stated in paragraph 7 of the counter-affidavit filed on behalf of the respondent Nos. 5 and 6 that Reserved Forests are constituted through notification under Section 17 of the Assam Forest Regulation, 1891. It is stated therein that no land under duly notified Reserved Forest could be allotted for non-forestry use without de-reservation and no "NOC" for the purpose of granting LPC could be issued in respect of the land within the notified Reserved Forest.

13. It must therefore, be accepted that the lands in question are within the aforesaid notified Reserved Forest and the respondent-Deputy Commissioner as well as the respondent No. 7 were well aware about the same. They were also well aware about the requirement of "NOC" from the Forest Department and as such, the Deputy Commissioner after receipt of applications from the respondent No. 7 for granting her LPCs., made correspondence with the respondent Forest Officials requesting them to issue "NOC" from their end. From the conduct of the respondent-Deputy Commissioner and respondent No. 7, it becomes clear that they accepted the status of the lands in question as part of the Reserved Forest. From the aforesaid discussions, there would be no difficulty in coming to a conclusion that the lands in question fall under the Reserved Forest.

14. The question as to whether any "NOC" was issued by the Forest Department has been answered in paragraph 10 of the counter-affidavit filed for and on behalf of the respondent Nos. 5 and 6. A categorical denial has been made by the Forest officers concerned making averments as follows:

    "10. That with regard to the statement made in paragraph 6 of the writ petition your humble deponent begs to state that since the Department of Environment & Forest has not issued any NOC for issuance of Land Possession Certificate (LPC) by the competent authority from the notified Reserved Forest, the Department has no details of LPC issued to any individual."

    It has been made clearer in paragraph 15 of the said counter-affidavit, which reads as follows:

    "15. That with regard to the statement made in paragraph 22 of the writ petition, your humble deponent begs to state that as the forest land within the notified Reserved Forest has not been de-notified under the Forest (Conservation) Act, 1980 and NOC for Land Possession Certificate (LPC) has not issued by the concerned DFO, hence, the question of handing over the forest land in question to any individual for possession does not arise."

From the above, it has become clear that the Forest Department did not issue any NOC for granting LPC to respondent No. 7 inasmuch the lands in question come under the notified Reserved Forest and the said area was not de-notified under the Forest (Conservation) Act, 1980 (hereinafter referred to as the "1980 Act")

15. The question as to whether the LPCs. were issued in favour of the respondent No. 7 bona fide is to be examined. From the materials placed before this Court, it has been disclosed in the affidavit filed on behalf of the respondent Nos. 3 and 4 that the Govt. of India, Ministry of Tourism vide letter No. 9 NE(7)/2007 dated 27.3.2008 informed the Commissioner-cum-Secretary (Tourism), Govt. of Arunachal Pradesh about the sanction of Rs. 33.651 lakhs (Rupees 3 cores 36 lakhs and 51 thousand) for the purpose of development of tourism infrastructures near Pakoi Wild Life Sanctuary at Seijusa

in East Kameng District. Out of the above sanctioned amount, an amount to the tune of Rs. 269.21 lakhs was released on 31.3.2008 as first instalment for construction of the project. In the said affidavit it has also been disclosed that respondent No. 7 donated some lands to the Government free of cost for construction of tourist lodge. There is a background how it was processed with the Govt. of India for development of tourism infrastructures at the said place. It can be traced out from the communication dated 30.8.2008 made by the respondent No. 7 in the capacity of ZPM of 3 East Kameng Zilla Constituency with the Chief Minister stating inter alia that her predecessor Mr. Taram Nyari processed the case in the year 2006 with the then DFO, Pakke Wild Life Sanctuary and accordingly, the said DFO wrote a letter to the Director (Tourism), Govt. of Arunachal Pradesh on 27.3.2006. On the basis of the said proposal, it was taken up with the Director (Tourism), Govt. of India and accordingly two tourist centres for the N.E. Region-one at Phakui Wild Life Sanctuary in Arunachal Pradesh and another in Assam were sanctioned.

16. After the sanction of tourist centre in Arunachal Pradesh, the Govt. selected a site which was not found suitable due to erosion by flood. At that stage, respondent No. 7 wrote a letter to the Chief Minister to change the tourist centre site to her land i.e. the present land in question, which she was ready to donate for construction of tourist lodge. This letter dated 30.8.2008 is available in the rejoinder affidavit filed by the petitioners to the affidavit-in-opposition of respondent Nos. 3 and 4 (Annexure-A/22). The respondent No. 7 with intention to get the tourist centre site shifted to her land made application before the respondent-Deputy Commissioner for granting her LPCs. and she became successful in getting the LPCs. in question granted in her favour during October, 2007 and February, 2008. The respondent No. 7, as it appears from the various correspondence made by her, is a registered Class-II contractor of the CPWD. She also runs an "NGO" known as "DDDWO" at Seijusa. She made application in the capacity of Member, ZPM before the Chief Minister on 12.6.2008 for awarding the work of development of tourism infrastructures near Phakui Wild Life Sanctuary. She also made similar application before the Secretary (WRD) on 12.6.2008 and also before the Director (Tourism) for awarding the contract work to her. Her husband Shri Kameng Dolo in the capacity of the MLA, as he was then, also requested the Chief Minister vide his note dated 27.6.2008 for early execution of scheme of tourism infrastructures near Phakui Wild Life Sanctuary at Seijusa. Copies of all those correspondences referred to above are available in the aforesaid rejoinder filed by the petitioners. The letter dated 12.6.2008 aforesaid is reproduced:
"Itanagar
12/6/2008

To
The Honourable Chief Minister,
Arunachal Pradesh,
Itanagar

Subject: Award of work Development of Tourism Infrastructure near Pakhui Wild Life Sanctuary at Seijosa in East Kameng District.

Hon'ble Sir,

With due regard, I am to inform you that I had been elected as Zilla Parishad Member from 3 East Kameng Zilla Constituency (Seijosa) recently. It has come to my knowledge that a scheme-Development of Tourism Infrastructure near Pakhoi Wild Life Sanctuary at Seijosa in East Kameng District, Arunachal Pradesh for an amount of Rs. 336.51 lakhs by Ministry of Tourism, Govt. of India vide their letter No.

9-NE(7)/07 dated 27.3.2008 (copy of the sanction order is enclosed herewith).

It is understood that the work has yet to be awarded to anybody. The Executing Agency of the above proposed work is the Water Resource Department of Arunachal Pradesh.

I am having vast experience for construction of road, buildings, bridges, etc. as well as my name is enlisted in to Class II Contractor list of CPWD, having the vast experience for construction of similar nature of work. Since the public has approached me to undertake the work in the name of an NGO "DDDWWO" Seijosa which is run by the public of Seijosa area, I shall be extremely grateful if you could kindly award the aforesaid work in the above registered firm.

In this connection, I already approached Secretary (WRD), to award this work and accordingly, the Secretary (WRD) vide his UO No. Secy/WRD/01/2008/Dtd. 12.6.2008 his comments has been conveyed to Chief Engineer (WRD) to allot the work in favour of DDDWWO, Seijosa (A copy is enclosed herewith).

Above all, I very fervently request you to kindly instruct Chief Engineer (WRD) to award the above work in favour of DDDWWO Seijosa, so that, large number of public can be benefited accordingly.

Thanking you Sir,
Yours faithfully,

Sd/- (Mrs. Maya Dolo)

ZPM (Elect.),Seijosa,
Camp - ltanagar.

17. It has thus become clear that the respondent No. 7 used her official power and influence backed by her husband, who was at times, powerful cabinet minister in the State, in getting the LPCs issued in her favour expeditiously without any "NOC" from the Forest Department in violation of the provisions under the Forest Act/Regulation and also in violation of the existing procedures prescribed by the Govt. Besides she put tremendous pressure on the Chief Minister through the Minister (Land Management etc.) and her husband to get the aforesaid work settled in favour of the "DDDWO", an "NGO" run. by her. Behind the donation of the land, she had an object of getting the Govt. contract work awarded in the name of an "NGO" run by her. It is totally unbecoming of an elected public representative like respondent No. 7 to introduce herself as a registered contractor and seek Govt. contract work holding such important public office. There is no difficulty in understanding that she obtained LPCs from the district authority by playing fraud in collusion with some officials concerned in violation of the existing law and procedures prescribed for issuance of LPCs and as such, the LPCs in question are liable to be cancelled.

18. The petitioners on the contrary are ordinary citizens and disadvantaged people who also applied for LPC before the respondent-Deputy Commissioner but were denied of the same. They have been denied LPC on the basis of a so called report of some officials who reported that the petitioners have no possession over the land and they were not found at the place when a spot verification was made. There is no record to show that any notice was issued to the petitioner about the proposed spot verification by the officials concerned. The petitioners were not served with any notice as claimants of the land in question before the LPCs were issued in favour of the respondent No. 7.

It is, therefore, easy to understand that the interest of the petitioners were affected by the impugned action of the respondent authorities in issuing the LPCs in question without considering the claim of the petitioners, who are also similarly indigenous tribe of the locality living since the days of their forefathers, if not time immemorial or generations. The Apex Court on several occasions has been expressing serious concern in several cases over the wanton destruction of forest affecting the ecological balance. The 1980 Act was enacted to provide for conservation of forest and for matter connected there with or ancillary or incidental thereto. The object and reasons for enactment of the said Act is to check de-forestation and save ecological balance and environmental deterioration. For this purpose, restrictions have been imposed on "de-forestation of forest" or use of forest land for "non-forest purpose" under Section 2 of the said Act. For the purpose of properly appreciating the case at hand, it is necessary to have a close look at the provision under Section 2 of the said Act which is quoted below:

"**2. Restriction on the de-reservation of forests or use of forest land for non-forest purpose.** Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing:

(i) That any reserved forest (within the meaning of the expression "reserved forest" in any law for the time being in force in that State) or any portion thereof, shall cease to be reserved;

(ii) That any forest -land or any portion thereof may be used for any non-forest purpose.

(iii) That any forest-land or any portion thereof may be assigned by way of lease or otherwise to any private person or to any authority, corporation, agency or any other organisation not owned, managed or controlled by Government;

(iv) That any forest-land or any portion thereof may be cleared of trees which have grown naturally in that land or portion, for the purpose of using it for reafforestation.

(a) The cultivation of tea, coffee, spices, rubber, palms, oil bearing plants horticultural crops or medicinal plants;

(b) Any purpose other than reafforestation.

But does not include any work relating or ancillary to conservation, development and management of forests and wild life, namely, the establishment of check-posts, fire lines, wireless communications and construction of fencing, bridges and culverts, dams, water holes, trench marks, boundary marks, pipelines or other like purposes."

19. In the present case, the State Government, after obtaining sanction for setting up tourism infrastructures with huge fund, started construction of tourist lodge near the Phakui Wild Life Sanctuary. From the pleadings of the respondent authorities, it does not appear that a prior approval of the Central Govt. particularly from the Department of Environment and Forest, has been obtained for construction of such tourist lodge inside or near the Phakui Wild Life Sanctuary as required under Section 2 of the Act. The State Government or any authority cannot escape from obtaining such prior approval for using the land in the Reserved Forest particularly for "non-forest purpose". It has been held in *Tarun Bharat Sangh vs. Union of India* reported in 1993 (Supp) 3 SCC 115 that once an area is declared as a protected forest, it comes within the purview of the 1980 Act and it becomes a forest land within the meaning of Section 2 of the Act. The

effect of this decision is that no non-forest activity can be carried on in and on the said area without the prior approval of the Central Govt. Even the State Government cannot carry on any such non-forest activity in the said area without prior approval from the Central Govt. The Apex Court in *Nature Lovers Movement vs. State of Kerala and Ors.* reported in (2009) 5 SCC 373 further held that the ratio of relevant judgment of the Supreme Court, the 1980 Act is applicable to all forests irrespective of the ownership or classification thereof and after the date of enforcement of the said Act i.e. 25.10.1980, neither the State Government nor can any other authority make an order or issue direction for de-reservation of reserved forest or any portion thereof or permit use to any forest land or any portion thereof for any "non-forest purpose" or assign any forest land or any portion thereof by way of lease or otherwise to any private person or to any authority, corporation, agency or organisation not owned, managed or controlled by the Govt. except after obtaining prior approval of the Central Government.

20. The respondents having not shown by sufficient materials that the prior approval from the Central Govt. has been obtained, the respondent authorities have violated the provisions under Section 2 of the 1980 Act. It may be recalled that in *T.N. Godavarman Thirumulkpad vs. Union of India and Ors.* reported in (1997) 2 SCC 267, the Apex Court expressed serious concern over felling of trees in certain districts of Arunachal Pradesh and it directed stoppage of felling of trees forthwith. It is worth quoting the direction issued by the Supreme Court in para 5 of the said judgment.

"5. We further direct as under:
1. GENERAL

1. In view of the meaning of the word "forest" in the Act, it is obvious that prior approval of the Central Government is required for any non-forest activity within the area of any "forest". In accordance with Section 2 of the Act, all on-going activity within any forest in any State throughout the country without the prior approval of the Central Government, must cease forthwith. It is, therefore, clear that the running of saw mills of any kind including veneer or plywood mills, and mining of any mineral are non-forest purposes and are, therefore, not permissible without prior approval of the Central Government Accordingly, any such activity is prima facie violation of the provisions of the Forest Conservation Act, 1980. Every State Government must promptly ensure total cessation of all such activities forthwith.

2. In addition to the above, in the tropical wet evergreen forests of Tirap and Changlang in the State of Arunachal Pradesh, there would be a complete ban on felling of any kind of trees therein because of their particular significance to maintain ecological balance needed to preserve biodiversity All saw mills, veneer mitts and plywood mills in Wrap and Changlang in Arunachal Pradesh and within a distance of 100 kms from Its border, in Assam, should also be closed immediately. The State Governments of Arunachal Pradesh and Assam must ensure compliance of this direction.

3. The felling of trees in all forests is to remain suspended except in accordance with the working plans of the State Governments, as approved by the Central Government in the absence of any working plan in any particular State, such as Arunachal Pradesh, where the permit system exists, the felling under the permits can be done only by the Forest Department of the State Government or the State Forest Corporation.

4. There shall be a complete ban on the movement of cut trees and timber from any of the seven North' Eastern States to any other State of the country either by rail,

road or waterways. The Indian Railways and the State Governments are directed to take all measures necessary to ensure strict compliance of this direction. This ban will not apply to the movement of certified timber required for defence or other government purposes. This ban will also not affect felling in any private plantation comprising of trees planted in any area which is not a forest."

21. Now the question arises as to whether the construction of a tourist lodge for development of tourism infrastructures near the Phakui Wild Life Sanctuary can be said to be for "forest purpose" or "non-forest purpose". As per the explanation to Section 2 of the 1980 Act, "non-forest purpose" means the breaking up and clearance of any forest land or portion thereof for the cultivation of tea, coffee, spices etc. and for any purpose other than re-forestation. The construction of tourist lodge for development of tourist infrastructures is a long terms plan. It involves construction of houses for the visiting tourists and also residential houses for the staff. In such construction of houses including the road and other facilities, there would be cutting down of trees, breaking up or clearance of the forest land which would amount to de-forestation in the said area. After all, in the present days, tourism is an industry and it would like to expand its industry in future, which would amount to further destruction or deforestation in the said area. There is every possibility of causing disturbance to the wild lives and the forest flora and fauna and also causing serious ecological imbalance and environmental deterioration. Of course, this is only an apprehension of the Court without any expert opinion but it must be said that before allowing construction of the tourist lodge, the respondent authorities should have taken steps to obtain expert opinion from any corner in spite of serious concern expressed by the Supreme Court in such matter and also objection raised by the conscious citizens including the lovers of wild life and nature Of course it is not to speak against the principle of sustainable development in the backward State like Arunachal Pradesh.

22. There again, speaking for the principle of sustainable development, the Apex Court laid down the necessary consideration to be made in *T.N. Godavarman Thirumulkpad vs. Union of India* reported in (2008) 2 SCC 222. The same is quoted from Para 3 as under:

"3. As a matter of preface, we may state that adherence to the principle of sustainable development is now a constitutional requirement. How much damage to the environment and ecology ' has got to be decided on the facts of each case. While applying the principle of sustainable development one must bear in mind that development which meets the needs of the present without compromising the ability of the future generations to meet their own needs is sustainable development Therefore, Courts are required to balance development needs with the protection of the environment and ecology. It is the duty of the State under our Constitution to devise and implement a coherent and coordinated programme to meet its obligation of sustainable development based on inter generational equity (see *A.P. Pollution Control Board vs. Prof. MV Nayudu*). Mining is an important revenue-generating industry. However, we cannot allow our national assets to be placed into the hands of companies without a proper mechanism in place and without ascertaining the credibility of the user agency."

23. As regard the petitioners, it has been abundantly made clear that they are illiterate or half literate indigenous tribal people of the State who have been living in the aforesaid area unconcerned about their rights, privilege and security. They were equally concerned about the necessity of obtaining any document for occupying the lands in the Reserved Forest since the days of their forefathers. They are not instructed about the existing statutory provisions and they have been used by some vested interests to serve their purpose. Due to prevailing inner line permit system, there has been a little check on settling down of general people in the said area but amongst their tribesmen,

who have attained affluency, have been enjoying the land and other facilities at the cost of the fellow backward disadvantaged tribesmen. One can see in the present case how the affluent person like respondent No. 7 has been active in exploiting the fellow tribesmen like the petitioners by way of depriving them in getting the LPCs in the area where they have been living for long. She became more active when she found that she can earn huge financial gains if the construction works of tourist lodge could be grabbed by her. She used all her power and influence for obtaining the LPCs granted within a short period of time by circumventing and violating all prevailing provisions of law and procedure prescribed by the State. In such cases, the Court cannot close its eyes and ears to protect the unprivileged and disadvantaged tribesmen like the petitioners who are not in a position to establish their right and interest. The State must provide protection to these people under the provisions of 2006 Act which has recognised the rights of the forest dwelling scheduled tribes and other traditional forest dwellers, which has come into force with the publication of the same in the official gazette of the Govt. of India on 2nd January, 2007. The Government is bound to consider the applications if so submitted by the petitioners, for protecting their rights and privileges under the said Act. It is the duty of the Government to inform and educate the indigenous tribal people dwelling in the forest about their rights granted under the said Act and to take necessary action/measure so as to enable them to enjoy the said rights and privileges.

24. For the foregoing discussions made and reasons given in the light of the observations and rulings of the Apex Court, I direct the respondent authorities, particularly respondent No. 3, Deputy Commissioner, East Kameng District, to pass necessary orders cancelling all LPCs in question issued in favour of the respondent No. 7 forthwith within a period of 30 days from the date of receipt of this order. The respondent-Government may, if so advised, consider her case for granting the LPCs under the strict provisions of 1980 Act and 2006 Act and office memorandum No. LR-31/84 dated 19.12.1988 and Memo No. KD/29/99/TECH/1819 dated 06-08-2007 along with the present petitioners and other similarly situated persons, if such applications are made by them after spot verification in presence of all the parties concerned and providing them with due opportunity of hearing. And, if on enquiry and verification, it is found that the respondent No. 7 or any other person/persons, had illegally dispossessed the petitioners from any land over which they have rightful claim and interest as forest dwellers under the 2006 Act, the respondent authorities shall take necessary steps to restore the physical possession of the same to the petitioners forthwith. It is also directed that the State respondents shall obtain expert opinion about the apprehended destruction to forest and causing ecological imbalance and environmental deterioration in the area in question due to construction of tourist lodge for so called development of tourism infrastructures near the Wild Life Sanctuary and take appropriate decision as to whether such project should continue or not on the basis of the expert opinion.

25. With the aforesaid reasons, observations and directions, this writ petition stands allowed. There shall be no order as to cost.

26. The Registry shall send true copy of this judgment and order to all the official respondents and also to the Secretary, Ministry of Environment & Forest, Government of India, New Delhi, immediately for taking necessary steps.

Shri Nuney Tayang vs. Union of India & Ors.

WP (C) NO. 489 (AP) OF 2009
HIGH COURT OF GAUHATI, ITANAGAR BENCH
29.03.2011
CORAM: A.C. UPADHYAY, J.

SUMMARY

BRIEF FACTS

The writ petition was filed in a representative capacity on behalf of two tribal villages, Bodary and Chittangam, in Arunachal Pradesh. It challenged the legality and validity of the following notifications issued under the Assam Forest Regulation, 1891:

- **Gazette Notification No. 1197 proposing to constitute Denning Reserve Forest, under Section 5 of the 1891 Regulation, and**

- **Gazette Notification No. 118/68 dated 23.09.1977, under Section 17 of said Regulation, declaring the Denning Reserve Forest.**

By these notifications, approximately 25,641 hectares of land was declared as "Denning Reserve Forest", including 275 hectares of ancestral land belong to the two villages. The notifications were issued without the knowledge of the actual land owners, in violation of the provisions of the (i) Assam Forest Regulation, 1891; (ii) the Balipara, Tirap, Sadiya Frontier Tract Jhum Land Regulation, 1947; (iii) the Arunachal Pradesh (Land Records and Settlement) Act, 2000 and (iv) the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA). The villagers came to know about the formation of the Reserve Forest only three decades later when the State Government transferred the forest to the Indian Army for a sum of Rs. 2.5 crores.

The question for consideration was whether the State Government complied with the mandatory requirement of the provision of the Assam Forest Regulation before constitution of the "Denning Reserve Forest", in respect of the community land belonging to the tribal villagers of Bodary and Chittangam.

In response to the petitioners arguments, the State Government argued that

the process of law had been observed, and in any case the claims raised by the petitioners after more than 32 years were baseless.

FINDINGS OF THE COURT

The Court, after considering the facts and circumstances, held that the delay in approaching the writ Court, which has been properly explained, shall not take away the equitable relief that may be available to the petitioners. This was a case where "there was apparently no knowledge on the part of the State Authority that their action had taken away the rights of the villagers, and the villagers had no knowledge that their right to live in the village had been extinguished due to state action", until the Indian Army entered the picture.

The Court held that though the petitioners, living in the villages bordering China, "are aware of their duties and responsibilities towards Nation building and they are agreeable to give away their right over their Ancestral land, for being utilized by the Indian Army", nonetheless, the villagers were entitled to land compensation as envisaged under different Acts, Rules, and policy governing the field, to enable them to decently rehabilitate in another location.

Accordingly, the Court directed the respondent authorities to rise to the occasion, and to make an effort to settle the dispute with the tribal villagers by way of amicable settlement, by making payment of adequate land compensation to the individual land owners or by relocating the Tribal villagers to a suitable location to enable their rehabilitation. This process was to be completed within four months. With this order, the writ petition was disposed of.

EDITOR'S NOTE

Although the case was argued and decided subsequent to the enactment of the FRA, the said statute has not been referred to, nor relied upon, apart from the superficial mention at the outset. This is despite the fact that this situation is the *locus classicus* scenario the FRA seeks to address. The imbalance in power dynamics between the tribal petitioners, and the State machinery (in this case the Union Defence Ministry as well as the State Government), is painfully apparent in the acceptance of "compensation'' by the Petitioners, even though the judgment of the Court is delivered in their favour.

JUDGMENT

1. The writ petitioner has challenged the legality and validity of the Gazette Notification No. 119/71 dated 16.02.1973, proposing to constitute Denning Reserve Forest, under Section 5 of the Assam Forest Regulation, 1891, and subsequent Gazette Notification No. 118/68 dated 23.09.1977, issued under Section 17 of the Assam Forest Regulation, 1891, declaring approximately 25,641 hectares of land described in the schedule as „Denning Reserve Forest, by including thereto 275 hectares of ancestral land belong to the petitioner, within the reserve forest. The petitioner alleged that the notification constituting the „Denning Reserve Forest was issued by the State Government without the knowledge of the actual land owners, in violation of the provisions of the(i) Assam Forest Regulation, 1891; (ii) the Balipara, Tirap, Sadiya Frontier Tract Jhum Land Regulation, 1947; (iii) the

Arunachal Pradesh (Land Records and Settlement) Act, 2000 and the Schedule Tribes and other Traditional Dwellers (Recognition of Forest Rights) Act, 2006.

2. The petitioner has also challenged the legality and validity of the Tripartite Memorandum of Understanding (MoU) dated 22.03.2005, by which the villagers of the Denning forest area were made to agree and part away with their ancestral land in question, and the consequent order issued vide No. LRE-5723/06 dated 27.01.2009, passed by the Deputy Commissioner, Tezu, Lohit District, rejecting the representation filed by the petitioner.

3. The facts, leading to the filing of this writ petition, may be stated, in brief, as follows:
   The tribal population of Arunachal Pradesh have been engaging in Jhum cultivation from time immemorial on their community land. The private (individual) and community (common) ownership of land is well accepted in the State of Arunachal Pradesh, among the villagers. Accordingly, different clans and tribes in the State have individual, as well as common right of ownership and title over their land.

4. It has been stated in the writ petition that the villagers of Bodaru and Chittangam villages are local Mishmi tribe of Lohit District, and they are living in the aforesaid area and sustaining their livelihood by doing cultivation (including Jhum), over their ancestral land. The Bodaru and Chittangam villages are now spread over more than 300 hectares of land from very long time.

5. Learned counsel for the petitioner relied on a decision cited in 2005 3 GLT 306: *Bedang Apum & Ors. vs. State of Arunachal Pradesh & Ors.* to explain the Jhum land and the rights of the tribal people over such community land, which may be gainfully quoted as follows:

   "In the areas where the shifting method of Jhum cultivation is followed, all land as a principle belongs to the clan or village. Such land begin with clearing operation of trees along with under grown trees which are cut down and left it on the field to dry. Thereafter fire is set to those tress and cleared and the ashes are left on the ground. Thereafter sowing starts and the cultivation depends upon what is known as Patat. The entire agricultural land of a village is divided into a numbers of blocks which are earmarked for village after a definite number of years of fallow and such blocks are known as Patats. The Patats are demarcated by stone pillars known as LISIK, Taba and Sodak for proper identification. If for a particular period one Patat is used it is kept fellow after some period of time and cultivation is made on the other area in a rotating manner. The individual right of cultivation and possession continues through the cycle of agricultural operation, and remains suspended during fallow periods. Thus there is no specific and absolute individual claim of right of a cultivator over such portion of land which can be claimed for ever by him, on the ground of cultivation for a period.

   This system of cultivation is recognized as Jhum cultivation. "Jhum land" has been defined in the Balipara, Tirap, Sadiya, Frontier Tract Jhum land Regulation, 1947 (for short 1947 Regulation) is as follows :
   " (b) "JHUM LANDS" means and includes all lands which any member or members of a village or community have customary rights to cultivate by means of shifting cultivation or to utilize by clearing jungle or grazing livestock provided that such village or community is in a permanent location but does not include
      (i) any land which has been or is under process of being terraced for the purpose of permanent or semi-permanent cultivation whether by means of irrigation or nor,

      (ii) Any land attached or appurtenant to a dwelling house and used for the

purpose of permanent cultivation, or

(iii) Any land which in the opinion of the Deputy commissioner is subjected to permanent cultivation. Explanation "

(1) Any land which is otherwise Jhum land according to the above definition shall be deemed to be so notwithstanding the fact that a part or the whole thereof may have been planted with fruit trees, bamboos, or ftung or reserved for growing firewood.

(2) Any village or community shall be held to be in permanent location of it always remains within a specific area, although part or the whole of such village or community may migrate from time to time to different localities within that area".

Section 4 of the 1947 Regulation provides accrual procedure rights over Jhum and section 5 of the Act provides for transfer of Jhum land. Under Section 4 (1) a customary right to Jhum land is established in favour of a community when such community has enjoyed the right to cultivate to such land for not less than 5 years prior to the making of the regulation.

Under Section 4 (2) of the Act, a customary right to Jhum land in favour of an individual cultivator arises:
"(a) if he inherited the land in accordance with a local custom:

(b) if he purchased the land prior to the making of this Regulation and such purchase was not contrary to local custom, or

(c) if he has purchased the land at any date subsequent to making of this Regulation, provided such purchase was not contrary to any local custom or any provisions of this Regulation, or if, being a resident of permanent village, he has brought the land under cultivation, and the land has not been cultivated at any time within 30 years preceding his bringing the same into cultivation. "

Section 5 of the Regulation provides that Jhum land to which a community has a customary right may not be transferred to another community or to any individual except with the permission of the Land Conservator. The aforesaid provisions were made with a view to safe guard and regulate the rights of the tribes indigenous to the area over the Jhum land. Such community land has also been statutorily recognized by the State which can be seen from the S. 9 of the Arunachal Pradesh (Land Settlement and Records) Act 2000 dealing with accrual of rights over land. S. 9 of the Act of 2000 is quoted herein below:

"9. (1). All lands, public roads, lands and paths and bridges, ditches, dikes, and fences on or beside the same, the beds of rivers, streams, nallahs, lakes and tanks, and all canals and water courses and all standing and flowing water, and rights in or over the same or appertaining thereto, which are not the property of any person or community are hereby declared to be the property of the Government

(2). Unless it is otherwise expressly provided in the terms of a grant made by the Government, the right to mines, quarries, mineral products including mineral oil, natural gas and petroleum shall vest in the Government, and it shall have all the powers necessary for the proper enjoyment of such rights".

6. Thus the community land is not declared as Govt. land in view of the special status attached in such land since time immemorial. Under Section 20 of the said Act the definition of "Jhum land" is declared to be same as defined in the 1947 Regulation, above.

7. As per Annexure 2, annexed with the writ petition, the Panchayat members and Gaon Buras of different villages of Lohit District have unanimously certified that the present petitioners are the owners of the lands situated at Bodaru and Chittangam villages.

8. In the year 1972, the then Chief Conservator of Forests & Ex-Officio Secretary (Forests), Arunachal Pradesh Administration, Shillong, issued a gazette Notification vide No. FOR 119/71 dated 16.02.1973, under Section 5 of the Assam Forests Regulation, 1891, proposing to constitute a reserve forests, called "Denning Reserve Forests", consisting of 25,641 hectare (approx) of land in Lohit District of Arunachal Pradesh, and subsequently, the respondent authorities issued notification and declared the "Denning Reserve Forests", under Section 17 of the Assam Forests Regulation, 1891.

9. The petitioner specifically stated that the respondent authorities had not complied with the mandatory provisions of Assam Forests Regulation, 1891, while constituting the "Denning Reserve Forests". In support of the allegation aforesaid, it has been contended on behalf of the petitioner that the actual land owners, who were forest villagers, were not at all informed or issued with any show cause notice before constitution of the Reserve Forest, and the required Notification in terms of Section 5 and 17 of the Assam Forest Regulation, was issued clandestinely, in an arbitrary exercise of power by the authority concerned.

10. Learned counsel for the petitioner pointed out that the requirement of law under Sections 6,8,10,11 and 15 of the aforesaid Regulation was not at all complied with and no proceeding as envisaged under the aforesaid provisions of law, was ever drawn up by the respondent State. It has been contended on behalf of the petitioner that the provision of the Assam Forest Regulation (hereinafter the Act), has been violated by the State authority in constituting the Denning Reserve Forest, which has rendered the exercise of declaration of Denning Reserve Forest *non-est* in the eye of law.

11. According to the writ petitioner, the proclamation made by Forests Settlement Office under Section 6 of the Act; inquiry carried out by the Forest Settlement Officer under Section 8 of the Act; treatment of claims relating to practice of Jhum cultivation by the resident of the locality under Section 10 of the Act, and power to acquire land over which right is claimed, without admitting the quantum of compensation under Section 11 of the Act, as well as the entire exercise carried out, without affording the opportunity to prefer appeal from orders under Section 15 of the Act was illegal and thus the so called Notification, issued under Section 17 of the Assam Forest Regulation, could not have been issued and the same is *non-est* in the eye of law.

12. The petitioner claims for quashing the aforesaid orders and notifications for being illegal and void, and therefore, rendered the constitution of "Denning Reserve Forests , as illegal and arbitrary in the eye of law, for non-compliance of the provisions of Sections 5,6,8,10, 11 and 15 and other provisions of the Assam Forests Regulation, 1891, by the respondent authorities.

13. Learned counsel for the petitioner submitted that the factum of declaration of "Denning Reserve Forests", under Section 17 of the Assam Forest Regulation, 1891 and inclusion of 275 hectares of the land belonging to the petitioners and other land owners was never known by the actual land owners i.e. tribal villagers. The poor tribal villagers had no inkling, whatsoever, from any source that their lands were included in the "Denning

Reserve Forests" and, therefore, they also could not raise their objections against constitution/declaration of "Denning Reserve Forests", because the State respondents at no point of time had informed the petitioner and the other land owners about the publication of aforementioned notification under Section 5 and 17 of the Regulation, 1891. As a result of which, the petitioner and other land owners of Bodaru and Chittangam villages remained ignorant of the above facts and peacefully continued to occupy and possession by growing cultivation over their ancestral land, without any interference from the State Government till date.

14. At this stage it would be pertinent to extract, herein below the relevant provisions of Assam Forest Regulation, which provides provisions relating to declaration of Reserve Forest, which reads as under:

"5. Notification by State Government of proposal to constitute a reserved forest. (1) Whenever it is proposed to constitute any land a reserved forest, the State Government shall publish a notification in the official Gazette- (a) Specifying, as nearly as possible, the situation and limit of such land; (b) Describe that it is proposed to constitute such land a reserved forest; and (c) Appointing an officer (hereinafter called the Forest Settlement Officer), to enquire into and determine existence, nature and extent of any right claimed by, or alleged to exist in favour of, any person in or over any land comprised within such limit, and any claims relating to the practice within 4 such limits, of Jhum cultivation, and to deal with the same as provided in this chapter.

(2) The Forest Settlement Officer shall ordinarily be a person other than a Forest Officer, but a Forest Officer may be appointed by the State Government to assist the Forest Settlement officer in the enquiry prescribed in this Chapter.

6. Proclamation by Forest Settlement Officer. When a notification has been published under S. 5, the Forest Settlement Officer shall publish in the language of the country, at the headquarters of each district and sub-division, in which any portion of the land comprised in such notification is situated, and in every town and village in the neighbourhood of such land, a proclamation:

(a) Specifying, as nearly as possible, the situation and limits of the proposed forest;

(b) Setting forth the substance of provisions of the next following section,

(c) Explaining the consequences which, as hereinafter provided, will ensue on the reservation of such forest; and

(d) Fixing a period of not less than three months from the date of the publication of such proclamation and requiring every person claiming any right or making any claim referred to or mentioned in S 5 either to present top such officer within such period a written notice specifying or to appear before him within such period and state the nature of such right or claim.

8. Inquiry by Forest Settlement Officer. (1) The Forest Settlement Officer shall take down in writing all statements made under S.6 and shall inquire into all claim made under the section and existence of any right or practice mentioned in S.5 in respect of which no claim is made.

(2) The Forest Settlement Officer shall at the time consider and record any objection which the Forest Officer, if any, appointed under S. 5 to assist him, may make to any such claim or with respect to existence of any such right or practice.

10. Treatment of claims relating to practice of Jhum cultivation.

(1) In the case of a claim relating to the practice of Jhum-cultivation, the Forest Settlement Officer shall record a statement setting forth the particulars of the claim and of any local rule or order under which the practice is allowed or regulated, and submit the statement to the State Government together with his opinion as to whether the practice should be permitted or prohibited wholly or in part.

(2) On receipt of the statement and opinion, the State Government may make an order permitting or prohibiting the practice wholly or in part.

(3) If such practice is permitted wholly or in part, the Forest Settlement Officer may arrange for its exercise:

(a) By altering the limits of the land under settlement so as to exclude land of sufficient extent, of a suitable kind, and in a locality reasonably convenient for the purposes of the claimants, or

(b) By causing certain portion of the land under settlement to be separately demarcated and giving permission to the claimant to practice Jhum cultivation therein under such conditions as he may prescribe. All arrangements made under this sub-section shall be subject to the previous sanction of the State Government.

(4) The practice of Jhum cultivation shall in all cases to be a privilege subject to control, restriction and abolition by the State Government and not to be a right.

11. Power to acquire land over which right is claimed. (1) In the case of claim to a right in or over any land other than the following rights, namely:

(a) a right of way,
(b) a right to water-course or to use of water,
(c) a right of pasture or to forest-produce

The Forest Settlement Officer shall pass an order specifying the particulars of such claim and admitting or rejecting the same wholly or in part.

(2) If such claim is admitted wholly or in part, the Forest Settlement Officer may-

(a) come to an agreement with the claimant for the surrender of the right, or
(b) exclude the land from the limits of the proposed forest, or
(c) proceed to acquire such land in the manner provided by the land Acquisition Act, 1870.

(3) For the purpose of so acquiring such land-

(i) the Forest Settlement Officer shall be deemed to be a Collector proceeding under the Land Acquisition Act, 1872;

(ii) the claimant shall be deemed to be a person interested and appearing before him in pursuance of a notice given under S. 9 of that Act;

(iii) the provisions of the preceding sections of that Act shall be deemed to have been complied with; and

(iv) the Collector, with the consent of the claimant, may award compensation in land, or in money, or partly in land and partly in money.

15. Appeal from order passed under foregoing sections. Any person who has made a claim under this Chapter (or any Forest Officer or other person generally or specially empowered by the State Government in this behalf) may within three months from the date of any order passed on such claim by the Forest Settlement Officer under S. 11, 12, 13 or 14 present an appeal from such order to such officer of the Revenue Department, of rank not lower than that of a Deputy Commissioner as the State Government may by notification in the official Gazette appoint by name, or as holding an office, to hear appeals from such orders.

17. Notification declaring forest reserve (1) When the following events have occurred, namely:

(a) the period fixed under S. 6 for preferring claim has elapsed, and all claims, if any, made within such period has been disposed of by the Forest Settlement Officer; and

(b) if such claims have been made, the period fixed by S. 15 for appealing from the orders passed on such claims has elapsed, and all appeals, if any, presented within such period have been disposed of by the appellate officer; and

(c) all lands, if any, to be included in the proposed reserved forest which the Forest Settlement Officer has under S. 11 elected to acquire under the land Acquisition Act , 1870 have become vested in the Government under Land Acquisition Act, 1870 (X of 1870).

The State Government may publish a notification in official Gazette, specifying the limits of the forest which it is intended to reserve, and declaring the same to be reserved from a date fixed by such notification.

(2) From the date so fixed such forest shall be deemed to be reserved forest."

15. The State respondent filed their counter affidavit contending therein that the Denning Reserve Forests was duly constituted by observing the process of law as provided under the Assam Forest Regulation and issued Notification dated 23.09.1977. The claim raised by the petitioner according to the respondent after more than 32 years of constitution of the Reserve Forest is baseless. It has been further contended in paragraph 5 of the counter affidavit that after issuing of preliminary notification, proclamation was issued under Section 6 of the Assam Forests Regulation, 1891 and after due process, final notification was published in the official gazette. The State authorities, however, failed to annex any documents to substantiate the claim of having issued the proclamation under Section 6 or that any proceeding was ever taken up or initiated in accordance with law. Further, the State respondents have not come forward to explain the allegations of violation of provisions of sections 8,10,11 and 15 of the Regulation.

16. Now, question, which arises for consideration, is whether the State Government complied with, the mandatory requirement of the provision of the Assam Forest Regulation before constitution of the "Denning Reserve Forest" in respect of the community land belonging to the Tribal villagers of Bodaru and Chittangam. It would be pertinent to depict herein the reply of the State respondent in this regard.

17. On bare perusal of the aforesaid provisions reveal requirement of strict compliance of the provisions of the Regulation. The State Government except making bare statement in the affidavit regarding publication of notification in accordance with law, did not put forward to place any document to prima facie show that such compliance was effected in accordance with law and the actual land owners had due notice of the proposed

constitution of the Reserve Forest. Inference can be drawn that the allegations made by the petitioner of not following the due process of law in declaring the Reserve Forest is apparently not without basis.

18. The State respondents in their affidavit contended that the "Denning Reserve Forest" area has been constituted with due process of law vide notification dated 23.09.1977 and the claim of the petitioner after 32 years of the constitution of the "Denning Reserve Forest" for having included 275 hectares of land belonging to the forest villagers are baseless. The private respondent Nos. 13, 14, 15 & 16 i.e. the Gaon Burahs, who had signed the MoU dated 22.03.2005 also filed their affidavit in this proceeding to state that they were simply called in the meeting and asked to sign the papers by the Deputy Commissioner, without informing the content of the papers. Apparently the affidavit indicates that the innocent, illiterate villagers were taken for a ride by obtaining their consent in an oblique way to sign the Memorandum of Understanding.

19. The Deputy Commissioner, Lohit District, affirmed existence of the Bodaru and Chittangam villages during the census operation of 1961 and 1971 census. The respondent-State Government denied the claim of constitution of reserve forest, without following the procedure provided in the Assam Forest Regulation, 1891. Though the State respondent annexed copies of the notification under Section 5 read with Section 3 of the Regulation, and also the notification issued under Section 17 of the Regulation to show constitution of Reserve Forest in accordance with law, but the moot question for consideration is whether such bare notification, without following other requirements of law, would include the areas under occupation of the Forest villagers. Apparently, there is no document or report from the side of the State Government to show that the villagers of Bodaru and Chittangam were notified in accordance with law. Question, which now arises for consideration is whether constitution of the Reserve Forest would include the two villages, namely, Bodaru and Chittangam, if due notice was not served on the residents in compliance of the provisions of law.

20. On perusal of the affidavit filed by the State respondent, it appears that there is no reference of the enquiry made by the Forest Settlement Officer, appointed in terms of the impugned notifications. Apparently, either the Forest Settlement Officer could not locate the forest villages or the villagers could not find the Forest Settlement Officer, else there would have been some reference of the existence of such a villages, when the exercise was carried out . There is also no reference of any claim made by any of the residents of the Forest village to trigger land acquisition process as per provision of Section 11 of the Regulation.

21. The petitioner further stated that after declaring the "Denning Reserve Forests", the Deputy Commissioner, Tezu, Lohit submitted a proposal to the Secretary, Department of Forests, Itanagar, vide letter dated 23.09.1982, for de-reservation forests land at Lohitpur for establishment of KLP Army Brigade. On 17.09.2002, the Assistant Inspector General of Forests, Ministry of Environment &Forests(FC Division), Government of Arunachal Pradesh approved the diversion/de-reservation of 720 hectares of the Denning Reserve Forests, for establishment of KLP Brigade Head Quarters at Lohitpur, District Lohit. The areas, which were initially proposed for reserved forests, for de-reservation by the State respondents, are as follows:
    1. Udio-Majum Reserve Forests - 19.50 hac.
    2. Tezu Station Reserve Forest - 7.75 hec.
    3. Denning Reserve Forests - 275.00 hec.
    4. Denning Reserve Forests - 7.50 hec.

22. Learned counsel for the petitioner pointed out that in the instant writ petition, the

petitioner is concerned with the de-reservation of 275 hectares of the Denning Reserve Forests land mentioned at Sl. No. 3 above, which belonged to the villagers of Bodaru and Chittangam.

23. The petitioner pointed out that in the year 2002, the office of the Deputy Commissioner, Tezu started surveying the land of the petitioners. Upon enquiry, the petitioner and the other land owners of Bodaru and Chittangam villages were informed that the land was being surveyed for allotment to the Army authorities.

24. When the State Government of Arunachal Pradesh, proposed to allot the land belonging to the petitioner and other villagers to the Army authorities, the villagers of Bodaru, Chittangam, Dibanggam, Dinningam, Chepailang, Loilang, Chetangam and Lohitpur villages, to their utter surprise came to know that their lands have already been included into a Reserve Forests. All of them vehemently opposed the allotment of their land to the Army authorities.

25. Being aggrieved by such action of the State Government, the petitioners also filed representation dated 25.06.2002, before the Deputy Commissioner, Tezu, objecting declaration of their land as Reserve Forests and allotment of the same to the army authorities. The aforementioned villagers also sought for permission to hold a peaceful procession against the State Government, for alienating them from their ancestral land without any authority of law. The petitioners stated that on 26.08.2002, the land owners of Bodaru, Chitangam, Dibangam and Denningam conducted mass public procession at Tezu, Lohit District, after due permission from the respondent authority. The Gaon Burahs and Panchayat/Village Council members have also submitted representation-dated 25.10.2002, to the Deputy Commissioner, Tezu to refrain his staff from surveying the land of the aforesaid villagers, for the purpose of allotment to the Army authority.

26. The petitioner stated that the attempts to deprive the petitioner and other land owners of Bodaru and Chittangam villages from their ancestral land continued and finally in the year 2005, the Government of Arunachal Pradesh, in connivance with some Gaon Burahs of the Loilang and Tafrogam villages, who had no authority from the local Mishmi villagers of Bodaru and Chittangam villages, executed the impugned Tripartite Memorandum of Understanding dated 22.03.2005(Tripartite Agreement), with the army authorities and Government of India. Consequently, in terms of the Memorandum of Understanding dated 22.03.2005, the Gaon Burahs of Loilang and Tafragam village, representing the Bodaru and Chittangam villagers, agreed to part away with 275 hectares of land of the petitioner and other landowners, for allotment to the Army authorities. The petitioners alleged that the entire process of declaring and notifying Denning Reserve Forest was kept a closely guarded secret, and no notices were issued to the petitioner and other landowners of Bodaru and Chittangam villages. Learned counsel for the petitioner submitted that the Memorandum of Understanding dated 22.03.2005, being devoid of any legal sanctity, is liable to be declared as null and void.

27. The petitioner submitted representation dated 16.10.2008 to the Deputy Commissioner, Tezu, Lohit District, being aggrieved by the inclusion of 275 hectares of ancestral land of Bodaru and Chittangam area into the Denning Reserve Forests, in a surreptitious manner, without following due process of law and subsequent de-reservation and allotment of the said land to the Army authorities. Since the representation dated 16.10.2008, was not considered by the State authority, the petitioner preferred WP(C) No. 495(AP) of 2008 before this Court. On 12.01.2009, this Court disposed of the aforesaid writ petition by directing the Deputy Commissioner, Tezu, Lohit District, to consider

and dispose of the representation of the petitioner dated 16.10.2008.

28. The Deputy Commissioner, Tezu, considered the aforesaid representation dated 16.1.2009 and rejected it, vide order dated 27.01.2009, on the following grounds:

> **1. Since Denning reserve Forest had been notified vide Secretary, Forests, Govt. of Arunachal Pradesh, Itanagar Notification No. FOR/118/68 dated 22/9/77, 248.60 Ha. of land acquired by Army at Bodaru and Chittangam areas(Denning/ Lohitpur) is considered to be falling within Denning RF area.**
>
> **2. 248.60 Ha. of land acquired by Army at above mentioned area shall stand as it is, non-restorable either to Forest Department or local Mishmi people as Army had already paid Rs. 2,48,60,000/-(Rupees two crores forty eight lakhs sixty thousand) only to the state Govt. for the cost of land transfer value and Rs. 1,84,64,000/-(Rupees one crore eighty four lakhs sixty four thousand) only to the Forest Department for the cost of NPV/CA considering it a part of Denning Reserve Forest area.**
>
> **3. Regarding benefits of local people under the Schedule Tribes and Other Traditional Forest Dwellers(Recognition of Forest Rights) Act,2006, this Act was not in force while signing/executing the Tripartite Agreement/MoU on 22/3/05.**

29. It may be mentioned here that the petitioner preferred WP(C) No. 62(AP) of 2009, challenging the rejection of the representation dated 16.10.2008, assailing the legality and validity of the order dated 27.01.2009, passed by the Deputy Commissioner, Tezu, and in the aforesaid writ petition, the State respondents have filed their affidavit-in-opposition on 03.11.2009. However, the petitioner with a liberty to file afresh withdrew the said writ petition.

30. In the aforementioned order dated 27.01.2009, the Deputy Commissioner, Tezu, Lohit District, admitted that the local Mishmi people are the original land owners of Bodaru and Chittangam area and they had settlement in Bodaru and Chittangam, area even prior to the year 1950. In the aforesaid order the Deputy Commissioner, Tezu also admitted that due to objection from the original land owners (petitioner and the other villagers) of Bodaru and Chittangam areas, their land could not be handed over to Army authorities.

31. Mr. A Mannan, learned CGC, appearing on behalf of the respondent Nos. 1 to 7 submitted that the Union of India has not filed any affidavit in this writ petition but submitted that the Indian Army has already paid an amount of Rs. 2,48,60,000/- being the cost/ value of the land to the State Government of Arunachal Pradesh and Rs. 1,84,64,000/- , being the cost of NPV/CA(Compensatory Afforestation) to the Forests Department, Govt. of Arunachal Pradesh.

32. The petitioner by filing affidavit-in-reply to the affidavit-in-opposition filed by the respondent Nos. 7 to 12, explained the delay in approaching the Court as follows:

> "4.1 There is no delay in approaching this Hon'ble Court because the entire action of the respondent authorities in converting the land of the petitioner as a „Reserve Forest and subsequent e-reservation was done surreptitiously without the knowledge of the petitioner and other villagers of Bodaru and Chitangam area. The petitioner has sufficiently explained the reasons of delay, if any. As stated in paragraph 21 of the writ petition, it was for the first time in the year 2002 when the office of the Deputy Commissioner, Tezu was surveying the land of the petitioner for allotment to the Army authorities that the petitioner and other land owners

came to know that their ancestral land has been included into a Reserve Forest. All the aforementioned villagers of Bodaru, Chittangam, Dibanggam, Dinningam, Chepailang, Loilang, Chetangam and Lohitpur villages vehemently opposed allotment of their land to the Army authority by the State Government and they jointly filed a representation dated 25.06.2002 before the Deputy Commissioner, Tezu objecting declaration of their land as Reserve Forest and allotment of the same to the Army authorities. The effected people has been agitating and raising the issue since then, The aforementioned villagers also held peaceful procession and agitated the matters by submitting representations, which culminated in the representation dated 16/10/2008 seeking land compensation (Annexure 11) and also filed a writ petition before this Hon'ble Court (WPC 495(AP)/2008) which was disposed of on 12/1/2009 wherein the Deputy Commissioner, Tezu was given liberty to dispose of the representation dated 16/10/2008. The ground of delay was not at all raised in WPC 495(AP)/2008. It is stated that the representation dated 16/10/2008 was disposed of by the Deputy Commissioner only on 27/1/2009 (Annexure 13) and being aggrieved another writ petition being WPC No. 62(AP)/2009 was filed. However, the aforesaid WPC No. 62(AP)/2009 were withdrawn on 03/11/2009 with liberty to file a fresh petition. The present writ petition was filed on 21/12/2009 in which amongst other grounds, the rejection order of the Deputy Commissioner only on 27/1/2009 (Annexure 13) is impugned. Therefore, there is no delay in moving the present petition and hence the ground of delay is not tenable.

5. That in regards to the statements made in paragraph 6 of the affidavit in opposition, the petitioner begs to state that the entire process was carried out in surreptitious manner without letting the land owners know about the process. It is reiterated that the lands included in the "Denning Reserve Forest" are being cultivated by the land owners since time immemorial to till date by the respective land owners through wet rice cultivation, horticulture garden and bamboo plantations. If the land was declared as reserve forest through due process of law, the land owners would have been stopped from cultivation and necessary legal process for unauthorised occupation ought to have been initiated but till date nothing of that sort has come up which shows that the entire process was done in a surreptitious manner. It is not the case of the respondent authorities that the petitioner and other land owners have come and occupied the land in questions recently after declaration of "Denning Reserve Forest".

33. The petitioner by showing the photographs of the villages has submitted that it is still under the occupation of the petitioner and other landowners and are being used for cultivation by Jhumming. Learned counsel for the petitioner submitted that if at all the "Denning Reserve Forest" was duly constituted, then necessary legal process to evict the villagers and land owners could have been taken long before for unauthorised occupation, but no action was even taken till date, which according to the petitioner, is an indirect admission of the fact that the land has been included in the "Denning Reserve Forests", surreptitiously by simply preparing paper documents and notifying it. The petitioner emphasized on the fact that the lands are still under the lawful occupation of the petitioner and other landowners.

34. Further, the petitioners have filed additional-affidavit to bring on record, the Xerox copy of brief history dated 13.3.2003 and the Xeroxed copy of the para wise replies addressed to the Sr. Govt. Advocate dated 2.1.2009, both under the signature of the Dy. Commissioner, Lohit District, Tezu have been brought on records. The aforesaid records reveal as follows:

"1.1. The proposal for handing over of 720 Ha. of Key Location Point(KLP) land for locating Army Brigade HQ in Denning, Lohitpur could not materialize due to strong

objections from the original land owners of said area. The land originally belongs to Mishmi People of Bodaru, Chittangam, etc. villages where clans like Tayang, Tindya, Tailu, etc. were setting prior to 1950.

1.2 The area was proposed for acquisition by Army after Indo-Chinese 1962 war but due to strong protest from the villagers the same could not be initiated. Meanwhile, in 1977 the above mentioned land was notified vide Notification No. FOR/118/68 Dtd. 22/9/1977 as Denning Reserve Forest ignoring the objections of the people. Thereafter, in 1980 process was started for acquisition of said land to set up Army Brigade HQ.

1.3 Meanwhile, as it was declared as a reserve forest area, proposal was sent for de -reservation of 720 Ha of land to PCCF. As per records 309.75 Ha of land falls under Denning RF whereas 410.25 Ha of land falls under USF area. But de-reservation for 720 Ha of land was taken up. The then Deputy Commissioner merely issued an NOC allowing forest land to be acquired by army. Accordingly, Ministry of Environment, Govt. of India approved de-reservation of 720 Ha of said disputed forest land in principle subject to payment of the cost of NPV and CA vide their No. 8-172/84-FC Dtd. 18/9/2002. Accordingly, Army paid Rs. 1,84,64,000/-(Rupees one crore eighty four lakhs sixty four thousand) only to the Forest Department.

3.1 The said land in question was a community land prior to issue of notification of Forest Department declaring it as Denning Reserve Forest as per Assam Forest Regulation 1891. Whether sections 5,6& 7 of the Assam Forest Regulation,1891 were maintained while constituting it as a Reserve Forest or not, may be known to the Divisional Forest Officer, Tezu.

3.2 Though it is considered as Reserve Forest yet Jhum cultivation is practised by local people in this area/land from time to time."

35. Learned counsel for the petitioner has also drawn the attention of this Court to a brief history of the disputed land prepared by the Deputy Commissioner, Lohit District, which reads as follows:

"GOVT. OF ARUNACHAL PRADESH

OFFICE OF THE DEPUTY COMMISSIONER

LOHIT DISTRC: TEZU

BRIEF HISTORY OF DISPUTED KLP LAND FOR ARMY BRIGADE AT DENNING, LOHITPUR IN LOHIT DISTRC, ARUNACHAL PRADESH

1.1 The handing over of 1800 acres of KLP land for locating Army Brigade HQ in Denning, Lohitpur could not be materialized due to strong objection from the original land owners of said area. The land originally belongs to Mishmi people of Dingbom, Tabangam, Sioliang, Chingring, Cheppagam, Parlaliang, Badaro where clans like Boo, Kathak, Drai, Tayeng, Tindya were settling.

1.2 The AREA WAS PROPOSED FOR ACQUSTION BY Army after 1962 war but due to strong protest from the villagers same could not be initiated. Meanwhile, in 1977 the above mentioned land was notified vide Notification NO. FOR/118/68 dated 22/9/1977 as Denning Reserved Forest ignoring the objections of the people. Thereafter, in 1980 process was started by the then Deputy Commissioner Smti. PM Singh for acquisition of those land to set up Brigade HQ. Representations were

submitted to Smti. PM Singh, the then Deputy Commissioner by public leaders, land owners etc. but the Deputy Commissioner refused to hear the plea of the people and went ahead for acquiring the said land. A draft Notification was sent to the State Govt. under Section 4 of Land Acquisition Act on 12/2/1980. But said draft Notification was not published in official Gazette and thereafter process under the land acquisition act was ignored.

1.3 Meanwhile, as it was declared as reserved forest area, proposal was sent for de-reservation of 1800 acres of land to PCCF. The DFO processed de-reservation of 410.25 acres land under Denning RF and asked the Deputy Commissioner to process acquisition of 309.75 acres of land falling under USF. But the Deputy Commissioner directed DFO to process de-reservation of 309.75 acres of USF land also along with 410.25 acres of RF land and as per direction of DC, de-reservation of 720 Hect. i.e. 1800 acres of land was taken up. The Deputy Commissioner merely issued an NOC allowing forest land to be acquired by Army. Accordingly, Ministry of Environment, Govt. of India approved de-reservation of 720 Hect. i.e. 1800 acres of said disputed forest land in principle subject to the condition of payment of compensation vide their No. 8-172/84-FC dated 18/9/2002. Accordingly, Army paid Rs. 1,84,65,000/- to the Forest department.

1.4 Consequent upon it, survey was proposed for handing over land to Army. But survey could not be conducted due to objection raised by the original land owners.

2.1 From records it is seen that proper procedure for acquisition of village land was not adopted by the District Authority ignoring the plea of the people. The land owners were raising objections for acquisition since land 40 years for which DCs could not processed the same. Even USF are which did not fall under the forest area was shown as forest land and compensation was paid to forest department for afforestation instead to land owners. The District Authority was asked again to ear-marked double of the land for reservation lieu of the are de-reserved. Accordingly, Dalai Reserve Forest was proposed which again deprives the traditional rights of the people over their traditional Jhum and hunting land.

2.2 From the records it reveals that DC had only issued NOC to acquire the said disputed forest land and since the land has not acquired as per procedure, handing over of said land to Army by DC does not arise.

2.3 The plea of land owners were ignored by the District Authority in the past for which land owners are agitating over proposed handing over of the said land to Army. There are human habitations and cultivation fields in the area and if they are evicted from the said land, without payment of compensation, it will render them homeless and landless.

2.4 Since the land in question was shown as Forest land and Forest department was paid compensation, the onus of handing over said land falls with forest department.

(YD Thongchi) IAS
Deputy Commissioner,
Lohit District, Tezu"

36. Facts and circumstances reveal that the forest villagers of Bodaru and Chittangam village, who were living in deep forest for centuries together were oblivious of any declaration of Reserve Forest and were happily living in their ancestral dwellings without any disturbance whatsoever. Apparently, the State Government also did not

take into notice the Forest villagers of Bodaru and Chittangam village while taking necessary steps for constitution of the "Denning Reserve Forest". In the vast area of the "Denning Reserve Forest" around 6,541 hectares of land declared and notified by the State Government, apparently village Bodaru and Chittangam got included in the notified area by default.

37. On bare perusal of the above documents it clearly reveal that the State Government admits the existence of Forest village in the "Denning Reserves Forest" but very surprisingly, the State Government could not rise to the occasion either to address the issue by rehabilitating the forest villagers by duly compensating them or by awarding due compensation in terms of the Land Acquisition Act.

38. The trouble started brewing when the State Government on the request of the Central Government decided to divert 720 hectares of land of the Reserve Forest for settlement of KLP (Key Location Point) Brigade HQ at Lohitpur for the Indian Army.

39. The Army authority as the user authority agreed to abide by the condition imposed by the Ministry of Environment and Forest as per provision of the Forest Conservation Act, 1980. The Army authority also deposited Rs. 1,84,64,000.00 on 17.08.2001 being the costs of compensatory Afforestation Plantation to be created over equivalent area. But unfortunately, the forest villagers of Bodaru and Chittangam village were just ignored and forgotten while doing the groundwork for handing over the Forest land area to the Indian Army.

40. The petitioner has sought for quashing and setting aside the Gazette Notification No. 119/71 dated 16.02.1973, issued under Section 5 of the Assam Forests Regulation, 1891, by the Chief Conservator of Forests & Ex-Officio Secretary(Forests), Arunachal Pradesh Administration, Shillong and the Gazette Notification No. 118/68 dated 23.09.1977, issued under Section 17 of the Assam Forests Regulation, 1891 by the Secretary(Forests), Government of Arunachal Pradesh, Itanagar, declaring the Denning Reserve Forests, in so far as it includes 275 hectares of land of the petitioner and other land owners of Bodaru and Chittangam village with prayers for quashing the subsequent orders including the Memorandum of Understanding dated 22.03.2005 and the Order No. LRE-5723/06 dated 27.01.2009, passed by the Deputy Commissioner, Tezu, Lohit District.

41. Mr. Pertin, learned counsel for the petitioner submitted that the petitioners, who are simple tribal villagers residing in deep forest from time immemorial, were either ignored or conveniently forgotten with a design to deny them their legitimate rights as citizen of the country and the law of the land was never ever applied to give them the benefit of adequate compensation for acquiring their hearth and home. The poor villagers are now going to be uprooted from their land without considering their rehabilitation.

42. Mr. Pertin, learned counsel for the petitioner contended that the poor tribal villagers living in the remote border areas of the country, may be rustic and tribal, but as citizen of India, they are aware of the requirement of the Army and the strategic importance of the location of the land belonging to them. Learned counsel for the petitioner submitted that he has instructions to submit that the petitioners would not have any objection if the respondent authorities rise to the occasion to resolve the issue by making payment of adequate compensation for the land belonging to the villagers.

43. The petitioner, relying on the provisions of "COMPENSTATION", as provided under Section 11(3)(iv) of the Assam Forests Regulation,1891, the Balipare, Tirap, Sadiya Frontier Tract Jhum Land Regulation, 1947 and also the Arunachal Pradesh(Land Records and

Settlement) Act, 2000 has made alternative prayer for compensation. Learned counsel for the petitioner pointed out that in terms of the accrued right of the tribal people under the Schedule Tribes and other Traditional Dwellers(Recognition of Forests Rights) Act, 2006, the petitioner has also made an alternative prayer seeking a writ of Mandamus directing the respondent authorities to pay adequate land compensation to the petitioner and other land owners of Bodaru and Chittagam area for having acquired 275 hectares of their ancestral land situated at Bodaru and Chittangam are/village in terms the recent policy guidelines, for payment of compensation i.e. Rehabilitation and Resettlement Policy, 2008.

44. Ms. G Deka, learned Addl. Senior Govt. Advocate, representing the State respondents, contended that the Denning Reserve Forests was constituted in the year 1977 in terms of the provisions of Sections 5,6 and of the Assam Forests Regulation, 1891. The petitioner has approached this Court for setting aside the Notification dated 23.09.1977, after a lapse of 32 years. Therefore, she submitted that the writ petition is barred under the doctrine of estoppels acquiesces and the instant writ petition is liable to be dismissed on the sole ground of delay and laches in seeking relief sought for. In support of her contention, learned State Government counsel relied on the following decisions:

(i) 2009(1) SCC 168: *City Industrial Development Corporation vs. Dosu*, and

(ii) 2008(16) SCC 198: *Parag Construction vs. State of Maharashtra*.

In *City and Industrial Development Corpn. vs. Dosu Aardeshir Bhiwandiwala*, (supra), Hon'ble Supreme Court observed as follows:

> "26. It is well settled and needs no restatement at our hands that under Article 226 of the Constitution, the jurisdiction of a High Court to issue appropriate writs particularly a writ of mandamus is highly discretionary. The relief cannot be claimed as of right. One of the grounds for refusing relief is that the person approaching the High Court is guilty of unexplained delay and the laches. Inordinate delay in moving the court for a writ is an adequate ground for refusing a writ. The principle is that the courts exercising public law jurisdiction do not encourage agitation of stale claims and exhuming matters where the rights of third parties may have accrued in the interregnum."

45. In *Parag Construction vs. State of Maharashtra*, (2008)16 SCC 198, Hon'ble Supreme Court analysing the attendant fact of the case held as follows:

> "We find that the TPS was finalised on 7-7-1978 and right from 1972 to 1978, the proceedings before the arbitrator were in progress. If the appellant-petitioners claimed to have come on the property by way of an auction -purchase in the year 1981, which included Final Plot No. 22, it cannot be believed that the appellant-petitioners would have no idea about the state of affairs regarding the Scheme, which was already finalised in 1978.
>
> 47. There is a clear reference to the Town Planning Scheme II of Borivali in the certificate dated 24-9-1981 which is a basic document of the appellant-petitioners. It is again difficult to believe that the appellant-petitioners did not have idea that the possession of this plot was already taken by the arbitrator in the year 1980 itself from the Velkars. At any rate, at that stage, when the possession was taken, if at all anybody had any grievance, it was the Velkars and not the appellant-petitioners, because the appellant-petitioners were nowhere on the scene on that date. Therefore, it could not lie in the mouth of the appellant-petitioners that the possession was illegally taken from the Velkars or was not taken at all. There are enough documents on record to prove that the possession was actually taken and was thereafter handed over to the Corporation."

46. In both the above decisions (1) *City and Industrial Development Corpn. vs. Dosu Aardeshir Bhiwandiwala*, (2) *Parag Construction vs. State of Maharashtra*, (supra) the writ petitioners had the knowledge of the Government action. To refuse relief to the person approaching the High Court for unexplained delay and the laches there has to be inordinate delay in moving the court for a writ. In ordinate delay in action would be counted from the date of knowledge. Unfortunately, in this case the State respondent could not place any record to show that the poor Tribal villagers had the knowledge of the State action. Apparently, the villagers, who were living peacefully ever before, unmindful of State action, got the message of being thrown away, when the State decided to give their land to the Army. Consequently, this action of the State triggered cause of action, for the entire exercise by the villagers.

47. In support of his contention, learned counsel for the petitioner relied on the decisions reported in 1998 (4) GLT 416. *Dhirendra Ch. Roy vs. Union Of India*, where in it has been held as follows:

> "It has been held in *Sethi vs. Union of India*, AIR 1975 s. C. 2164 para 9) that the delay cannot be a bar where 'the Government have been holding out hopes to the petitioner from time to time. In this case this Court first issued a Notice of motion calling upon the Respondents to show-cause as to why a writ should not be issued, and then after hearing the learned counsels for the petitioner and the respondents, this Court issued a Rule and now at the hearing stage I would not throw tout this petition on the ground of delay in the facts and circumstances of this case as stated above."

48. In yet another decision reported in (2008) 8 SCC 445 (para 4) : *Ashok Kumar vs. State of Bihar*, it has been held as follows:

> "4. In our view, the High Court had fallen into error in not holding that the appellant had sufficiently explained why the writ petition could not be moved or why it was moved after 4 years of the decision of the State Government. Since the appellant had filed a representation/review of the decision of the State Government, it was expected by him that an order should be passed on the said representation/review. Therefore, in our view, the delay in moving the writ application against the decision of the State Government was sufficiently explained by the appellant and, therefore, the writ petition ought not to have been dismissed on the ground of delay and laches. Accordingly, we set aside the impugned orders of the Division Bench as well as of the learned Single Judge."

49. The petitioners were pursuing with the matter diligently immediately after coming to know that hearth and home belonging to them have been taken away surreptitiously. Considering the facts and circumstances of the case, the delay, in approaching the writ court, which has been properly explained, shall not take away the equitable relief that may be available to the petitioners. More so, when the fact of stealing away of their rights, were not within the knowledge of the petitioners. To negate or debar a relief by a writ court, for delay in taking appropriate action, knowledge of both sides about arising of a right to relief due to illegal state action and consequent laches or inaction to take resort to appropriate legal relief shall be necessary. This is a case where there was apparently no knowledge on the part of the State authority that their action has taken away the rights of the villagers, so also the villagers had no knowledge that their right to live in the village got extinguished due to State action.

50. More so, if the State would have knowledge of the existence of Forest villagers and had taken cognizance of such existence, definitely there would have been some negotiation with the villagers. Some action for relief or rehabilitation would have been forthcoming in this regard. Absolute inaction and no knowledge syndrome of the

State, regarding the existence of the Forest villagers reflects, either the state authority ignored their existence or did not conveniently notice their existence. Though official handing over of the land to the Army was given on 08.05.2008, but actual possession is yet to be given effect.

51. This is a case, where neither the State authority apparently had the knowledge that a large numbers of forest villagers were peacefully residing inside the Denning Reserve Forest, nor the poor forest villagers had the information either formally or informally that illegal state action has stolen away their ancestral dwellings. In the circumstances, it would not be fair to attribute knowledge of the State action on the poor villagers from the date of notification, to cast of the relief sought for. Therefore, in my considered opinion, the question of delay departing equity would not arise in the instant case.

52. Consequently, without lingering the discussions any further, in view of the above, I find that the Gazette Notification No. 119/71 dated 16.02.1973 issued under Section 5 of the Assam Forest Regulation, 1891 and the Gazette Notification No. 118/68 dated 23.09.1977, issued under section 17 of the Assam Forests Regulation, 1891, proposing and constituting the Denning Reserve Forest covering the area of Bodaru and Chittamgam villages, is in violation of provisions of the Assam Forests Regulation, 1891, and the Balipara, Tirap, Sadiya Frontier Tract Jhum Land Regulation, 1947 and such other related notifications, are liable to be declared null and void. However, learned counsel for the petitioner, on instructions, has submitted that the petitioner and other land owners, who are patriotic Indian citizens, living in the villages bordering China are aware of their duties and responsibilities towards Nation building and they are agreeable to give away their rights over their ancestral land, for being utilized for Key Location Point (KLP), by the Indian Army, for the service of the Nation. Learned counsel submitted that nonetheless, the villagers are entitled to land compensation as envisaged under different Acts, Rules and policy, governing the field, to enable them to decently rehabilitate in another location.

53. Therefore, in view of the above development, I propose to direct the respondent authorities to rise to the occasion, to make an effort to settle the dispute with the Tribal villagers by way of amicable settlement, by making payment of adequate land compensation to the individual land owners or by relocating the Tribal villages of Bodaru and Chittangam, to a suitable location, to enable them to rehabilitate. In the facts and circumstances, I further direct that the entire process shall be completed within a period of four months from the date of receipt of certified copy of this order. Ordered accordingly.

54. With the above observations and directions, this writ petition stands disposed of. However, I pass no order as to costs.

Smt. Maya Dolo vs. Vijoy Tachang & Ors.

REVIEW PETITION NO. 29 OF 2010
GAUHATI HIGH COURT
21.4.2011
CORAM: P.K. MUSAHARY, J.
CITATION: (2012) 5 GAU LR 532; 2011 SCC ONLINE GAU 226

SUMMARY

Previously, in a judgment dt. 7.4.2010[35] this Court had allowed a writ petition challenging the grant of land possession certificate to this petitioner, Ms. Maya Dolo. She filed a review petition against that judgment on a variety of grounds. One such ground, which had also been urged by her in the previous round, was that the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) does not apply to the State of Arunachal Pradesh because it has not been notified by the State government.

All the arguments of the review petitioner, including this one, were cited by the Court only to be rejected. The Court observed that the FRA came into effect on the date as notified in the Gazette of India, from which date it was applicable to the whole of India, except the State of Jammu and Kashmir as stated under Section 1(3) of the said Act.

JUDGMENT

1. Heard Mr. NN Saikia, learned Senior Counsel assisted by Mr. NJ Dutta, learned Counsel for the review petitioner, Mrs. M Bora, learned Govt. Advocate for respondent Nos. 5 to 12 and Mr. A Kashyap, learned Counsel appearing for respondent Nos. 1 to 4.

2. This application has been filed seeking review of the judgment and order dated 7.4.2010 passed by this Court in WP (C) No. 20 (AP) 2009 by which the aforesaid writ petition was

[35] *Shri Vijoy Tachang & Ors. vs. State of Arunachal Pradesh & Ors.*, Judgment dt. 07.04.2010 in WP (C) No. 20 (AP) 2009, Gauhati High Court. This judgment has been extracted elsewhere in this compendium.

allowed and the respondent-Deputy Commissioner, East Kameng District was directed to cancel the land possession certificates issued to the respondent No. 7, the present review petitioner within 30 days from the date of receipt of the judgment and order presently sought to be reviewed. The writ petition was contested by the respondent No. 7/Review petitioner by filing affidavit-in-opposition and the judgment and order was passed after hearing the parties concerned. The review has been sought for on the following ground:

(a) The review petitioner realized that certain vital issues were not pointed out by the learned Counsel during the course of hearing. There was an omission on the part of the review petitioner to point out that in terms of the Rule 7 of Chapter IV of the Gauhati High Court Rules; all matters pertaining to Customary Laws are to be heard ordinarily by a Division Bench. The review petitioner as well as the Respondents/Writ petitioners belong to Nishi Tribe, which is a notified Scheduled Tribe in the State of Arunachal Pradesh and the land in question is a private land inherited by the review petitioner and the question of inheritance of private land is governed by the Customary law of the Nishi Tribe.

(b) The writ petition was filed initially by 5 (five) writ petitioners and one of them, who was shown as Petitioner No. 1, withdrew from the said writ proceeding and his name was deleted. Pursuant to the withdrawal and deletion of the name of petitioner No. 1, no further affidavit supporting the said writ proceeding was sworn by any of the remaining other petitioners. Under such circumstances, the aforesaid WP (C) No. 20 (AP) 2009 was heard and disposed of vide judgment and order under review without having affirmed by an affidavit, which is in contravention of the Code of Civil Procedure as well as Rule 7, Chapter IV of the Gauhati High Court Rules.

(c) While allowing the writ petition and cancelling the land possession certificates granted by the Respondent-Deputy Commissioner in favour of the review petitioner, completely ignored the field verification report passed by the Circle Officer concerned and no reason has been recorded for not taking into consideration the Circle Officer's report although a Co-ordinate Bench relied on the said report at the time of passing the interim orders.

(d) The writ petitioners earlier filed WP (C) No. 496 (AP) 2008 for the same cause of action, which was dismissed and as such, filing of another WP (C) No. 20 (AP) 2009 was barred under the principle of constructive res judicata and as such, the aforesaid WP (C) No. 20 (AP) 2009, which was filed subsequently, ought not to have been allowed.

(e) The earlier writ petition being WP (C) No. 496 (AP) 2008 was filed with a specific prayer for stoppage of construction of tourist lodge on the land donated by the review petitioner whereas in the writ petition namely WP (C) No. 20 (AP) 2009, the prayer was for quashing the land possession certificates issued in favour of the review petitioner. There was no prayer for stoppage for construction of tourist lodge in the subsequent WP (C) No. 20 (AP) 2009 but while passing the judgment and order dated 7.4.2010, direction was issued for cancellation of the land possession certificates amounting to stoppage of construction and/or usage of the tourist lodge, which is beyond the relief sought for in the writ petition.

(f) The Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (hereinafter called in short, "Forest Dwellers Act" only) was not implemented at the relevant time and the Government was in the process of constitution of various Bodies/Committees contemplated under the said Act for its

due implementation. Under such circumstances, the land possession certificates, which were issued by the Respondent-Deputy Commissioner in favour of the review petitioner could not be said to be in contravention of the Forest Dwellers Act. Moreover, there is no provision under the said Act which expressly stipulates that the land possession certificates issued prior to implementation of the Act would be in contravention of the provisions under the Forest Dwellers Act and Rules.

(g) Even assuming but not admitting that the Forest Dwellers Act is applicable in the State of Arunachal Pradesh, the objects and reasons of the said Act presupposes acceptance of all Customary Laws pertaining to the land rights of the indigenous Scheduled Tribes and other Forest Dwellers and as such, the judgment and order under review appears to be totally oblivious of the prevailing Customary Laws of the Scheduled Tribes governing inheritance of land which is against the spirit of the Constitution of India and the rights of the indigenous Scheduled Tribes.

(h) No notification was brought on record by the writ petitioners or the Respondent-Government that the aforesaid Forest Dwellers Act has been enforce and the Court proceeded only on the submissions and contentions made by the writ petitioners. Moreover, the Union of India was not arrayed as necessary party although directions were issued to the Government of India, Department of Forests for taking necessary steps.

3. Mr. Saikia, learned Senior Counsel, in support of his submissions that the matter involving question of Customary Law is to be heard by a Division Bench, has cited the case of *Boken Jopir vs. Tabur Jopir*.[36] In support of his further submissions that the order passed by the Coordinate Bench, should be given due consideration, he has referred me to *U.P. Gram Panchayat Adhikari Sangha vs. Daya Ram Soraj*.[37] Before making any consideration as to the applicability of the aforesaid cited cases, it would be appropriate to discuss about the settled position of law in regard to scope for review of judgment and order passed by this Court. Review has been provided under section 114 of the CPC Application for review of judgment can be made under Order XLVII of the CPC It would be appropriate to reproduce the provision under Order XLVII, Rule 1 of the Code of Civil Procedure herein under:

"1. Application for review of judgment — (1) Any person considering himself aggrieved —

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred.

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter of evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

[36] 2000 (1) GLT 534.

[37] (2007) 2 SCC 138

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review."

4. In the present review petition, there is no pleading to the effect that there was discovery of new and important matter or evidence or some mistake or error apparent on the face of the record. What has been pleaded is that there was an omission in pointing out before the Court at the time of hearing to the necessity of placing the matter before a Division Bench as it involves Customary Law of a local Tribe; the Court failed to take notice that the Forest Dwellers Act was not in force as no notification was issued by the Government enforcing the same in the State of Arunachal Pradesh and it failed to give due regard to the certain orders of a Coordinate Bench. In my considered view, these are not the requirements/conditions for making an application for review of a judgment rendered by a Court nor are they mistake or error apparent on the face of the record. If the matter involves question of Customary Law and there was an omission on the part of the review petitioner to bring the same to the notice of the Court at the time of hearing, it is to be agitated by filing an appeal before the Division Bench and in that case, the review petitioner would have better scope and get the judgment set aside or modified. It has been held in several cases that the power of review is not an inherent power in as much as review is the creation of statute. The scope of review is only for correction of mistake and not to substitute the views taken by the Court and the mistake must be one, which is apparent on the face of the record.

5. A mistake apparent on the face of the record cannot mean error which has to be fished out and searched as declared in *Lily Thomas vs. Union of India*[38]. It has also been held in *Northern India Caterers (India) Limited vs. Lt. Governor of Delhi*[39], that a party is not entitled to seek a review of a judgment delivered by the Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgment pronounced by the Court is final and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so. The Court may reopen its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice.

6. If one carefully goes through the contentions and grounds taken in the review petition, he would easily understand that the review petitioner is trying to fish out material to substantiate her claim that allotment of land and issuance of land possession certificates are matters covered by the Customary Law, which were not pleaded in the writ petition. About the enforcement of the Forest Dwellers Act, the Writ Court came to a conclusion that it came in to force with effect from 2nd January, 2007, the date on which the Government of India published the said Act in the Gazette of India (Extra Ordinary) and under section 1(3) of the aforesaid Forest Dwellers Act, it is provided that it shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint. Under section 1(2), it is also provided that it extends to the whole of India except the State of Jammu and Kashmir. The decision in Boken Jopir (supra) relates to dispute over land between the local parties, which was originated in the 'Kebang' involving Customary rights and laws and as such, it was a clear case involving Customary Law and it was therefore held that it should be heard by a Division Bench.

[38] (2000) 6 SCC 224: AIR 2000 SC 1650

[39] (1980) 2 SCC 167.

7. In the present case, the review petitioner never took the plea of applicability of Customary Law and as such, in my considered view, the case of Boken Jopir (supra) would not at all be applicable to the present case.

8. From the grounds taken in this review petition, it is apparent that the review petitioner, in fact, is seeking rehearing of the entire matter in the garb of seeking review of the judgment, which is not at all permissible under the law. The Writ Court after taking into consideration the entire facts and circumstances of the case, the materials placed before it and upon hearing the learned Counsel for the parties, took some views and arrived at a conclusion. Such views cannot be substituted by other view/views in the review petition. The substitution of a view is possible only in appeal. It is because, in no case, review cannot be treated as an appeal in disguise. It has been clearly held in Lily Thomas's case (supra) that mere possibility of second views on the subject is not a ground for review.

9. Last of all, I may refer to the case of *Promoters and Builders Association of Pune vs. Pune Municipal Corporation*[40] wherein it has been held that review of an earlier order is not a routine procedure. A review of an earlier order is not permissible unless the Court is satisfied that material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice. It has also been held that a review of judgment in a case is a serious step and reluctant resort to it is proper only where a glaring omission or mistake or like grave error has crept in earlier by judicial fallibility. It is because, as held therein that the stage of review is not a virgin ground but review of an earlier order which is the normal feature of finality. For the said reason, Justice VR Krishna Iyer, J, as his Lordship was then, observed in Northern India Caterers (India) Limited case (supra) that "A plea of review, unless the first judicial view is manifestly distorted, is like asking for the moon. A forensic defeat cannot be avenged by an invitation to have a second look, hopeful of discovery of flaws and reversal of result".

10. In the aforesaid premises I am of the firm view that the grounds taken by the review petitioner in her petition are not good grounds for review of the judgment and order and no case could be made out for such review.

11. There is no merit in this review petition and as such, it is liable to be dismissed. It is accordingly dismissed.

12. Petition Dismissed.

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[40] (2007) 6 SCC 143

Naga United/Inavi Village vs. State of Nagaland & Ors.

WP (C) 25(K) OF 2010 ETC
HIGH COURT OF GAUHATI, KOHIMA BENCH
24.08.2011
CORAM: MADAN B. LOKUR, C.J. AND ARUP KUMAR GOSWAMI, J.
CITATION: (2012) 5 GAU LR 62; 2012(1)GLD165(GAU)

SUMMARY

The question was whether the appellants, who are the original writ petitioners, and are in possession of forest lands within the Intangki National Park, were entitled to the benefit of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA). In addition, an issue was raised whether the FRA is applicable to the State of Nagaland in view of Article 371 A of the Constitution of India.

According to the petitioners, they had settled down in the area of Intangki National Park but were illegally evicted from the land by the Government of Nagaland. They claim to belong to a forest dwelling Scheduled Tribe within the meaning of Section 2(c) of the FRA. Even if they do not come within the definition of "forest dwelling Scheduled Tribes", they would certainly come within the definition of "other traditional forest dwellers" as defined under Section 2(o) of FRA.

The stand of the State of Nagaland was that the Inavi Village and Naga United was not a recognized village under provisions of the Nagaland Village and Area Councils Act, 1978. Additionally, the villagers had been encroaching the Intangki National Park, and it was for this reason that they have been forcibly evicted as many as 27 times, but they keep coming back to encroach upon the Intangki National Park.

FINDINGS OF THE COURT

The Court examined the provisions of FRA and concluded that the petitioners/ appellants do not fall within the definition of "forest dwelling Scheduled Tribes" in Section 2(c) since they came to the Intangki National Park as recently as 1987, from their ordinary place of residence more than 400 kms away. The FRA in the Court's view applies only to bona fide forest dwellers, which the petitioners are not. Rather, there is clear evidence they are encroachers on the National Park,

having been evicted 27 times.

The Court further accepted the contention of the Advocate-General that the decision of the Supreme Court in the *Godavarman case* regarding the "polluter pays principle" is applicable in protected areas[41]. The Court was of the view that although in the present case the encroachment was not for commercial purposes, nevertheless the encroachment resulted in destruction of the Intangki National Park which is "an asset of the State of Nagaland". Therefore, such encroachment can be held to be on the same footing.

Dismissing the writ appeal, the Court issued directions to the petitioners/appellants to vacate the National Park, and hand over possession and occupation to the State Government within 3 months. Failure to do so would result in damages of Rs. 5 lakh per hectare per month payable to the State of Nagaland.

EDITOR'S NOTE

It is interesting to note that no finding was given by the Court on the issue relating to Article 371A of the Constitution of India, and till the date of writing the Nagaland Legislative Assembly has not adopted the FRA for the State. Therefore, the Court's lengthy examination of the fact situation before it within the framework of the FRA itself appears to be somewhat superfluous. Not surprisingly, this decision was appealed in the Supreme Court, and the final order passed is extracted elsewhere in this compendium.

JUDGMENT

(the judgment of the Court was delivered by Madan B Lokur, C.J.)

1. The question for consideration is whether the Appellants are entitled to the benefit of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (for short the Forest Dwellers Act). Since we answer this question in the negative, the second question - whether the Forest Dwellers Act is applicable to the State of Nagaland in view of the provisions of Article 371A of the Constitution - does not arise.

2. The Appellants are the Inavi Village and the Naga United/Inavi Village. The residents of the Inavi Village and the Naga United/Inavi Village are hereinafter referred to as the Villagers. They challenge the judgment and order dated 14-9-2010 passed by a learned Single Judge in WP(C) No. 217(K)/2009 and in WP(C) No. 111(K)/2009.

3. Late Mr. Inavi, originally a resident of Iphonumi village in the Pughoboto sub-division of Zunheboto District, seeing the plight of landless persons and also the availability of large tracts of vacant and unoccupied land near Intangki forest, decided to migrate over there with his followers and establish a village in the deforested area with the approval of the State Government.

[41] *T.N. Godavaram Thirumalpad vs. Union of India & Ors.* Judgment dt. 29.10.2002 in IA Nos 276 with 413, 437, 453, 454 in WP (C) No. 202 of 1995, Supreme Court of India.

4. At this stage, it may be stated that we have been told that the distance between Iphonumi village in Zunheboto District and the area where late Mr. Inavi and his followers decided to settle down is about 400 kms It is also necessary to mention at this stage that the Intangki forest was declared a Reserve Forest by a notification issued on 7-5-1923. It was thereafter declared a Wild Life Sanctuary by a notification dated 22-4-1975. Eventually it was declared a National Park by a notification dated 3-3-1993.

5. Late Mr. Inavi and his followers came to Intangki forest some time in 1987 when it was a National Park.

6. On or about 1-7-1987, late Mr. Inavi submitted an application to the Chief Secretary to the Government of Nagaland for permission to establish a new village. The application was considered and late Mr. Inavi and his followers were allowed to settle down in the Hazatisa area of Intangki National Park by an order dated 22-4-1988 for developing the land for cultivation peacefully and without disturbing the rightful occupants. We have been told by learned Counsel for the parties that the Hazatisa area is about 7/8 kmsoutside Intangki National Park and is not a part thereof. This is important because permission was not granted to late Mr. Inavi and his followers to settle down within Intangki National Park.

7. According to the Villagers they have settled down in the Hazatisa area of Intangki National Park and have been cultivating the land peacefully but were illegally evicted from the land by the Government of Nagaland as many as 27 times.

8. On the other hand, the stand of the State of Nagaland is that Inavi Village and Naga United/Inavi Village is not a recognized village under the provisions of the Nagaland Village Council Act. That apart, the Villagers have been encroaching into the Intangki National Park and it is for this reason that they have been forcibly evicted as many as 27 times but they keep coming back to encroach upon the Intangki National Park.

9. It is also the contention of the State that Beisumpuikam village was the original owner of the land covering Intangki National Park till it was donated to the Governor-in-Council in 1923 for declaration as a Reserve Forest. The villagers of Beisumpuikam village are, therefore, the actual owners of the Intangki National Park and have been donating acres and hectors of land, from time to time, for the use of the Intangki Reserve Forest, Intangki Wild Life Sanctuary and Intangki National Park.

10. It is the submission of the State that Intangki National Park was free from encroachment but some time in 1984 some encroachment took place by the residents of Beisumpuikam village and this gave an occasion to the residents of other neighbouring areas (including the Villagers) to encroach into Intangki National Park. The State is doing its best to ensure that Intangki National Park remains free of all encroachments and the Villagers who have encroached into Intangki National Park deserve to be evicted, and eviction drives have been carried out from time to time.

11. On these broad facts, the Villagers filed writ petitions in this Court contending that they were entitled to the benefit of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 in matters relating to the recognition and protection of their rights. It was prayed that therefore the State of Nagaland be prevented from carrying out any eviction of the Villagers and to compensate them for their illegal eviction from time to time which has resulted in destruction of their properties and means of livelihood. A direction was also sought against the State to enforce the provisions of Nagaland Land and Revenue (Amendment) Act, 1978 and to prevent illegal settlers into Intangki National Park from interfering with the rights of

the Villagers.

12. Learned Counsel for the parties before us admitted that Wild Life Sanctuary, which is now a National Park, is a great asset to the State of Nagaland and its character as such should be preserved and protected at all costs.

13. According to the Villagers since they belong to a Forest Dwelling Scheduled Tribe within the meaning of Section 2(c) of the Forest Dwellers Act, they are entitled to the protection thereof and are entitled to the various rights given to them under Chapter II of the Forest Dwellers Act.

14. To better appreciate the controversy before us, it is necessary to give the Statement of Objects and Reasons for enacting the Forest Dwellers Act. The Statement of Objects and Reasons reads as follows:

> "Forest dwelling tribal people and forests are inseparable. One cannot survive without the other. The conservation of ecological resources by forest dwelling tribal communities have been referred to in ancient manuscripts and scriptures. The colonial rule somehow ignored this reality for greater economic gains and probably for good reasons prevalent at that time. After independence, in our enthusiasm to protect natural resources, we continued with colonial legislation and adopted more internationally accepted notions of conservation rather than learning from the rich traditions of the country where conservation is embedded I the ethos of tribal life. The reservation processes for creating wilderness and forest areas for production forestry somehow ignored the bona fide interests of the tribal community from legislative framework in the regions where tribal communities primarily inhabit. The simplicity of tribals and their general ignorance of modern regulatory frameworks precluded them from asserting their genuine claims to resources in areas where they belong and depended upon. The modern conservation approaches also advocate exclusion rather than integration. It is only recently that forest management regimes have initiated action to recognize the occupation and other rights of the forest dwellers and have in their policy processes realized that tribal communities who depend primarily on the forest resource cannot but be integrated in their designed management processes. There is a recognition of the fact that forests have the best chance to survive if communities participate in its conservation and regeneration measures. Insecurity to tenure and fear of eviction from these lands where they have lived and thrived for generations are perhaps the biggest reasons why tribal communities feel emotionally as well as physically alienated from forests and forest lands. This historical injustice now needs correction before it is too late to save our forests from becoming abode of undesirable elements.
>
> 2. It is, therefore, proposed to enact a law laying down a procedure for recognition and vesting of forest rights in forest dwelling Scheduled Tribes. This Bill is a logical culmination of the process of recognition of forest rights. The recognition of forest rights enjoyed by the forest dwelling Scheduled Tribes on all kinds of forest lands for generations which includes forest land for sustenance and usufructs from forest based resources is the fundamental basis on which the proposed legislation stands.
>
> 3. The Bill, *inter alia*, provides for the following matters, namely:
>
> (i) it reinforces and utilizes the rich conservation ethos that tribal communities have traditionally shown and cautions against any form of unsustainable or destructive practices;
>
> (ii) it lays down a simple procedure for recognition and vesting of forest rights in the forest dwelling Scheduled Tribes so that rights, which stand vested in forest

dwelling tribal communities, become legally enforceable through corrective measures in the formal recording system of the executive machinery;

(iii) it provides for adequate safeguards to avoid any further encroachment of forests and seeks to involve the democratic institutions at the grass roots level in the process of recognition and vesting of forest rights;

(iv) it addresses the long standing and genuine felt need of granting a secure and inalienable right to those communities whose right to life depends on right to forests and thereby strengthening the entire conservation regime by giving a permanent stake to the Scheduled Tribes dwelling in the forests for generations in symbiotic relationship with the entire ecosystem.

4. The Bill seeks to achieve the above objects."

15. At this stage, it is necessary to place two facts on record: Firstly, even though the Forest Dwellers Act was passed in 2006, it came into force when it was published in the official gazette on 2-1-2007. Secondly, during the pendency of the writ petitions before the learned Single Judge, an order was passed on 8-10-2009 in WP(C) No. 111(K)/2009 for carrying out a survey of the land occupied by the Villagers.

16. Pursuant to the directions of the learned Single Judge, a report was prepared by the Deputy Commissioner of Peren District, the Superintendent of Peren District, the Wild Life Warden of Dimapur, the Training Officer, Land Records and Survey of the Government of Nagaland and endorsed by several other persons including the Head Gaon Burah and Gaon Burah of Inavi Village representing the Villagers. It was noted that the encroachment by Inavi Village falls within the tourist zone of Intangki National Park. The tourist zone is inside the National Park and is an area where tourists are allowed for a visit only and to observe the habitat and fauna without disturbing the ecosystem and raising any other adverse impact on the park. No unauthorised activities, settlement, grazing is allowed in the tourist zone or in the core zone or the buffer zone of Intangki National Park.

17. As mentioned above, according to learned Counsel for the Villagers, his clients are Forest Dwelling Scheduled Tribes as defined in Section 2(c) of the Forest Dwellers Act. Alternatively, it is submitted that they are Other Traditional Forest Dwellers as defined in Section 2(o) of the Forest Dwellers Act. For easy reference both these provisions are reproduced herein below:

"2. In this Act, unless the context otherwise requires,
(a).....
(b).....
(c) "forest dwelling Scheduled Tribes" means the members or community of the Scheduled Tribes who primarily reside in and who depend on the forests or forest lands for bona fide livelihood needs and includes the Scheduled Tribe pastoralist communities;
(d).....
(e).....
(f).....
(g).....
(h).....
(i).....
(j).....
(k).....
(l).....

(m).....
(n).....
(o) "other traditional forest dweller" means any member or community who has for at least three generations prior to the 13th day of December, 2005 primarily resided in and who depend on the forest or forests land for bona fide livelihood needs.

Explanation - For the purpose of this clause, "generation" means a period comprising of twenty-five years."

18. Learned Advocate-General appearing on behalf of the State of Nagaland submitted that the Villagers are not entitled to the benefit of the Forest Dwellers Act since they do not fall within the definitions given in Section 2(c) or Section 2(o) of the Forest Dwellers Act. It is also submitted that Inavi Village or Naga United/Inavi Village is not a recognized village while Beisumpuikam is a recognized village. In support of this, reliance has been placed on a notification dated 8-2-1981 issued by the Governor of Nagaland. The contents of the notification have not been disputed by learned Counsel appearing on behalf of the Villagers.

19. As mentioned above, the principal question before us is whether the Villagers are entitled to the benefit of the Forest Dwellers Act or not.

20. A plain and simple reading of Section 2(c) of the Forest Dwellers Act clearly suggests that the Villagers cannot fall within the category of "Forest Dwelling Scheduled Tribes". The Villagers first came to Hazatisa near Intangki National Park as recently as in 1987 from their place of ordinary residence at a distance of about 400 kms What prompted them to come to Intangki National Park is of no consequence. But it cannot reasonably be stated, by any stretch of imagination that they primarily reside in or depend on the forest or the forest land of Intangki National Park.

21. The Forest Dwellers Act recognizes and vests various rights on persons who are *bona fide* forest dwellers. The Villagers cannot reasonably be described as *bona fide* residents of Intangki National Park. They are only encroachers therein. They were entitled to reside, if at all, only in Hazatisa area which is about 7/8 kmsaway from Intangki National Park. They were not permitted or entitled to expand their possession and occupation to areas close to Intangki National Park and certainly not in areas within Intangki National Park. Under the circumstances, it is not possible to accept the contention of learned Counsel for the Villagers that they primarily reside in and depend on the forests or forest lands for their *bona fide* livelihood needs, so as to come within the definition of "Forest Dwelling Scheduled Tribes".

22. This being the position and in view of the encroachments by the Villagers, the Government of Nagaland had no option but to resort to evicting them from Intangki National Park on as many as 27 occasions. But they were determined to settle in Intangki National Park and despite repeated evictions, they keep coming back to firm up their encroachment within the Intangki National Park. Surely, this is not permissible.

23. It is admitted on all hands that Intangki National Park is an asset which belongs to the entire State of Nagaland and the Villagers are no exception. On the contrary, they would be wise to cooperate with the Government of Nagaland to preserve that asset, rather than to destroy it through uncontrolled encroachment and also destroy the flora and fauna of the area.

24. Learned Counsel for the Villagers then submitted that if his clients cannot come within

the definition of "Forest Dwelling Scheduled Tribes" they would certainly come within the definition of "other traditional forest dwellers" as defined under Section 2(o) of the Forest Dwellers Act. This argument is merely stated to be rejected.

25. To come within the definition of "other traditional forest dwellers" the Villagers should have, for at least three generations prior to 13th December, 2005 primarily resided in or depended on the forest land of Intangki National Park for their bona fide livelihood needs. The explanation to Section 2(o) of the Forest Dwellers Act defines "generation" to mean a period of 25 years. It is nobody's case that the Villagers have been bona fide residents for three generations in Intangki National Park. In fact if their presence in Hazatisa is taken from 1987, not even one generation has gone by. Under no circumstances, therefore, can the Villagers claim the benefit of the definition of "other traditional forest dwellers" as defined under Section 2(o) of the Forest Dwellers Act.

26. Whichever way we look at the problem, there is no doubt that the Villagers are rank encroachers in Intangki Wild Life Sanctuary and Intangki National Park and the State of Nagaland is fully entitled to evict them there from and to ensure that they do not continue with their encroachment in the Intangki Wild Life Sanctuary or the Intangki National Park.

27. Learned Counsel for the Villagers placed reliance on *Mohd. Noor and Ors. vs. Mohd. Ibrahim and Ors.* (1994) 5 SCC 562 in support of his contention that a person can be the owner of a thing only if he has absolute domain over it in all respects and is capable of transferring such ownership. The reason for advancing this contention is that according to learned Counsel, the Villagers had no ownership rights over the land under their control and possession in the Intangki National Park and, therefore, it was not necessary for the State Legislature to adopt the Forest Dwellers Act since it was not covered by the provisions of Article 371A (a)(iv) of the Constitution. We do not see the relevance of this decision insofar as the present case is concerned but even if the decision is relevant, since we are of the opinion that the Villagers cannot claim the benefit of the Forest Dwellers Act, the question of its applicability to the State of Nagaland does not arise.

28. Reliance was also placed by learned Counsel on *State Bank's Staff Union (Madras Circle) vs. Union of India & Ors.* (2005) 7 SCC 584 in support of his contention that the Objects and Reasons of a statute are to be looked into as an extrinsic aid to find out the legislative intent only when the meaning of the statute by its ordinary language is obscure or ambiguous. If the words in a statute are clear and unambiguous then the statute itself makes clear the intention of the Legislature and in such a case it would not be permissible for a Court to interpret the statute by examining its Objects and Reasons.

29. There can be no quarrel with the proposition canvassed by learned Counsel. However, we wish to make it clear that in our opinion the plain and ordinary language of the Forest Dwellers Act is quite lucid - the Villagers cannot get the benefit of the Forest Dwellers Act whichever way one looks at their contentions. We have made a reference to the Statement of Objects and Reasons of the Forest Dwellers Act only to highlight the occasion for enacting the Forest Dwellers Act and not for the purposes of understanding its provisions which, as we have already mentioned above, are quite clear and unambiguous.

30. Finally learned Counsel for the Villagers relied upon *Lalappa Lingappa and Ors. vs. Laxmi Vishnu Textile Mills Ltd*, (1981) 2 SCC 238 to contend that in considering a social welfare legislation the Court should adopt the beneficial rule of construction. If a

section is capable of two constructions, that construction should be preferred which fulfils the policy of the Forest Dwellers Act and is more beneficial to the persons in whose interest it has been passed.

31. Insofar as the Forest Dwellers Act is concerned, as we have already noted, the various provisions thereof are not capable of having two meanings. The language of the various provisions is clear and unambiguous and as held by the Supreme Court in the cited judgment when the language is explicit it must be given effect to whatever be the consequences, for the words of the statute speak the intention of the Legislature. We do not see how this decision helps the Villagers.

32. Learned Advocate-General relied upon a decision rendered by the Supreme Court in *T.N. Godavarman Thirumulkpad vs. Union of India and Ors.* (IA Nos. 276 with IA Nos. 413, 437, 453 and 454 decided on 29/10/2002) in support of his contention that since the Villagers are destroying Intangki National Park or the Wild Life Sanctuary through their encroachment and are depriving Nagaland of a valuable asset, merely dismissing their writ appeal would not be enough. He submitted that the Villagers have admittedly been evicted 27 times, but they keep coming back. Therefore, the equivalent of the "polluter must pay" principle must be applied to the facts of the case.

33. We are in agreement with the learned Advocate-General. In the cited decision, the Central Empowered Committee had recommended the payment of compensation for encroachment of land for commercial purposes at '5 lakhs per hectare. In the present case, the encroachment is not for commercial purposes, but the encroachment is on an admitted asset of the State of Nagaland. We place these on an equal footing and direct that if the Villagers voluntarily vacate the Intangki National Park and peacefully hand over the land in their possession and occupation to the State Government within three months from today and in any case of on or before 31st December, 2011 they will not be liable to pay any compensation. However, if they continue to remain in occupation, then they will have to pay ` 5 lakhs per hectare per month to the State of Nagaland. The amount will be recovered from Mr. S. Khchoi, Mr. Kivito Nekha and Mr. Honito Yeptho (the Appellants in Writ Appeal No. 25(K) of 2010) and from Mr. Hevito, son of Late Khazevi (the Appellant in Writ Appeal No. 30(K) of 2010). The amounts recovered shall be kept in a separate account and shall be used by the State Government exclusively for forest protection and rehabilitation of the encroached area.

34. Both the writ appeals are dismissed. There will be no order as to costs. All pending Misc Cases also stand disposed of.

In Re: Kaziranga National Park vs. Union of India & Ors.

PIL (SUO MOTU) 66 OF 2012, ETC.
HIGH COURT OF GAUHATI
09.10.2015
CORAM: K. SHREEDHAR RAO, A.C.J. AND P.K. SAIKIA, J
CITATION: 2015 SCC ONLINE GAU 397

SUMMARY

The Court registered a PIL suo motu after several newspapers reported the illegal poaching of rhinoceros and other animals in Kaziranga National Park (KNP). Thereafter, additional writ petitions were filed seeking different reliefs. One writ petition (WP 66/2012) sought removal of human encroachments in the animal corridors in and around the KNP. Other writ petitions claimed to represent the residents of the KNP and its subsequent additions, and contended that the due process of law under the Wildlife Protection Act, 1972 (1972 Act) and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) must be complied with. These petitions sought the settlement of rights under the 1972 Act and constitution of statutory Committees under the FRA to ensure that no eviction took place without the due process of law.

Hearing the matter at regular intervals over several years, the Court issued various directions. It directed the Director, KNP to submit a detailed report on various factors which aid poaching and illegal activities within and around the KNP. Later, a high power committee was formed to look into the matter. The report of the high power committee showed an increase in the number of patta holders in the 2nd and 3rd addition to the KNP. Finding some improprieties and illegalities, the Court directed the concerned Collectors to verify the patta holders and take necessary action to evict illegal occupants from the National Park and its additions.

A variety of arguments were raised by the writ petitioners seeking protection of their rights inside the KNP, placing heavy reliance upon the argument that the lands have been acquired in violation of Section 26A and 35 of the 1972 Act. They argued that procedure for acquisition of rights in and over the land to be included in a National Park has to be followed before a final notification under the 1972 Act. It was also argued that two villages have been declared as revenue villages, and do not fall within the area of the National Park. An additional argument regarding

non-implementation of FRA was also raised.

FINDINGS OF THE COURT

After studying the report of the expert committee, the Court held that the petitioners have no right over the land as the material facts clearly show that the constructions were recently made. The arguments relating to non-compliance with the 1972 Act were rejected on the ground that the Land Acquisition Act, 1894 has been duly complied with.

Regarding the revenue villages, the Court held that "forest land" under the Forest Conservation Act, 1980 not only includes any area recorded as forest in the Government record irrespective of the ownership, but also the "forest" as understood in the dictionary sense. Accordingly, these villages could not have been converted into revenue villages without compliance with the Forest Conservation Act, 1980.

The Court also rejected the contention of the petitioners that the "formalities under the Forest Rights Act" are not completed, on a preliminary ground that the petitioners did not assert or disclose that they are other traditional forest dwellers or forest dwelling Scheduled Tribes in their pleadings.

The Court dismissed the petition by stating that in view of the larger interests of the public and the Constitutional mandate, the claims of the petitioners are untenable. The Court observed:

> **"The individual claims for a handful of persons is in conflict with the public and national interest. There have been persistent and repeated reports of poaching of rhinoceros, elephants and other wild animals. It is irresistible inference that the habitants in KKP area would fall in suspect group and they would be well-acquainted with the areas and animal movements, therefore they would alone be in a position to do poaching successfully or abet poaching by others. The concept of national park in the Wild Life Act contemplates that there should be no human habitation." (@para 40)**

EDITOR'S NOTE

The present judgment is in stark contrast with that rendered by the Madras High Court in the *Elephant Corridor Case*[42]. Although representatives of villagers residing in and around the KNP approached the Court with substantive writ petitions pointing out multiple violations of law by the State authorities, similar to the Madras case, the Gauhati High Court seemed determined not to allow "the individual claims of a handful of persons" to stand in the way of "public and national interest", stating that a "rigid and technical view would only harm & endanger the wildlife of the KNP". However, when it came to compliance with the "formalities" under FRA, the Court was quick to adopt just such a "rigid and technical" approach and reject the argument in its entirety due to a fault in the pleadings.

It is only a matter of time before this judgment is challenged, especially in light

[42] In *Defence of Environment & Forests vs. The Principal Chief Conservator of Forest & Ors.* Judgment dated 7.4.2011 in WP 10098 of 2008. Extracted elsewhere in this compendium.

of the fact that the KNP is close to an international border and the sociopolitical dynamics relating to minority communities are quite complex in the area.

JUDGMENT

(the Judgment of the Court was delivered by K. Sreedhar Rao, A.C.J.)

1. The news concerning the illegal poaching of rhinoceros and other wild animals in the Kaziranga National Park(KNP) was widely reported in three English dailies ~ The Telegraph dated 28th and 29th September, 2012, The Indian Express dated 27th September, 2012, and The Hindu dated 27th September, 2012.

2. This Court suo motu registered a PIL (No. 66/2012) to inquire into the news report regarding illegal poaching and killing of wild animals in the KNP. PIL 67/2012 is filed by one Mrinal Saikia on the same subject matter with an additional relief of removal of human habitation and encroachment in the animal corridors in and around the KNP.

3. The eight residents of the second addition of the KNP filed 4860/ 2013 contending that before the second addition is added to KNP the requisite formalities as required under Sections 26A and 35 of the Wild Life(Protection) Act, 1972 and the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers(Recognition of Forest Rights) Act, 2006(in short, the Forest Rights Act of 2006) have not been complied. In that view it is submitted that without formal compliance of the requisites of law the eviction of the residents is illegal. Therefore they seek a writ of mandamus directing the respondents to complete the process of settlement of rights under the Wildlife Protection Act in pursuance of the notifications issued as "additions" under the Wildlife Protection Act and to constitute statutory committees under the Forest Rights Act to ensure that no eviction takes place without the due process of law.

4. This Court by order dated 4th March, 2014 passed the following order on 4.3.2014 directing the Director of KNP to submit a detailed report about the geographical features, the flora and fauna, the animal life, the contributory reasons, which is aiding the poaching and illegal activities and also to give long-term solutions to remedy the ills affecting the Park.

> "BEFORE HON'BLE MR JUSTICE AM SAPRE, THE CHIEF JUSTICE, HON'BLE MR. JUSTICE AK GOSWAMI, 04.03.2014. (AM Sapre, CJ)
> Today we have heard the views of Mr. MK Yadav, Director, Kaziranga National Park, who is present in person and also heard the views of several learned counsel appearing for various organisations and stakeholders on the various problems faced by Kaziranga National Park and in particular with regard to poaching of rhinos which has caused serious concern to all.
>
> Mr. Yadav, Director, Kaziranga National Park, submitted that sincere steps are being taken to curb poaching at any cost. He also submits that Government be granted around two months time to prepare high quality methodical report to suggest various proposals for curbing poaching on a permanent basis and also on related issues dealing with the Park and to preserve the endangered species "Rhino".
>
> We express our serious concern about the incidences of poaching in Kaziranga National Park which have recently taken place and are taking place from time to time, we view it seriously. At any cost, in our view, the same must be stopped at

the earliest to save the nature's most priceless and precious endangered species "Rhino". Indeed, it is our duty to preserve this God's gift to this world at any cost.

We grant two months time to the Director, Kaziranga National Park to submit the detail report on or before the next date of hearing suggesting therein the effective and remedial steps for implementation to curb poaching of "rhinos" in the Kaziranga National Park. He is at liberty to take help of all stakeholders, organisations, parks all over the world for preparation of report.

We request Mr Yadav, Director, Kaziranga National Park, to remain present on every date of hearing to facilitate the hearing on the matter.

List on 26th of May, 2014".

5. The Director of the KNP pursuant to the said order has gone into the issue and submitted a detailed report in a book form containing 402 pages. The brief description of the contents of the book is as follows.

"Kaziranga, the home of the Greater One Horned Rhinoceros, faces certain threats which, if not adequately mitigated today, would become the cause of extinction of the rhinoceros in times of come. The Report dwells upon the cause and possible solutions in some details. The factors identified as threat to the survival of the rhinos, other than poaching, are loss and fragmentation of habitat, lack to technology and strategic advantage over poachers, certain lacuna in policy and law and their implementation, challenges of growth and development on the fringes of the park and possible impacts of climate change and climate variations. The approach to mitigate the threats and ensure long term survival of Kaziranga is multi-pronged and multi-disciplinary with a series of immediate, short term, medium term and long term measures to be undertaken. Some of the suggested measures include erosion control, habitat improvement, extension of habitat, corridors retrofitting, up scaling of anti poaching infrastructure, security and surveillance in and around the Park, adopting a landscape based approach and constitution of a landscape authority for conservation and development of the areas, adopting a green growth approach for development in the landscape, adopting better management strategies such as organisational restructuring, increased staff strength, staff welfare and creating some key and necessary infrastructure, adopting better policies and strengthening further the legal provisions, and above all creating several secure habitats outside Kaziranga for the rhinos. The Report also identifies the actionables and classifies them into immediate, short term, medium term and long term time frames. A tentative budgetary estimate of the measures suggested is also provided at the end along with possible sources of funding. The Report projects financial estimates for a period of 10 years.

The Report is divided into three parts. Part I of the Report examines the key issues and challenges being faced in rhino protection. It also contains a brief description of the existing set up and provides the background information required for further analysis. Part I is divided into 9 chapters dealing with habit issues, human interface issues, policy and law, rhino population dynamics, rhino poaching, stakeholders' analysis and in brief about Kaziranga.

Part II of the Report contains the proposed solution framework and consists of 9 chapters. The solution framework is divided into habitat strategies, up scaling anti poaching infrastructure, Kaziranga Landscape Conservation and Development Authority. Management strategies, Kaziranga Landscape Green Growth Framework, Policy, Law, protocols and programme strategies, Time budget, and lastly Budget

and finances. It also contains the references, some website links and bibliography along with citations for further reading.

Part III of the Report contains the annexures such as tables, photo-plates, soft version minutes of various meetings held and comments and suggestions received from various experts and stakeholders, and other annexures.

The Report finds that other than the poaching, there are other threats to the survival of rhino such as lack of adequate and secure habitat which is very badly in need of extension, retrofitting of the existing corridors, introducing SMART GUARD and SMART Communication and a series of technology interventions in short and medium term, green growth and green development opportunities for the fringe villages. On the policy side, it recommends amendments in the Wildlife(Protection) Act, 1972, challenges in the ways wildlife crime investigation is handled, organisational modifications, constitution of a Kaziranga Landscape Conservation and Development Authority to manage the entire landscape as a single unit consisting of the core, buffer and all the corridors and watersheds. The Report recommends initiation of the Rhino Range Expansion Project, setting up of key infrastructure and welfare of staff.

The actual implementation of the recommendations would require a series of ground surveys, in depth study, execution of Proof of Concepts, preparation of DPRs and Technical Feasibility Reports. The implementation would largely depend upon how strong is the institutional framework, availability of funds, support of the stakeholders, especially the local stakeholders, and the monitoring and feedback mechanisms put in place"

6. This Court passed the following order on 29.5.2015.

"BEFORE HON'BLE THE CHIEF JUSTICE(ACTING) MR. K SREEDHAR RAO, HON'BLE MR JUSTICE P. K. SAIKIA
29.5.2015.

Chief Justice(Acting)

The members of the high-power committee viz. Sri Mukti Gogoi, Commissioner (Home), Government of Assam; Sri PK Tiwari, Revenue Secretary, Government of Assam; Sri Anurag Agarwal, Inspector-General of Police(Border), Assam; Sri Ajay Kanojia, Director(NE-II), ministry of Home Affairs; and Sri DP Bankhwal, Inspector-General(Forest), NTCA Regional Office are directed to be present before this Court on 2.6.2015.

A copy each of this order be hand-delivered to Sri SC Keyal, Asstt. Solicitor-General and Sri RK Bora, govt. advocate".

7. This Court passed the following order on 2.6.2015.

"BEFORE HON'BLE THE CHIEF JUSTICE(ACTING) MR. K SREEDHAR RAO, HON'BLE MR JUSTICE PK SAIKIA
2.6.2015.

Chief Justice(Acting)

The members of the high-power committee are present before this Court. The members are told to do the counting of residences in the Kaziranga National Park area, which would include the first Addition to sixth Addition, and also to survey

the population in the residential buildings, huts, etc. The committee shall also take biometrics of the people residing in the area and submit the report by 26th June, 2015.

Hand-deliver the copy of this order to the standing counsel for the Forest Department and the govt. advocate for compliance of this order".

8. The high-power committee has gone into the issues and has filed a report, which is as follows.

"MINUTES OF THE 3RD MEETING AND FIELD VISIT OF THE HIGH POWERED CONSTITUTED BY THE HON'BLE GAUHATI HIGH COURT IN PIL 66/2012 HELD ON 24TH MAY, 2015 AT 8.00 AM AT KOHORA, KAZIRANGA NATIONAL PARK

Members present:

List of the members present is annexed herewith.

The Commissioner & Secretary, Revenue & DM Department, Govt. of Assam chaired the meeting and the field visit. The field visit, in order to cover maximum area, started right at 8.00 AM in the morning starting from the 3rd Addition to Kaziranga National Park followed by the 2nd Addition to the Kaziranga National Park, part of the core areas of Kaziranga National Park 5th Addition to Kaziranga National Park, 1st Addition to Kaziranga National Park and the 6th Addition to Kaziranga National Park along with a view of the core of the Kaziranga National Park at places. The Committee also took stock of govt. land at Banderdubi and Deosur areas as well. The Committee was accompanied, among others, by the members of the Gauhati High Court Bar Association and the learned Counsels appearing on behalf of the Petitioners and Defendants, and officials from the Forest, Revenue and Police and Home Departments.

The members also interacted with the people residing in the addition areas, and visited the actual habitation sites where the people were currently residing or had erected huts etc. The Committee visited Siljurigaon, Methoni Bagicha, No. 1 Sildubigaon, No. 2 Sildubigaon, Periphery of Kaziranga Nankegaon, Hatikhuli TE areas and the Haldibari in the 2nd, 3rd, and 5th Additions to KNP and khuties in the 6th Addition areas. After taking the stock of the ground situation and after much deliberation, the following decisions were arrived at:

1. List of the encroachers/settlers on the government land in the vicinity of Kaziranga National Park, its 6th Additions and the NH 37 (Jakhlabandha to Bokakhat) to be prepared by the respective Deputy Commissioners and it should be given to SP (border) within one month. The SP (Border) shall examine the same and take appropriate action within 30 days, such as handing over cases to the Hon'ble Foreigners' Tribunal, if required.

2. Village Land Bank must be re-verified within 15 days i.e. till 10th of June, 2015 by the respective Revenue Officers as per direction already issued by the Revenue & DM Department, on priority for all the areas falling in the vicinity of the Kaziranga National Park and its Additions.

3. Banderdubi and Deosur: A detailed in-depth survey of individuals/families occupying Government land along with land status report is to be prepared by the concerned DC/SDO (Civil) and it should be provided to police within one month for taking further action.

4. The Committee observed that the general impression after the field visit, in the 2nd Addition areas, was that most of the constructions were new dating back from last one to ten years and temporary and semi permanent in nature, which have been erected with an apparent intention of bargaining for land elsewhere.

5. The Committee observed that persons, mostly in the 3rd Addition areas, were share croppers from across the NH 37 and other nearby areas and settled in last 5 years in temporary structures. The land mostly belonged to persons far away from the Addition area.observed that a large numbers of annual patta had been issued in 2nd Addition to KNP, 3rd Addition

6. The Committee to KNP and the 5th Addition to KNP. The DC Golaghat shall launch an intensive drive to verify each and every annual patta holder and submit report within 30 days whether they are still in possession of the land. NR cases should be registered against the non occupant Patta holders.

7. The Committee observed that in the 2nd Addition to KNP, land was also procured by the Government from the Hatikhuli Tea Estate to make it part of the Kaziranga National Park and the Tea Estates was paid too for this transaction. Hatikhuli has not removed the structures or its persons from the said portion of the 2nd Addition. The DC Golaghat was directed to verify the records and take immediate action to free the land from encroachment by the Tea Estate and the management of the Tea Estate, if necessary.

8. In the 6th Addition, the semi-permanent, make-shift bamboo structures called khutis were observed to have been put up recently. It could be sensed on talking to the encroachers that many of them had mischievously been planted by some vested interests. The DC, Sonitpur was directed to remove them from the Addition areas without any further delay.

9. The Committee noticed that a compensation package to the permanent Patta holders in the 2nd, 3rd and the 5th Additions to KNP has been submitted to the R&DM Department in 2013. Since two years have passed the DC Golaghat was asked to verify the list of the patta holders in these addition areas to facilitate the decision and rehabilitation package.

10. After the Addition areas are made encroachment free, the Forest Department would construct appropriate structure to mark the areas. Boundary pillars which can be spotted from a distance should be fixed on all corner points of the Park boundary and the Addition areas immediately after joint survey with the Revenue authorities.

11. The Committee decided that it will review the progress of the work in the last week of June, 2015.

The meeting ended with vote of thanks from the Chair.

(P.K. Tiwari, IAS)
Commissioner & Secretary to the Govt. of Assam,
Revenue & DM Department
& Chairman, High Powered Committee"

9. It is said that the entire area of KNP including 1st to 6th additions measures at 884.44 square kilometres and the possession of the land in 2nd addition has also been handed

over, but there are some encroachments. With regard to the 3rd and 5th Additions, the preliminary notification and inquiries required under the law are held, but no final notification is issued.

10. This Court passed the following order on 15.7.2015.

"BEFORE HON'BLE THE CHIEF JUSTICE(ACTING) MR. K SREEDHAR RAO, HON'BLE MR JUSTICE PK SAKIA

..ORDER..

15.07.2015.

(K. Sreedhar Rao, CJ (Acting)

Mr. N Dutta, learned Senior Counsel for the petitioners submitted that in the 3rd Addition, vide report, dated 05.08.2014, the number of families living by encroachment was 32. In the current report, 82 families are shown to be now pattadars. It is submitted that from the report it is seen that the Government is encouraging the encroachers by granting pattas.

It is said that the Bandardubi village, 183 families are living as encroachers and in Deuchur Chang village 122 families are living as encroachers, thus, total 305 families are living as encroachers. The said families have been given the building materials under Indira Awas Yojana, a Government Scheme, for building houses. It is also said that LP Schools, Madrassas, Iddgah and Masjids are constructed in the villages. It is argued that the Government is encouraging the encroachments and facilitating their permanent settlement.

The above material discloses that there appears to be some improprieties and illegalities in granting pattas and legalizing the encroachments. It is, therefore, directed that the Revenue Authority, particularly, the Deputy Commissioners of Nagaon, Sonitpur and Golaghat to furnish the copies of all the pattas granted to the persons in 3rd Addition.

In so far as the Bandardubi and Deuchur Chang villages are concerned, the Deputy Commissioner, Nagaon shall evict the encroachment of Government land from the said two villages on or before 12-08-2015, if necessary with effective police assistance.

The Superintendent of Police(Border), Nagaon shall also make verification of the Nationality of the encroachers in the 2nd, 3rd and 5th Additions. The compliance report to be submitted by 12-08-2015.

The biometric of all the residences in 2nd, 3rd and 5th Additions is to be taken and report to be submitted by 12-08-2015.

Hand delivery of the order to be given to the Assistant Solicitor General of India, Government Advocate, Assam, the Standing Counsel, Forest Department and the Director, Kaziranga National Park.

Call the matter on 12-08-2015".

11. This Court has directed the Deputy Commissioners to evict the residents from the park area including the 2nd, 3rd 5th, 6th additions and also the residents of Bandardubi, Deuchur Chang and Palkhowa.

12. The petitioners in WP(C) 648/2013 contend that the petitioners are grazing cattle in the

lands in the sixth addition and without settlement of compensation they should not be evicted.

13. IA 1261/2015 and 1262/2015 are filed by the applicants to be impleaded in PIL 66/2012. It is the contention of the applicants that they are patta-holders and lawful residents in Bandardubi and Deuchur Chang villages. The said villages are revenue village, which do not form part of the KNP, therefore, they cannot be evicted.

WP(C) 4860/2013

14. Shri S Upadhay, the learned counsel for the petitioner in WP(C) 4860/2013, urged the following contentions to resist the eviction process against the petitioners.

    (a) There has been no valid acquisition of the said villages as contemplated under Section 26A and 35 of the Wild Life(Protection) Act, 1972, besides there is no compliance of the requirements of the Forest Rights Act of 2006. The authorities are evicting the petitioners who are the lawful residents and patta-holders of the lands.

    (b) The provisions of sub-Section (3) of Section 26A of the Wild Life(Protection) Act, 1972, earlier to the amendment dated 1st April, 2003, insisted that there should be a resolution passed by the legislature to authorise for addition or alteration of the boundaries of a National Park as a condition precedent. In this case, the unamended provisions prior to 1st April, 2003 will apply. Since there is no resolution passed by the Legislature, the entire acquisition proceedings are illegal.

    (c) Section 35(5) of the Wild Life(Protection) Act, 1972 declares that no alteration of the boundaries of at National Park by the State Government shall be made except on a recommendation of the National Board. In this case, there is no recommendation of the National Board is obtained. Hence, the acquisition proceedings are illegal.

    (d) There has been no final notification issued as required under sub-Section (1) of Section 35 of the Wild Life(Protection) Act, 1972 in respect of the second, third and fifth Additions of the KNP.

    (e) The definition of "forest land" under the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 includes the Sanctuaries and National Parks. Section 6 of the Act protects the rights of the Scheduled Tribes and other traditional forest dwellers. The Act contemplates constitution of gram sabhas and forest rights committees. The said gram sabhas and forest rights committees have to scrutinise and record the rights of forest dwellers and Scheduled Tribes living in the forest. In the present case, no such gram sabhas or forest committees are constituted. The petitioners are all residents of the forest area since the 1950s and pattas have been granted in their favour in the year 1962. The summary eviction of the petitioners cannot be done without inquiry and without ascertaining their rights over the land in question.

    (f) The affidavit of the Director filed before the Supreme Court in WP(C) no. 337/1995 dated 23rd January, 2006, it is mentioned that for the proposed third addition of Kaziranga National Park, the preliminary notification under section 18 has been issued. The provisions of Section 18 pertains the acquisition of land for the purpose of sanctuary and not for the National Park. Therefore, without there being proper notification for acquisition of land for National Park, the entire acquisition proceedings are illegal.

    (g) The minutes of the meeting held on 18.1.2013 pursuant to the order of this

Court dated 8th January, 2012 wherein there is a mention that the ADC (Revenue), Golaghat has stated that since no money has been acceptable/handed-over by/to anyone, "the land acquisition process in respect of the patta lands under the 2nd, 3rd and 5th addition area is not deemed as completed as per the land acquisition Act".

(h) The sub-Section (4) of Section 35 of the Act contemplates that before eviction all claims of the petitioners have to be disposed of by the state government and thereafter the final notification has to be published regarding the vesting of the land. Since no such procedures have taken place, without a valid acquisition the petitioners cannot be evicted.

15. The petitioners 4 and 5 claim that their ancestors and they are residing in Siljuri village since the time of independence and they have been granted the myadipatta. Petitioner 7 and 8 also claim that they are residing since the 1950s on the land covered under the fifth addition by paying touzi to the government. In the light of the statements made by the Additional Deputy Commissioner, Golaghat the process of acquisition as required under Section 35(4) of the Land Acquisition Act, 1894 having not been complete any premature eviction would be illegal.

16. The learned counsel relied on the decisions of the Supreme Court in *Pradeep Krishen vs. Union of India and others* (AIR 1996 SC 2040). In paras 5 and 17 of the judgment the following observations are made.

"5. The deponent further states that there are 11 National Parks and 33 Sanctuaries in the State of Madhya Pradesh, out of which 3 National Parks are finally notified under the National Park Act, 1955 and one Sanctuary is notified under the Act as amended in 1991, but the final notification is yet to be issued. The remaining 8 National Parks and 32 Sanctuaries were notified from time to time under the Act prior to its amendment in 1991. In these National Parks and Sanctuaries, proceedings under Sections 19 to 25 of the Act were not taken to acquire the rights of the people. That is why they were not finally notified. The State Government could not have taken away the rights of the tribals and villagers dependent on minor forest produce without acquisition of those rights after payment of compensation. It is for this reason that the final notification under Section 26A could not be issued unless provision for payment of compensation and rehabilitation were simultaneously made. So also, in regard to National Parks, the final declaration could not be issued under Section 35 of the Act for the same reason".

17. On a plain reading of these provisions, it is, therefore, obvious that the procedure in regard to acquisition of rights in and over the land to be included in a Sanctuary of National Park has to be followed before a final notification under Section 26A or Section 35(1) is issued by the State Government. In the instant case, it is not the contention of the petitioner that the procedure for the acquisition of rights in or over the land of those living in the vicinity of the areas proposed to be declared as Sanctuaries and National Parks under Section 26A and 35 of the Act has been undertaken. It was for this reason that the order of 28.3.1995 in terms stated that since no final notification was issued under the said provisions, the State Government was not in a position to bar the entry or villagers living in and around the Sanctuaries and the National Parks so long as their rights were not acquired and final notifications under the aforesaid provisions were issued. It is, therefore, not possible to conclude that the State Government had violated any provision of law in issuing the notification dated 28.3.1995".

18. The learned counsel relied on the decision of this Court in Jaladhar Chakma and etc. etc. vs. The Deputy Commissioner, Aizawl, Mizoram and others(AIR 1983 Gau 18).

WP(C) 648/2013

19. The learned counsel for the petitioner in WP(C) 648/2013 has submitted that the documents produced by the petitioner disclose that they have been permitted to graze and they have paid the revenue to the government. Petitioners are exercising rights for the past 50 to 60 years. Therefore without payment of compensation they cannot be summarily evicted.

20. The counsel for the intervening applicants in IA 1261/2015 and 1262/2015 has submitted that Bandurdubi and Deurchur Chan villages are the two villages that have been declared as revenue village by the government therefore it does not fall within the area of the National Park hence the eviction of any villager from the revenue villages is illegal. In this regard the learned Advocate-General has supported the contention of the applicants that as per the revenue records the said two villages are revenue village and not part of the National Park. In respect of other areas it is submitted that the State will take necessary action to evict persons in accordance with law.

21. The counsel for the forest department has submitted satellite image of Kaziranga National Park taken on 2.5.2010(latitude 26.617007 degree and longitude 93.496956 degree) from the Google Earth which shows that there is no habitation in the third Addition. The image taken on 12.29.2011(latitude 26.586765 degree and longitude 93.316559 degree) shows that there is no habitation in the 5th Addition. The image taken on 1.17.2014(latitude 26.586765 degree and longitude 93.316559 degree) shows that there is habitation in the fifth Addition while image taken on 1.18.2014(latitude 26.617007 degree and longitude 93.496956 degree) shows that there is habitation in the third Addition.

22. With regard to Deurchur Chan village it is submitted that a notification was issued by the Government in the year 1916 declaring that the entire area of Deurchur Chan as reserve forest.

23. With regard to Banderdubi village it is submitted that the report of the Director discloses that the Government had given the land for social forestry for raising plantation in the year 1986. There has been no development of social forestry. In the beginning, there were only 5/6 families living as encroachers and as of now, it is said that the whole village has come up. The Banderdubi area is part of social forest land and also a tiger resort and animal corridor.

24. Per contra the learned Advocate-General has submitted that since no social forest was developed, the forest department gave the land to the government and accordingly, it has become the revenue village.

25. Learned senior counsel Shri KN Choudhury relied on the decision of the Supreme Court in T.N. Godavarman Thirumulkpad v. Union of India and others[(1997) 2 SCC 267]. In para 4 of the judgment the following observations are made.

> "4. The Forest Conservation Act, 1980 was enacted with a view to check further deforestation which ultimately results in ecological imbalance; and therefore, the provisions made therein for the conservation of forests and for matters connected therewith, must apply to all forests irrespective of the nature of ownership or classification thereof. The word "forest" must be understood according to its dictionary meaning. This description covers all statutorily recognised forests, whether designated as reserved, protected or otherwise for the purpose of Section 2(i) of the Forest Conservation Act. The term "forest land", occurring in Section 2,

will not only include "forest" as understood in the dictionary sense, but also any area recorded as forest in the Government record irrespective of the ownership. This is how it has to be understood for the purpose of Section 2 of the Act. The provisions enacted in the Forest Conservation Act, 1980 for the conservation of forests and the matters connected therewith must apply clearly to all forests so understood irrespective of the ownership or classification thereof. This aspect has been made abundantly clear in the decisions of this Court in Ambica Quarry Works v. State of Gujarat, Rural Litigation and Entitlement Kendra v. State of UP and recently in the order dated 29-11-1996 (Supreme Court Monitoring Committee v. Mussoorie Dehradun Development Authority). The earlier decision of this Court in State of Bihar v. Banshi Ram Modi has, therefore, to be understood in the light of these subsequent decisions. We consider it necessary to reiterate this settled position emerging from the decisions of this Court to dispel the doubt, if any, in the perception of any State Government or authority. This has become necessary also because of the stand taken on behalf of the State of Rajasthan, even at this late stage, relating to permissions granted for mining in such area which is clearly contrary to the decisions of this Court. It is reasonable to assume that any State Government which has failed to appreciate the correct position in law so far, will forthwith correct its stance and take the necessary remedial measures without any further delay".

26. The counsel also referred to the provisions of Section 2 of the Forest (Conservation) Act, 1980, which reads as follows.

"2. Restriction on the dereservation of forests or use of forest land for non-forest purpose - Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, may order directing -
(i) that any reserved forest(within the meaning of the expression "reserved forest" in any law for the time being in force in that State) or any portion thereof, shall cease to be reserved;

(ii) that any forest land or any portion thereof may be used for any non-forest purpose;

(iii) that any forest land or any portion thereof may be assigned by way of lease or otherwise to any private person or to any authority, corporation, agency or any other organisation not owned, managed or controlled by government;

(iv) that any forest land or any portion thereof may be cleared of trees which have grown naturally in that land or portion, for the purpose of using it for reafforestation.

Explanation - For the purposes of this section" non-forest purpose" means the breaking up or clearing or any forest land or potion thereof for-
(a) the cultivation of tea, coffee, spices, rubber, palms, oil-bearing plants, horticulture crops or medicinal plants;

(b) any purpose other than reafforestation, but does not include any work relating or ancillary to conservation, development and management of forests and wild-life, namely, the establishment of check-posts, fire lines, wireless communications and construction of fencing, bridges and culverts, dams, waterholes, trench marks, boundary marks, pipelines or other like purposes".

27. In the light of the decision of the *Godavarman case* (supra) it is argued that the definition of "forest land" elucidated by the Supreme Court not only includes "forest" but also any area recorded as forest in the government record irrespective of the ownership, and this has to be understood for the purpose of Section 2 of the Forest Conservation Act, 1980, and that the provisions of the Forest Conservation Act, 1980 must apply clearly to all forests so understood irrespective of the ownership or classification". In that view it is argued that the Banderdubi village which is declared to be "social forestry" cannot be de-reserved and converted to revenue village. In that view of the matter the question of permitting any habitation in the said areas does not arise.

28. The government has produced the final notification issued in respect of the second Addition, which is dated 12th July, 2010 and the final notification issued in respect of the fourth Addition dated 10th April, 2012 and respect of third, fifth and sixth Additions final notification is yet to be issued.

29. The report of the Collector for the second addition of the KNP is as follows.

"**Report of the Collector for 2nd Addition to the Kaziranga National Park.**

In response to our proclamation 147 claims were received. During the course of hearing of these claims some more people had approached stating that they could not file the claim in time. They were allowed to file the same even at a subsequent date much beyond the time fixed by the proclamation. Eleven claims were received thereafter making a total of 158 claimants. All these claim forms were registered as individual cases of each claimant and notices were issued to each of them individually to appear before the undersigned with the required evidence in support of their claim. For the convenience of the claimants the hearing was fixed at the Range Office, Kaziranga Range at Kohora. Four claimants who did not appear on the first occasion were given another notice to give them a second opportunity of presenting their cases. Whatever evidence was furnished by each claimant was recorded in the order sheet of each individual case, where after based on these claims and the evidence furnished, findings on all these claims has been recorded in each individual case and all claims have been disposed of.

The initial claim of a group of claimants was that they are erosion-affected people and land had been allotted to them by way of rehabilitation. They could not, however, show any paper issued by any Government functionary making such an allotment of land as claimed by them. The matter was further checked from the Circle Officer, Bokakhat Circle who stated that no such allotment was ever made in the given area. Even the pattern of occupation of land does not support the claim that this land was ever allotted to the claimants by way of resettlement. Normally, resettlement is done in symmetrical plots either of 2 bighas or 5 bighas for each individual family, which are demarcated in a bigger piece of land. The land held by each family is thus equal and side by side. In the present situation the area of land occupied varies from person to person and is scattered all over the place. This clearly indicates that the claim that the land was allotted by way of resettlement is not correct.

Out of the 158 cases, the claimants in 116 cases, as listed out in Annexure-1, produced receipts of payment of Touzi Bahira. Some of these receipts were tampered while in all cases only the amount and the name of the person making the payment was recorded in the receipt. Normally, even in Touzi Bahira the Mouzadar allots a Touzi number to each occupant of the land and records the name of the encroachers. The receipts for payment of Touzi Bahira normally indicate the Touzi number and the person on whose behalf the money has been paid by the person paying the same.

This issue is however only of academic interest. Touzi Bahira is a fine laid down under the Revenue Laws for encroachment and is not an evidence of title over the occupied land. In view of this all 116 claims, wherein the claimants had produced receipts of payment of Touzi Bahira, have been rejected.

Twenty-seven claimants as listed in Annexure-II have no paper in support of their claim over the land that they are occupying. They do not have even a Touzi Bahira receipt. Evidently they have no title over the land they are occupying and the claims were hence rejected.

Nine claimants as listed in Annexure III are of claims wherein land has been used for non-Agricultural purposes. One of them is for a temple, two are self-styled public fisheries, one is a primary school, one is an anganwadi Kendra, two are self-help groups and two are public organizations. None of them had any document to show that they have any title over the land that has been occupied by them. The claims were hence rejected.

Six cases as listed in Annexure-IV were either duplicate, fictitious or the claimant did not appear. Two cases are of claimants who did not appear despite two notices having been issued to them. Three cases were found to be where claims were filed twice and separate cases had been registered. One case was found to be fictitious. Notices were issued twice in this but on neither occasion the person was found. The Gaon Burah has reported that there is no such person.

In conclusion, the claims in all 158 cases have been rejected, as no claimant had anything to establish title over the land.

Apart from the exercise taken up in response to the claims received, the status of land was checked from the land revenue record of the area. The land involved in the 2nd Addition is spread over four Revenue Villages of Bokakhat Circle. These are

1. Sildubi I
2. Sildubi II
3. Kaziranga Nanke Gaon.
4. Hatikhuli Bagicha Gaon.
5.

In village Sildubi No. I there was 158B-3K-18L of land covered by annual pattas. This land was acquired vide Land Acquisition Case No. 4 of 89-90 of Golaghat. Since this land has been acquired by the above mentioned Land Acquisition proceedings, the said land has become sarkari and all rights and title of the pattadars has been extinguished. However, 31B-2K-0L of land out of this has not been handed over as the pattadars have refused to leave their land. This is an unauthorised occupation and no right or title on the land has remained after the acquisition. An area of 109B-0K-0L, being part of the acquired land was handed over to the D.F.O Eastern Assam Wild Life Division, Bokakhat on 21-06-2004. In the same village 31B-3K-16L of land was covered by periodic pattas. This land has also been acquired by the above mentioned Land Acquisition case of Golaghat. Though the land has not been handed over as the pattadars have refused to leave it, the land in question has become Sarkari as the same has been acquired by a Land Acquisition Proceedings and nobody has any title over the same. 1383B-0K-10L of land in village Sildubi No. I is VGR and PGR land. The entire land is already in the possession of the D.F.O, Eastern Assam Wild Life Division, Bokakhat. 126B-2K-8L is Government land of which 113B-4K-8L has been handed over to the D.F.O, Eastern Assam Wild Life Division, Bokakhat on 05-07-2005 while 12B-3K-0L is under encroachment.

The second village involved is Sildubi No. 2. This has 1395B-2K-17L of land, which entirely is Government land as per Revenue records and is under encroachment. All claims that have been received are from this village alone. As already stated these claims have been examined and rejected as it has been found that the claimants have no right or title over the land and they are only encroachers.

The third village involved is Kaziranga Nanke Gaon. This has 1388B-3K-18L. The entire land is Government land out of which 58B-3K-18L is under encroachment. The remaining 1330B-0K-0L was handed over to the DFO, Eastern Assam Wild Life Division, on 05-07-2005 and is with the Forest Department.

The fourth village involved is Hatikhuli Bagicha Gaon. In this village 92B-2K-9L was periodic patta land which was acquired under the Land Acquisition Act 1894 vide Land Acquisition Case No. 5/89-90 of Golaghat. This land has been acquired and possession handed over to the D.F.O., Eastern Assam Wild Life Division, Bokakhat on 26-07-2004. Revenue records in the Chita had been corrected on 26-07-2004. Apart from this there is Government land measuring 378B-3K-13L possession of which has been handed over to the D.F.O., Eastern Assam Wild Life Division, Bokakhat on 05-07-2005 and Revenue records have been corrected accordingly.

It is thus clear from examination of Revenue records as well as after consideration and disposal of all claims received in respect of the 2nd Addition to the Kaziranga National Park that nobody has any legal right or title over any land that has been notified under Section 35(1) for the 2nd Addition to the Kaziranga National Park. The entire area involved is 4,955B-3K-9L of which 3,407B-1K-0L is already in the possession of the Kaziranga National Park. 1,548B-2K-9L is remaining, which has some encroachers. Once the notification constituting the National Park is issued, steps would need to be taken to remove these encroachments. It is recommended that the final notification under Section 35(4) be issued by the Government constituting the 2nd Addition to the Kaziranga National Park under the Wild Life (Protection) Act 1972 (Central Act NO. 53 of 1972).

The case records of all 158 claim cases and the file concerning the correspondences in connection with the 2nd Addition to the Kaziranga National Park are being transferred to the Director, Kaziranga National Park, Bokakhat for safe custody.

(H.M. Cairae)
Principal Secretary to the Government of Assam,
Higher Education Department & Collector for 2nd Addition to the Kaziranga National Park. Dispur."

OPINION

WP(C) 4680/2013

30. The petitioners 1, 2 and 3 claim to be residents of Sildubi I and II villages. They contend that they are patta holders and their claim has not been settled. The said contention appears to be palpably untenable. The report of the Collector extracted supra disclose that enquiry was held in respect of second addition. There were 158 claims. All the claims have been decided. It was found in the inquiry that nobody had any right or title over the land. The lands were taken over vide land acquisition case 4 of 89-90. The possession was delivered to the forest wildlife division. On 26.1.2004 and 5.1.2005.

The report further discloses that some of the residents despite the adjudication of their claims refused to leave. The expert committee report also corroborates this fact that in the areas in the second addition there were temporary structures and recently constructed one. This material clearly indicates that the petitioners 1 to 3 have no right over the land in any manner.

31. The petitioners 4 and 5 are said to be the residents of to the third and fifth additions. The contention of the forest department that the claims are adjudicated by the inquiry authority. The averments made in para 11 of the writ petition corroborate the contention that the claims are adjudicated since the para 11 states that the compensation amount of Rs 13,27,046/- is deposited with the Sub-divisional Officer. The said averments suggest that the petitioners have knowledge of the inquiry.

32. The petitioner 6 to 8 are said to be residents of Haldibari village, which is a part of the fifth addition. The authorities have fully complied with the requirements of law and claims have been settled. Only formal issuance of final notification for third and fifth editions remains. The petitioners cannot claim any right over the land that has been acquired and compensation is determined and deposited. Petitioners have suppressed the material fact. They have not stated anything about their participation in the inquiry and the rights they have over the land in question.

33. The contention that for acquisition before amendment of Section 26A in the year 2003 a resolution by the legislature was mandatory for issuance of preliminary notification. Hence the entire proceeding is bad in law. The proceedings for acquisition, be it under the Wild Life Act or the Land Acquisition Act, are one and the same. The petitioners of the second addition after conclusion of the proceedings and handing over possession belatedly after nine years cannot challenge that their claims are not adjudicated and there is no valid notification for acquisition.

34. With regard to the contention that formalities under the Forest Act is not completed does not hold water because the petition averments do not anywhere assert or disclose that the petitioners are Scheduled Tribes or other traditional dwellers of the forest. In the absence of such pleadings the claim of rights under the Forest Rights Act does not arise.

35. The decisions cited by the counsel for the petitioners have no application to the facts situation of the instant case. In the cited case the petitioners have asserted their rights to collect tendu leaves. In this case the fact situation is totally different. The acquisition and eviction of human habitation is being done for protecting the wildlife which is exposed to rampant poaching. The authorities have complied with all the formalities. Maybe, there may be some technical lapses but nonetheless the procedures of inquiry conducted by the Collector is in full consonance with procedures laid down under the Land Acquisition Act. Merely because there are some technical lapses in issuing preliminary notification should not be a cause to undoing the result of the acquisition proceedings. If technical views are taken there would be substantial damage to the wildlife and national interests.

36. With regard to the contention of the petitioners it is submitted that the petitioners have only grazing rights and they are said to be residents of the sixth addition. The rights granted to them are only in the nature of licence and for a larger public interest petitioners are prevented from grazing. They cannot have any legal right. Petitioners can approach the competent authority to establish their rights for seeking compensation. In the inquiry to be conducted before issuance of the final notification the petitioners can participate and seek compensation. Hence the relief sought in the

petition that they should not be prevented until compensation is paid is untenable.

37. The applicants are seeking to get impleaded to challenge the eviction proceedings. It is the case of the applicants that they are residents of Deocharchang and Bandardubi which are revenue villages within the territory of KNP. The claim of the petitioners is also supported by the government. However we are unable to agree with the submissions since Deocharchang is declared by notification in 1916 that it is a reserve forest. The government gave the lands in Bandardubi for social forestry in the year 1986. There was no development of social forestry. The illegal encroachment started and a village has come up by encroachment. It is the stand of the government that since social forestry is not developed the lands of Bandardubi was given back to the government and the lands are dereserved and shown as revenue village.

38. The Supreme Court in *Godavarman case* supra has laid down a ratio that the forest land occurring in Section 2 of the Forest (Conservation) Act, 1980 not only includes "forest" as understood in the dictionary sense, but also any area recorded as forest in the Government record irrespective of the ownership. This is how it has been understood for the purpose of Section 2. The provisions of Section 2(i) of the Forest Conservation Act, 1980, mandates that no State Government or other authority shall make, except with prior approval of the Central Government, de-reserve any forest area. When once the Government has given the land for social forestry it is impermissible for the Government to dereserve and make it a revenue village without consent of the Central Government besides the said area is tiger reserve and animal corridor.

39. The report submitted by Director, Kaziranga National Park on the orders of this Court also states, at page 167, that Bandardubi village is animal corridor. In that view, the claim of the persons, who want to get impleaded that they should not be evicted from Bandardubi and Deocharchang is untenable. In so far as these two villages are concerned, one is declared to be reserved forest and other is declared to be the social forestry and animal corridors. The human habitants of those areas cannot claim right of occupation or possession.

40. The individual claims for a handful of persons is in conflict with the public and national interest. There have been persistent and repeated reports of poaching of rhinoceros, elephants and other wild animals. It is irresistible inference that the habitants in KKP area would fall in suspect group and they would be well-acquainted with the areas and animal movements, therefore they would alone be in a position to do poaching successfully or abet poaching by others. The concept of national park in the Wild Life Act contemplates that there should be no human habitation.

41. Article 48-A of the Directive Principles of the Constitution of India mandates that the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country. Article 51-A(g) fastens the fundamental duties on the citizens to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

42. In the face of the Constitutional obligations on the part of the State with a corresponding duty on the part of the citizens it would be highly untenable on the part of the petitioners to take technical pleas and expose the wild life to a great danger of extinction.

43. The Supreme Court in *Union of India and another vs. Redeppa and Another* r[(1993) 4 SCC 269] has laid down the following ratio.

    "True the jurisdiction exercised by the High Court under Article 226 or the tribunal is not as wide as it is in appeal or revision but once the Court is satisfied of injustice or

arbitrariness then the restriction, self imposed or statutory, stands removed and no rule or technicality on exercise of power, can stand in way of rendering justice".

44. In the instant case any rigid and technical view would only harm and endanger the wildlife of the KNP. The jurisdiction of this Court under 226 of the Constitution is quite wide. The petitioners who have approached this Court have no right over the land and their claims have been adjudicated. The fact that the final notification in respect of the 3rd and fifth additions is not issued is not a ground for the petitioners to overstay on the land when their claims are adjudicated. There is also provision under the Land Acquisition Act that in urgent situations the possession of land is taken and later on adjudication of compensation procedures are followed. In that view of the matter even if the final notification is not issued since the claims of the persons of third and fifth additions are adjudicated they cannot claim right to stay in the land. If the Court, as argued by the petitioners, takes a technical view it would only endanger the wildlife in the KNP and there would be unabated acts of poaching. Hence keeping in view the interests of the KNP, which is a World Heritage Site, we are not inclined to accept the contention of the petitioners.

45. It may be that the recommendation of the National Board is to be taken, still it is open to the government to approach the National Board for its approval. We don't think that the National Board can take any different view than the one taken by the government for expanding the area of the KNP. Keeping in view the larger interests of the public and the Constitution mandates, the claim of the petitioners in WP(C) 4860/2013 is held to be untenable and accordingly the writ petition is dismissed. Similarly the claim of the applicants in IA 1261/2015 and 1262/2015 for the reasons stated above are dismissed. The claim of the petitioners in WP(C) 648/2013 is rejected. The Deputy Commissioners of Golaghat, Sonitpur and Nagaon are directed to take expeditious steps to evict the inhabitants in the second, third, fifth and as well the six additions of the Kaziranga National Park, including Deurchur Chang, Banderdubi and Palkhowa, within one month.

GUJARAT HIGH COURT

TABLE OF JUDGEMENTS AND ORDERS

275. Prahladbhai Maganlal Jani @ Chunriwala Mataji vs. Action Research in Community Health and Development
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Ganpat D. Parmar & Anr. vs. State of Gujarat & Ors.

SPECIAL CIVIL APPLICATION NO. 6252 OF 1992
24.8.2009
GUJARAT HIGH COURT
CORAM: AKIL KURESHI, J.
CITATION: 2009 SCC ONLINE GUJ 7337

SUMMARY

This is a writ petition filed by tribals occupying forest land for personal cultivation as far back as 1992. They were able to obtain an interim order protecting them from dispossession during the pendency of the petition. By the time the petition came up for hearing, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) had come into force. Relying upon the (then) recently enacted law, the petitioners sought permission to file applications under the said law for recognition of rights, which the Court readily granted.

The Court also directed that until the application of the petitioners is disposed of, the status quo shall be maintained, meaning thereby that if the petitioners are in possession of the land in question, their possession shall not be disturbed.

ORAL JUDGMENT

1. Petitioners are tribals occupying forest land for personal cultivation since years. They filed this petition seeking regularization of such occupation. Interim relief was granted in their favour during the pendency of the petition. Learned advocate for the petitioners submitted that after filing of the petition, the Government has framed a law, namely, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 giving certain privileges and granting protection to such tribals. He submitted that the Government has also issued circulars from time to time to consider such cases.

2. Counsel for the petitioners submitted that the petitioners will make a representation in this regard to the District Collector. If such representation is made within a period of four weeks from today, the same shall be considered in accordance with law, bearing in mind the statutes applicable and the Government policy prevailing. If the ultimate

decision of the Collector is adverse to the petitioners, it will be open to them to challenge the same in accordance with law. Till the representation is disposed of, status quo shall be maintained by both sides.

3. With the above directions, the petition is disposed of. Rule is made absolute to the above extent.

Jan Adhikar Sangh & Ors vs. State of Gujarat & Ors.

SCA NO. 1591 OF 2009
HIGH COURT OF GUJARAT
24.12.2010
CORAM: S.J. MUKHOPADHAYA, C.J. AND M. THAKER, J.
CITATION: 2010 SCC ONLINE GUJ 13567

SUMMARY

The writ petition had been filed by the members of the Rabari Tribe which have migrated from Gir, Alech, and Baroda forest areas. They submitted that although a State government circular was issued as far back as 29.11.1994 to recognize their Scheduled Tribe status even in spite of their migration to another part of the State, this had not been done. As a result, the petitioners were not being able to enjoy their forest rights under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA). The petitioners sought grant of certificate in favour of the Scheduled Tribe community persons in forests of Alech, Gir and Baroda, under the Scheduled Castes and Scheduled Tribes Lists (Modification) Order, 1956.

The State government brought to the notice of the Court that the Committees, as required under the FRA, have been constituted to determine the Scheduled Tribes of forest area who are entitled for such benefit.

The Court held that members of the Rabari, Bharwad and Charan tribes if they were residing in the forest area of Gir, Alech and Baroda, and even if they subsequently migrated, they are entitled to get the status of a Scheduled Tribe. The status of those members born thereafter would be determined on the basis of the domicile of the parents. The Court directed that if action had not been taken with regard to any member of the Rabari, Bharwad, and Charan community, whose ancestors were residing in the mentioned forest areas on or before 29.10.1956, the authorities were bound to consider their applications under FRA on the basis that they are STs, and pass appropriate orders. If any such orders had not been passed in respect of such persons, they would be entitled to move the Committee under FRA, which was to pass orders within 3 months.

EDITOR'S NOTE

It is seen from this judgment that through the simple method of approaching the issue from the perspective of the objective of the FRA, namely the correction of historical wrong against forest dwellers, the Court was able to issue directions which, while outside the strictly technical framework of the law, nevertheless served the ends of justice. This approach is definitely one which deserves emulation in other States where communities which ought to have the Scheduled Tribe status, have been denied the benefit of the FRA due to administrative inertia.

ORDER

(the Order of the Court was pronounced by S.J. Mukhopadhaya CJ)

1. This writ petition in the interest of Scheduled Tribes has been preferred by the petitioners alleging inaction on the part of the respondents not implementing its circulars and guidelines. Further prayer has been made to allow appropriate certificate in favour of the petitioners who belong to Alech Forest nesses of Kutiyana Taluka in Porbandar District.

2. The learned counsel for the petitioners would submit that the respondents have not issued appropriate certificate in favour of the Scheduled Tribes though the circular was so issued as far back as on 29.11.1994 for verification of the Scheduled Tribe status of Rabari, Bharward who have migrated from the Gir, Alech and Barda forest areas.

3. Per contra, according to the counsel for the State, the petitioners having sought for certificate showing them as a tribe of Alech, the petition cannot be entertained as a public interest litigation.

4. We have heard the learned counsel for the parties and perused the record.

5. In the present case, as we find that the petitioners have made a prayer for grant of certificate in favour of the Scheduled Tribe community persons, and have also claimed to be members of the said Tribe, we are not inclined to reject the writ petition on the ground that this is a person interested litigation. Grant of certificate in favour of the Scheduled Tribes is in the interest of the public. Therefore, we are inclined to issue the appropriate directions on the respondents.

6. We have already noticed that the Central Government has enacted the Act known as "Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006". Under the said Act, various tribes of Scheduled Tribes and other traditional forest dwellers have been mentioned. The respondent - State have already brought to the notice of the Court that the Committees as required under the said Act have been constituted to find out the Scheduled Tribes of forest area who are entitled for such benefit. Therefore, if one or other petitioner or other Scheduled Tribe is residing in the forest area, they are entitled to derive the advantage of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and the Committee may declare that they are Scheduled Tribe of such forest area.

7. So far as verification of Scheduled Tribe status of Rabari, Bharwad and Charan is concerned, if originally they were residing in the forest areas of Gir, Alech and Barda, even if they have migrated from Gir, Alech and Badra forest areas to other places of the State of Gujarat, as per the circular dated 29.11.1994, they are also entitled to get

certificate of Scheduled Tribe. Those Rabari, Bharwad and Charan thereafter born, shall on the basis of the domicile of their parents on the date of the notification, if they were residing in the forest areas of Gir, Alech and Barda, also be entitled to get the Scheduled Tribe certificate though they might have been migrated from Gir, Alech and Barda forest areas and are living in other places of the State.

8. The State having noticed that Rabari, Bharwad and Charan category persons are facing great difficulties in obtaining the caste certificate, having issued circular dated 29.11.1994, the respondents are bound to act in terms with the said circular and grant appropriate certificate in favour of the such persons after verification of the relevant record and evidence. It is expected that the Committee in terms of the circular comprising of Taluka Mamlatdar, Taluka Development Officer and Taluka concerned Range Forest Officer have been constituted and the said Committee is required to act as per the circular dated 29.11.1994. If such action has not been taken with regard to anyone or other member of Rabari, Bharwad and Charan community, whose ancestral were originally residing in the forest areas of Gir, Alech and Barda on or before 29.10.1956, the authorities are bound to consider their case and pass appropriate orders. If any such order has not been passed in respect of one or other persons, such person may move before the Committee and the Committee is expected to go through all the records and pass orders preferably within three months. If no such committee is constituted or members are to be inducted, the respondents are directed to constitute or induct such members within a month.

9. We may only mention that we have not expressed any opinion with regard to any of the petitioners whether they belong to a particular community or not.

10. The writ petition stands disposed of with the aforesaid observations and directions, but there shall be no order as to costs.

Taraben Rusping Vasava & Ors. vs. State of Gujarat &Ors

SCA NO.11021 OF 2000
HIGH COURT OF GUJARAT
17.01.2011
CORAM: M.D. SHAH, J.

SUMMARY

The petitioners were tribals occupying forest land for personal cultivation for a number of years. They had filed this petition in 2000 seeking regularization of such occupation.

In the meanwhile, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) was enacted and circulars issued by the government from time to time for its implementation. Accordingly, counsel for the petitioners submitted that they would make a representation in this regard to the District Collector (sic).

The Court directed that such representation be made within a period of four weeks, in accordance with the law. If the ultimate decision of the Collector (sic) is adverse to the petitioners, it will be open to them to challenge the same in accordance with law. It also directed that till the disposal of the representation, status quo shall be maintained.

EDITOR'S NOTE

While it is heartening that petitioners already before the Court for protection of their rights in forest lands are taking advantage of the subsequent enactment of the FRA, and are being allowed to do so by the Courts, it nevertheless is a matter of concern that the directions passed are not in accordance with the procedure in the Act. It is the Gram Sabha, and not the District Collector, before whom such an application is required to be made.

In subsequent decisions, as awareness about the FRA gathered ground, such errors were made less frequently.

ORDER

1. Petitioners are tribals occupying forest land for personal cultivation since years. They filed this petition seeking regularization of such occupation. Interim relief was granted in their favour during the pendency of the petition. Learned advocate for the petitioners submitted that after filing of the petition, the Government has framed a law, namely, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 giving certain privileges and granting protection to such tribals. He submitted that the Government has also issued circulars from time to time to consider such cases.

2. Counsel for the petitioners submitted that the petitioners will make a representation in this regard to the District Collector. If such representation is made within a period of four weeks from today, the same shall be considered in accordance with law, bearing in mind the statutes applicable and the Government policy prevailing. If the ultimate decision of the Collector is adverse to the petitioners, it will be open to them to challenge the same in accordance with law. Till the representation is disposed of, status quo shall be maintained by both sides.

3. With the above directions, the petition is disposed of. Rule is made absolute to the above extent.

Kavsing vs. Deputy of Forests & Ors.

SCA NO. 14862 OF 2010 ETC.
HIGH COURT OF GUJARAT
25.01.2011
CORAM: M.D. SHAH, J

SUMMARY

This writ petition appears to have been filed for protection of forest rights, as indicated in a previous order which refers to a report of local inspection of the land submitted by the Range Forest Officer.

Although the counsel for the petitioners did not appear despite several opportunities, the government counsel appearing for the respondent State stated at the bar that alternative remedy was provided under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA).

The Court disposed of the writ petition in terms of the statement made at the bar.

EDITOR'S NOTE

Again, it is heartening to find that a positive order has been passed by the Court in the interests of justice, despite the absence of the counsel for the petitioners.

ORDER

When these matters were listed yesterday, learned advocate for the petitioners was not present. Today also, even in the second round, he is not present. However, learned AGPs for the respondent-State in all the petitions remained present yesterday and are present today also.

Learned AGP, Mr. L.R. Pujari, for the respondent-State has stated at the bar that alternative remedy is provided under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. The petitioners shall avail of the alternative remedy as provided under the Act. With this observation and in view of the statement made by learned AGP, Mr. Pujari, these petitions stand disposed of.

Bansiabhai Vadiabhai Bagul vs. State of Gujarat & Ors.

SCA NO. 8511 OF 2000
HIGH COURT OF GUJARAT
25.01.2011
CORAM: M.D. SHAH, J.

SUMMARY

This petition was filed in 2000 by a tribal seeking regularization of personal cultivation over forest land, which he had been cultivating for many years. Subsequently, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) was enacted.

When the enactment of FRA was brought to its attention, the Court passed an order permitting the petitioner to file a representation/application under Section 6 of the FRA before the competent authority which will consider it in accordance with the law, and disposed of the writ petition accordingly.

The Court directed that until such disposal of the application, status quo would be maintained, meaning thereby that there would be no dispossession. It further directed that in the event that the order is adverse, the petitioner would have the liberty to approach the Court again.

EDITOR'S NOTE

In this decision, the Court has taken care to direct that the application be submitted before the 'competent authority' under Section 6 of the FRA, which is the Gram Sabha. Protecting the possession of the petitioner of the land in question until the disposal of his application is also a welcome step.

ORDER

1. Petitioner is tribal occupying forest land for personal cultivation since years. They filed

this petition seeking regularization of such occupation. Interim relief was granted in their favour during the pendency of the petition. Learned advocate for the petitioners submitted that after filing of the petition, the Government has framed a law, namely, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (`the said Act') giving certain privileges and granting protection to such tribals. He submitted that the Government has also issued circulars from time to time to consider such cases.

2. Counsel for the petitioners submitted that the petitioners will make a representation in this regard to the competent authority as per Section 6 of the said Act. If such representation is made within a period of four weeks from today, the same shall be considered in accordance with law, bearing in mind the statutes applicable and the Government policy prevailing. If the ultimate decision of the authority is adverse to the petitioners, it will be open to them to challenge the same in accordance with law. Till the representation is disposed of, status quo shall be maintained by both sides.

3. With the above directions, the petition is disposed of. Rule is made absolute to the above extent.

Abhesing Kaliyabhai Damor vs. State of Gujarat & Ors.

SCA NOS. 12848 AND 12855 OF 2012
HIGH COURT OF GUJARAT
15.10.2012
CORAM: K.M. THAKER, J.
CITATION: 2012 SCC ONLINE GUJ 5649

SUMMARY

The writ petitioners are members of Scheduled Tribes and other traditional forest dwellers who are engaged in cultivation and other activities in forest lands. They approached the Court for protection under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA), as the respondent State government officials were attempting to prevent them from engaging in their traditional activities.

The petitioners also urged the Court strongly for interim orders protecting their rights, particularly their right to cultivate their lands during the short monsoon season. They argued that their applications have been approved by the Gram Sabha, which is the body constituted under the FRA for determination of rights, and are pending before the "nodal agency".

The Court disposed of the matter at the preliminary stage itself, in light of the fact that the counsel for the State government, very reasonably, stated that if the petitioners' applications are indeed pending before the "State Monitoring Committee", they shall be duly considered. Accordingly, the Court disposed of the case with a direction to the petitioners to make the necessary representation to the State government and the "State Monitoring Committee" within two weeks, and further directing the said authorities to take appropriate decision as expeditiously as possible, and preferably within four weeks. It was further clarified that if the petitioners are not satisfied with the final decision, they may take further legal steps. The petition was accordingly disposed of without any interim protection or injunction.

EDITOR'S NOTE

While this order clearly contains directions beneficial to the petitioners and advances their efforts to get their forest rights under the FRA recognised, it is difficult to use it as a precedent because of the repeated use of incorrect terminology to describe the authorities under Section 6 of the FRA. Nevertheless, the prompt manner in which the Court has granted relief is welcome.

ORAL ORDER

1. In present petition, the petitioners have prayed that:

   "9(B) Allow this petition by issuing an appropriate writ, order or direction, directing the respondents authorities to act and behave in accordance with the provisions of the act and thereby holding that rights recognized by the Gram Sabha cannot be taken away prior to the decision of Nodal Agency.

   (c) Grant the interim relief by restraining the respondents and their agents, servants, etc. from taking any coercive action and also from removing the petitioner from the possession of the land in question."

2. During the submissions, Mr.Kharadi, learned counsel for the petitioners narrated the difficulties being faced by the petitioners because despite the decision taken by the concerned authorities/bodies constituted under the provisions of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (for short, "the Act"), the officers of respondent no. 2 & 3 restrain the petitioners from conducting the activities permissible under the provision of the said Act. According to the petitioners, the said actions by the officers of respondent nos. 2 & 3 cause undue harassment to the petitioners.

3. Mr.Kharadi, learned counsel for the petitioners submitted that the rights, including the right of cultivation, of members of Scheduled Tribes and other Traditional Forest Dwellers is recognized under the provisions of the said Act. Therefore, the officers of respondent nos. 2 & 3 are not justified in restraining the petitioners from undertaking their usual and traditional activities including cultivation, which is permissible in view of the provisions under the said Act.

4. Mr.Kharadi, learned Counsel for the petitioners has submitted that case of the petitioners is pending before Nodal Agency, and Nodal Agency has yet not given final decision.

5. He also emphasized the fact that though the application, is pending before Nodal Agency/the respondent Authority is prohibiting the petitioners from undertaking their usual activities including traditional agriculture activities, which can be carried out only during monsoon.

6. Mr.Kharadi, learned advocate for the petitioners submitted that the petitioners would make appropriate and detailed representation to the respondent no. 1 and also to the State Monitoring Committee in view of the fact that the petitioners's case is still pending before the Nodal Agency.

7. He also submitted that the petitioners would make appropriate request and therefore, representation that until the matter is considered and final decision is taken by the Nodal Agency, the petitioners may not be disturbed or restrained from undertaking

their usual activities including cultivation activities, which they have been undertaking since several years.

8. In view of the fact that the issue is alive and pending before Nodal Agency, it appears that the petitioners's request is reasonable and justified and present petition can be disposed of at this stage with the below mentioned observations.

9. Having regard to the submissions made by learned counsel for the petitioners that petitioners would approach respondent no. 1 as well as State Monitoring Committee with appropriate representation, the petition is not entertained at this stage and is disposed of so as to enable the petitioners to approach respondent no. 1 and State Monitoring Committee with appropriate representation and request.

10. The petitioners may submit such request and representation to respondent no. 1 and also to the State Monitoring Committee.

11. Mr.Yagnik, learned AGP, who has appeared for respondent no. 1 upon being served with advanced copy of the petition, has submitted that if and when such representation is made, respondent no. 1 and State Monitoring Committee shall consider the same.

Therefore, it is observed and clarified that the petitioners will make such representation within a period of two weeks. After such representation is made by the petitioners and received by respondent no. 1 and State Monitoring Committee, respondent no. 1 and State Monitoring Committee shall take up such representation for consideration and pass appropriate orders and direction to respondent nos. 2 & 3 having regard to the fact that the matter is still pending before Nodal Agency, and Nodal Agency has yet not taken final decision and until such decision is taken by the Nodal Agency, appropriate directions are required to be issued to respondent nos. 2 & 3. So that the petitioner may not have to face unnecessary difficulties. The Respondent no. 1 and State Monitoring Committee shall take into consideration the fact that the Gram Sabha, i.e. the body/authority constituted the provisions under the said Act has already made recommendation in favour of the petitioners. Appropriate decision as regards the petitioners's request/representation may be expedited by respondent no. 1 and the State Committee and appropriate direction may be passed as expeditiously as possible and preferable within four weeks having regard to the difficulties being faced by the petitioners.

12. It is clarified that after any order is passed by respondent no. 1 and State Committee, if petitioners still feel aggrieved by any action or even by the said order, it would be open to the petitioners to take out appropriate proceedings.

13. With the aforesaid clarification, present petitions are disposed of at this stage. Direct service is permitted.

Rambhai Bhikhabhai Makwana vs. State of Gujarat & Ors.

SCA NO.1999 OF 2011
HIGH COURT OF GUJARAT
8.03.2013
CORAM: Z.K. SAIYED, J.

SUMMARY

This writ petition was filed under the Electricity Act, 2003 and the Scheduled Tribes and Other Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA), by forest dwellers whose rights have been recognized under the FRA inside a wildlife sanctuary. The Petitioner made an application for an electricity connection, but the same was rejected on the ground that permission from the National Board for Wild Life (NBWL) or "wildlife clearance", and clearance under the Forest Conservation Act, 1980 (1980 Act) is required in advance.

The prayer in the writ petition sought a mandamus to the respondent no. 2 PGVCL to provide the electric connection forthwith, without demanding any further certificate from the remaining respondents, i.e. the Ministry of Environment and Forests (MoEF) and the NBWL.

The respondents argued quite forcefully that such clearances were essential, and the electricity connection cannot be granted without them.

Agreeing with the submissions made by the State government, the Court passed an order directing PGVCL to forward such application of the petitioner to the MoEF, which shall forward such application to the authority i.e. Standing Committee of National Board for Wildlife, New Delhi.

Accordingly, the writ petition was disposed of with the direction that "the said Authorities are directed to consider and decide the application in accordance with law preferably within six months from the receipt of the application".

EDITOR'S NOTE

This judgment proceeds on an erroneous reading of the law, and in particular Section 4(7) of the FRA, which provides that the forest rights shall be conferred "free of all encumbrances and procedural requirements, including clearance under the Forest (Conservation) Act, 1980…". Being per incuriam, the judgment accordingly has little precedent value.

ORDER

1. By way of this petition under the provisions of Electricity Act, 2003 and Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights Act), 2006, the petitioner seeks following prayers:

    [a] By an appropriate Writ, order and/or direction and/or by Writ of Mandamus directing the Respondent no. 2 to provide the electric connection forthwith without demanding any further certificate from the Respondent no. 3 to 5.

    [d] Pending hearing and till the final disposal, the Respondent no. 2 electric company be restrained from forfeiting the deposits made by the respective Petitioner as explained herein before in detail.

2. The facts of the case in brief are such that the petitioner being agriculturist the land within the settlement area of Forest Department and his name is in Farmer s Diary as Khedut Pothi. The petitioner with a view to get connection of electricity, applied before the respondent No. 2 and he paid amount of Rs.150/- and the respondent issued the receipt. Even the petitioner is a settlement farmer within the forest department which reflects from form Nos.8 and 9. The electric connection was approved to the petitioner by respondent No. 2 and accordingly, the petitioner made payment as per requirement towards the new service connection charges, connection security deposit and cost agreement fees. The respondent No. 2 wrote a letter to the petitioner informing that since the area concerned is within the Forest Department, the connection is yet not given as the Forest Department has denied for providing electric connection. The petitioner also informed the respondent No. 4 about the same. The respondent No. 2 wrote a letter to the petitioner to produce permission letter from the respondent No. 4 for the purpose of electric supply. The petitioner has right, title and interest in the land which is recognized under the Forest Rights Act, 2006 and also Scheduled Tribes and Other Traditional Dwellers (Recognition of Forest Rights) Act, 2006. As per the case of the petitioner, the respondent No. 2 is bound to give electric connection to the petitioner. Therefore, the petition is filed by the petitioner with a direction to provide the electric connection to the petitioner.

3. Learned advocate Mr. Karia for the petitioner submitted that the respondent No. 2 PGVCL may be directed to make an application to respondent Nos. 3 and 4 so as to forward the application for Wild Life Clearance to the Authority i.e. Standing Committee of National Board for Wildlife, New Delhi and also forward the application to Ministry of Forest and Environment at New Delhi for clearance under Forest Conservation Act to give electric connection to the petitioner in the sanctuary without charging NPV from petitioner.

4. Learned advocate Mr. Sinha for respondent No. 2 has not opposed the submission of the learned advocate for the petitioner subject to further direction to the petitioner to make an application to respondent No. 2 PGVCL which in turn shall take further action as may be directed by this Court.

5. Learned AGP submitted that if the respondent No. 2 makes an application to the respondent Nos. 3 and 4, the respondent Nos. 3 and 4 shall forward such application to the Standing Committee of National Board for Wildlife, New Delhi, for Wild Life Clearance and also forward the same for clearance under the Forest Conservation Act for the purpose of electric connection to be given to the petitioner, then the said Authority may be directed to consider such application in accordance with law.

6. In view of the statements of the learned advocates for the parties, the petitioner is directed to make an application before the respondent No. 2 PGVCL for Wild Life Clearance and clearance under the Forest Conservation Act. The respondent No. 2 is further directed to forward such application of the petitioner to the respondent Nos. 3 and 4. The respondent Nos. 3 and 4 are directed to forward such application to the Authority i.e. Standing Committee of National Board for Wildlife, New Delhi and Ministry of Forest and Environment, New Delhi and said Authorities are directed to consider and decide the application in accordance with law preferably within six months from the receipt of the application forwarded by respondent Nos. 3.

   In view of above direction, the petition is disposed of. Rule is made absolute to the aforesaid extent.

Action Research in Community Health & Development (ARCH) & Ors. vs. State of Gujarat & Ors.

WP (PIL) NO. 100/2011. ETC.; 2013 (O) GLHEL-HC 229483
HIGH COURT OF GUJARAT
03.05.2013
CORAM: BHASKAR BHATTACHARYA, C.J. AND J.B. PARDIWALA, J.
CITATION: 2013 SCC ONLINE GUJ 2583

SUMMARY

This is a batch of writ petitions substantially for the enforcement of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) and the Rules framed thereunder (FR Rules). The petitioners sought directions from the Court quashing a series of executive instructions issued by the State government restricting the meaning and intent of the FRA. In particular, the petitioners challenged the insistence of the State Forest Department upon production of satellite imageries as a mandatory form of proof along with a claim for forest rights.

According to the respondent State government, many grievances of the petitioners would not survive as the same have been taken care of by the resolution dated October 12, 2011 where a decision has been taken to review all such cases wherein the claims have been rejected under the FRA and FR Rules. It claimed that the provisions of the FRA and the FR Rules are being implemented in "letter and spirit". Further, it claimed that the resolution passed by the State Level Monitoring Committee empowers the authorities to use satellite imageries of stipulated period to confirm the possession of the claimant, and that the use of satellite imageries are used in an absolutely scientific manner to confirm the claims.

In a detailed judgment, the High Court closely examined the objective and purpose of FRA, the mechanism for recognition, verification and vesting of forest rights, and so on. The Court cited with approval the decision of the Supreme Court in the *Niyamgiri case* [43]. It further noted that the 2012 amendment to the FR Rules vide

[43] *Orissa Mining Corporation vs. Ministry of Environment and Forests & Ors.* (2013) 6 SCC 476.

Rule 12A(11) clearly states that satellite imagery cannot be made mandatory.

The Court stated that "we are of the opinion, having regard to the object of the Act and the purpose for which the same has been enacted, that to demand from such a class of citizens strict proof as regards their rights would frustrate the very object with which the Act has been enacted". The primary duty of the State with respect to the FRA is to adopt a constructive approach to achieve the purpose of the Act.

DIRECTIONS ISSUED

The Court disposed of the writ petitions by issuing a detailed list of directions (see para 45 below) to the respondent State government. This included directing that the claims rejected on this and other specious grounds be re-opened and examined again in accordance with the law. The Court also directed that cogent reasons be provided for rejection or modification of claims.

The Court further directed that a previous order of status quo with regard to dispossession of the 1,28,806 pending claims shall remain in force until their disposal.

EDITOR'S NOTE

This judgment marks an important milestone in the jurisprudence around the FRA, in that a constitutional court issued detailed directions *in rem* regarding a host of implementation issues. The judgment clearly reflects an understanding that, given the dramatic paradigm shift in forest law resulting from FRA, procedural rights are not merely 'formalities', but integral to the advancement of the right itself. In recognising that procedural due process can make or break a right, even moreso for a law which shifts the balance of power at so many levels, this judgment has buttressed the importance of ensuring that the procedures for vesting and recognition of forest rights as elucidated in the FRA and the FR Rules, are adhered to.

As subsequent decisions extracted in this compendium will demonstrate, the articulation of the importance of due process in this judgment was tested over and over again by the implementing agencies, with claimants coming before the Court repeatedly seeking, quite simply, the implementation of this judgment.

JUDGMENT

(the Judgment of the Court was delivered by J.B.Pardiwala, J.)

1. As common questions of fact and law have been raised in both the above captioned petitions, the same were heard analogously and are being disposed of by this common judgment and order. The Writ Petition (PIL) No. 100 of 2011, in the nature of Public Interest Litigation, has been preferred by Action Research in Community Health & Development (ARCHD), a registered public trust and a society working for the welfare of the tribals of Gujarat for the past thirty years jointly with two other petitioners who are also engaged in the welfare of the tribals and have prayed for the following reliefs:

   "(I) Quash and set aside all the orders of rejection of claims of tribals and other forest

dwellers who have preferred the claims under the [Forest Rights Act] and the Rules, by Sub-Divisional Level Committees and District Level Committees in 12 districts, namely: Narmada, Dangs, Vadodara, Sabarkantha, Banaskantha, Valsad, Navsari, Tapi, Surat, Bharuch, Panchmahal, Dahod; and to direct them to consider and decide all these claims afresh.

(II) Quash and set aside the instructions given by the respondents and the Resolution dated 20-1-2010, Circulars dated 6-3-2010, 12-3-2010 and 23-3-2010 and letters dated 27-5-2010, 3-6-2010 and 12-7-2010 referred to and annexed as annexures K, L, M, N, P, S and T in so far as they are contrary to the provisions of the Forest Rights Act and the Forest Rights Rules, as mentioned in this petition or are contrary otherwise, and the respondents may be directed not to issue any directions/ instructions that are against the provisions of this Act and the Rules; and to direct the respondents to decide the aforesaid claims keeping in mind the Forest Rights Act and the Rules.

(III) Direct the respondents to consider not only record-based evidence only, but all the evidences that are envisaged under the Rule 13, including physical evidences and approve forthwith all claims that have minimum two of these evidences.

(IV) Declare that the way Satellite Imageries have been used is highly unscientific, defective, unsatisfactory and illegal; and to quash the rejection of claims based on the use of these imageries and to direct that if they are to be used in future the same may be used in a scientific manner in the way suggested by the petitioners and to direct that in that case too, it may be used in a transparent manner with active involvement of the claimants and the Gramsabhas and also that it may be used only as one of the evidences, and the claims may not be rejected solely on the basis of the same.

(V) Direct the respondents to consider the cut-off date of 13-12-2005 for deciding the claims and not 1980;

(VI) Issue directions to the respondents that in case of the claims of Other Traditional Forest Dwellers, Genealogy may be considered as sufficient evidence to establish residence for 3 generations and to provide additional evidences like voters lists, settlement records, etc. to the claimants/Forest Right Committees;

(VII) Issue directions to the respondents not to outright reject claims over lands where the claimants have been evicted by the FD before or after 2005 but to treat their claims as claim for in situ rehabilitation as per Section 3(1)(m) and then take appropriate decisions.

(VIII) Issue appropriate instructions to the State Government and Sub-Divisional Level Committees and District Level Committees to provide reasonable opportunities to the affected claimants to present their case before any order is passed against their claims;

(IX) Initiate prosecution against the responsible officers and others, who have passed resolutions, sent circulars and/or gave instructions, etc., contrary to the Forest Rights Act and the Rules as mentioned in the petition and thereby knowingly violated the provisions of this Act and the Rules and committed the offence under Section 7 of the Act;

(X) To monitor and supervise the implementation of the Forest Rights Act, more particularly decisions of claim applications of the tribals and other forest dwellers

and evolve mechanism for proper implementation of the said Act; as the same concerns the very life and livelihood of more than one lakh tribals and other forest dwellers.

(XI) Direct the respondents to expedite the process of recognition of Community Rights over forest resources including right to protect, conserve, regenerate forests for sustainable use and cover all villages in the same and also to expedite the process of conversion of forest settlement villages into revenue villages.

(XII) During pendency of this petition direct the respondents, particularly the Forest department, not to evict any person from the forest lands under their occupation or harass any persons who have filed the claims for individual rights under this Act and whose claims may have been rejected, partially approved or pending.

(XIII) Any other relief or direction."

2. The Writ Petition (PIL) No. 168 of 2012, in the nature of a Public Interest Litigation, has been preferred by Van Kanun Bachau Samiti, a committee constituted by local tribals of four talukas, namely, Songarh, Uchhal of Tapi District, Umarpada of Surat District and Sagbara of Narmada District, and have prayed for the following reliefs:

"(I) Quash and set aside all the orders of rejection of claims of tribals and other forest dwellers who have preferred the claims under the Forest Rights Act and the Rules, by Sub-Divisional Level Committees and District Level Committees in 3 districts, namely, Narmada, Tapi, Surat; and to direct them to consider and decide all these claims afresh.

(II) Quash and set aside the instructions given by the respondents and the Resolution dated 20-1-2010, Circulars dated 6-3-2010, 12-3-2010 and 23-3-2010 and letters dated 27.5.2010, 3-6-2010 and 12-7-2010 in so far as they are contrary to the provisions of the Forest Rights Act and the Forest Rights Rules, as mentioned in this petition or are contrary otherwise, and the respondents may be directed not to issue any directions/instructions that are against the provisions of this Act and the Rules; and to direct the respondents to decide the aforesaid claims keeping in mind the Forest Rights Act and the Rules.

(III) Direct the respondents to consider not only record-based evidence only, but all the evidences that are envisaged under the Rule 13, including physical evidences and approve forthwith all claims that have minimum two of these evidences.

(IV) Declare that the way Satellite Imageries have been used is highly unscientific, defective, unsatisfactory and illegal; and to quash the rejection of claims based on the use of these imageries and to direct that if they are to be used in future the same may be used in a scientific manner in the way suggested by the petitioner and to direct that in that case too, it may be used in a transparent manner with active involvement of the claimants and the Gramsabhas and also that it may be used only as one of the evidences, and the claims may not be rejected solely on the basis of the same.

(V) Direct the respondents to consider the cut-off date of 13-12-2005 for deciding the claims and not 1980;

(VI) Issue directions to the respondents that in case of the claims of Other Traditional Forest Dwellers, Genealogy may be considered as sufficient evidence to establish residence for 3 generations and to provide additional evidences like voters lists,

settlement records, etc. to the claimants/Forest Right Committees;

(VII) Issue directions to the respondents not to outright reject claims over lands where the claimants have been evicted by the FD before or after 2005 but to treat their claims as claim for in situ rehabilitation as per Section 3(1)(m) and then take appropriate decisions.

(VIII) Issue appropriate instructions to the State Government and Sub-Divisional Level Committees and District Level Committees to provide reasonable opportunities to the affected claimants to present their case before any order is passed against their claims;

(IX) Initiate prosecution against the responsible officers and others, who have passed resolutions, sent circulars and/or gave instructions, etc., contrary to the Forest Rights Act and the Rules as mentioned in the petition and thereby knowingly violated the provisions of this Act and the Rules and committed the offence under Section 7 of the Act;

(X) To monitor and supervise the implementation of the Forest Rights Act, more particularly decisions of claim applications of the tribals and other forest dwellers and evolve mechanism for proper implementation of the said Act; as the same concerns the very life and livelihood of more than one lakh tribals and other forest dwellers.

(XI) Direct the respondents to expedite the process of recognition of Community Rights over forest resources including right to protect, conserve, regenerate forests for sustainable use and cover all villages in the same and also to expedite the process of conversion of forest settlement villages into revenue villages.

(XII) During pendency of this petition direct the respondents, particularly the Forest department, not to evict any person from the forest lands under their occupation or harass any persons who have filed the claims for individual rights under this Act and whose claims may have been rejected, partially approved or pending.

(XIII) Any other relief or direction."

FACTUAL BACKGROUND

3. The petition is substantially for the enforcement of the Forest Rights of more than one lakh families of forest dwelling scheduled tribes and other traditional forest dwellers. According to the petitioners, such rights have been recognized under the benevolent piece of legislation passed by the Parliament in the year 2006, namely, Scheduled Caste and Other Traditional Forest Dwellers (recognition of) Forest Rights Act, 2006. Under Section 14 of the Act, Rules have also been framed known as Scheduled Tribes and Other Traditional Forest Dwellers (recognition of) Forest Rights Rules, 2007. The object of such legislation is to recognize and confer the forest rights and occupation of forest land to the Forest Dwelling Scheduled Tribes (FDSTs) and Other Traditional Forest Dwellers (OTFDs), who have been residing in the forests for generations but whose rights could not be recognized and to provide a framework for recognition of such forest rights so vested and the nature of evidence required for such recognition and vesting.

4. The Act also includes community rights over forest resources, including right to own, access, use and dispose of minor forest produce, including bamboo, and also, most importantly, the right to protect, regenerate, conserve or manage forest resources of

their area as community forest resources for sustainable use. These community rights are most important as they ensure protection and conservation of forests and bio-diversity while ensuring livelihood and food security of the scheduled tribes and other traditional forest dwellers. Another important right recognized by the Act is the right of the communities living in the forest settlement villages to get their villages converted to revenue villages and lands held by them to revenue lands.

5. The Act has also established a three tier quasi-judicial system of authorities and procedures for determining the nature and extent of the rights. It recognizes Gram Sabha as an authority to initiate the process for determining the nature and extent of individual and community rights by receiving the claims, verifying them, passing a resolution recommending approval or rejection of the same and forwarding them to the Sub-Divisional Level Committee (SDLC) for further action, which, after examining, shall forward them to the District Level Committee (DLC) for final decision. Any person (including state agencies like the Forest Department) aggrieved by the resolution of the Gram Sabha can prefer a petition before the SDLC within sixty days. Similarly, any person aggrieved by the decision of the SDLC can also prefer a petition against it before the DLC. The SDLCs and DLCs are to dispose of such petitions, however, no such petition shall be disposed of against the aggrieved person, without first giving him/her a reasonable opportunity to present his/her case.

6. If any authority or committee or officer or member of such authority or committee contravenes any provision of this Act or any Rule concerning recognition of rights, it or they are deemed to be guilty of an offence under the Act and are liable to be proceeded against and punished with fine under Section 7 of the Act.

7. On 13th February 2008, a very unfortunate incident of police firing occurred at Antarsumba of Vijaynagar taluka of Sabarkantha district in which two tribals lost their lives and other three tribals received serious injuries. Following this incident, the State Government appointed a high level Committee under the Chairmanship of retired Chief Secretary of Gujarat, Shri P.K. Laheri, to inquire into its causes and to make recommendations. The Committee stated in its report that the conflict between the tribals and the forest department is because of the department s negative attitude towards forest rights of the tribals which was causing serious problems and to prevent such incidents in future, the State Government must implement the Act in a more meaningful and proper manner and that the forest department must change its attitude and co-operate fully in its implementation.

8. Thereafter, from March 2008, the respondent State Government took immediate steps for the implementation of this Act. It convened special meetings of Gram Sabhas in all 12 eastern tribal districts of the State for constitution of village Forest Rights Committees (FRCs), constituted District and Sub-Divisional Level Committees (DLCs and SDLCs), printed and distributed application forms for both Individual as well as Community Rights (Form-A and Form-B) in all respective villages, got the Act and the Rules translated into Gujarati and distributed the copies of the same along with awareness raising material amongst the villagers, organized training camps for FRC members, etc. The Tribal Development Department played a pivotal role in all such activities. This created a widespread hope amongst the forest dwellers and others that the Act would be properly implemented by the respondents in its true letter and spirit.

9. From April 2008, the Gram Sabhas and the village Forest Rights Committees (FRC) started the process of receiving and verifying the claims for forest rights, as provided under the Act and the Rules. Many people, including high level government officials, had expressed doubts whether they would be able to perform such tasks or not as they

had never undertaken such type of work before. However, this was for the first time that they were given such an important role and therefore were found to be highly motivated and took up their responsibilities under the Act very seriously. The petitioners also printed booklets and organized series of workshops across all 12 districts to provide help and guidance to them in that regard. As a result, the Gram Sabhas and the FRCs have, by and large, carried out their tasks in a fair and responsible manner.

10. They obtained the claim forms from the government, distributed them to the claimants, helped them in filling the forms, explained them the types of evidences that could be adduced in support of the claims, received the claims from the claimants, carried out the field verification of each and every plot of the claimed land and prepared rojkam, panchnama etc., took or verified statements given by village elders and other witnesses and examined other evidences and for each claim arrived at the finding as to whether the same was worth approving or not. They then presented such findings to the Gram Sabhas, who after considering them passed appropriate resolutions and forwarded the same together with original claim files to the Sub Divisional Level Committees (SDLCs) for further action. Most importantly, almost all the FRCs gave opportunity to the Forest Department to present its case/ objections with respect to the claims received by the FRCs. They gave prior notice/intimation to the forest department before field verification, giving them details of the claims received and dates on which field verification would be done and requesting them to remain present and present their case/objections during the same. At many places, the forest department officers also remained present during the process of field verification and raised their objections, if any, but in some districts, they simply ignored the notices and did not remain present during the field verification of the claims nor did they make any representation before the FRCs.

11. During this period, the FRCs in about 3500 villages with forest lands across 12 eastern districts of Gujarat received about 1,80,000/- individual claims for recognition of their rights over forest lands. After completing the verification process and passing appropriate resolutions, the Gram Sabhas started sending the files to the SDLCs from the beginning of 2009. By the end of 2009, most of the Gram Sabhas had more or less completed their tasks.

12. In the meantime, the respondent Tribal Development Department had apparently instructed the district authorities to take up and approve only pre-1980 claims and from those also only the claims that were: (i) already given in-principle approval under the previous State Government Resolution of 1992, but could not be given final formal orders; or (ii) were approved by the Forest Settlement Officers at the time of forest settlement and were recommended to be deleted from the forest area. The petitioners and the tribals came to know about this from the actions of the officers attached with the SDLCs, who started going to the villages asking the FRCs to deposit such files.

13. When the petitioners and others raised objections saying that it was contrary to the cut-off date, which was 13th December 2005, they were told that the same was done only to speed up the process and the remaining cases would be taken up in the next round. But far from doing so, this actually created a lot of confusion and gave a wrong signal to the district and sub-divisional level officers that only such pre-1980 claims were to be approved under the Act.

14. In the first week of May 2009, the State Government also declared at the highest level that only about 10% of the claims filed by the claimants were genuine claims. This was reportedly discussed during the meeting of State Level Monitoring Committee held on 7th May 2009, as reported by the Times of India on 10th May 2009.

15. Approximately 1,82,000 individual claims were preferred across the 13 districts of the State, out of which 1,13,000 claims which were approved by Gram Sabha were rejected by SDLCS and DLCS. According to petitioners, this summary rejection was the outcome of instructions given by the respondents vide annexures K, L, M, N, P, S and T. Such instructions are in violation of Rule-13 of the Rules. The petitioner s main grievance regarding rejection of individual forest rights revolves around the alleged violation of Rule 13.

16. According to the petitioners, in all 1,13,000 claims were rejected though they deserved to be approved. Out of such rejected claims, 45,000 claims were rejected on the ground that no minimum two evidences were produced by the claimants and that their claims were not supported by the BISAG map. In terms of Rule 13 (2) more than one evidence has to be produced, but according to the petitioners, apart from the statements of the elders which the respondents considered, they had produced other evidence too, but the SDLC and DLCs did not consider the same to evidences. This was in violation of rule 13 which permits such evidences to be produced and considered. As far as support from BISAG map is concerned, according to the petitioners because of the unscientific and defective user of BISAG maps, wrong conclusions have been reached as regards the claimants claims. The other 29,000 rejected claims were also rejected assigning the same reason that the minimum two evidences could not be adduced by the claimants. In such cases, the satellite imageries were not at all used. According to the petitioners, although the respondents own instructions required them to resort to user of satellite imageries, they did not consider the same and rejected such claims without verifying as to whether the satellite imageries of 2005 and 2007 showed the cultivations in the claimed lands or not.

17. According to the petitioners, the other 8,500 claims were rejected assigning the reason that there was no proof of such claimants being other traditional forest dwellers as claimed by them. As per Section 2(o), "Other traditional forest dwellers" means any member or community who has for at least three generations prior to 13th December 2005 primarily resided in and who depend on the forest land for bona fide livelihood needs. In explanation of Section 2(o), it is stated that 'generation' means a period comprising of 25 years. It is the case of the petitioners that such claims were rejected insisting that proofs should be adduced of residents in the forest or forest land for three generations i.e. 75 years. However such is not the requirement under section 2 (o) of the Act. The other 9000 claims of scheduled tribes were rejected because the scheduled tribe certificates were not attached. However, the plight of the scheduled tribe claimants in these cases was that the authorities did not provide such certificates. The other 7000 claims were rejected by assigning the reason that the claimants were not in possession of the claimed lands. However, according to the petitioners, section 3 (1) (m) gives the forest rights of in situ rehabilitation including alternative land in cases where the scheduled tribe and other traditional forest dwellers were illegally evicted or displaced from forest land without receiving their legal entitlement prior to 13th December 2005. The preamble also emphasizes to address the cases of those who were forced to relocate their dwelling due to state development interventions. Section 4 (8) of the Act lays down that the forest rights recognized and vested under the Act shall include the right of land to forest dwelling for scheduled tribes and other traditional forest dwellers who can establish that they were displaced from their dwelling and cultivation without compensation due to state development interventions and where the land was not used for the purpose for which it was acquired within five years of the said acquisitions. According to the petitioners, the claim of the claimants who were not in possession ought not to have been summarily rejected but their cases should have been considered for in situ rehabilitation, wherever such evidences was available on the record of the claim.

18. The petitioners have placed reliance on Rule 13 of the Scheduled Caste and Other Traditional Forest Dwellers (recognition of) Forest Rights Rules, 2007. Rule 13 is with regard to the evidence which the claimants are expected to adduce for determination of the forest rights. Rule 13 reads as under:

"13. **Evidence for determination of forest rights.**- (1) The evidence for recognition and vesting of forest rights shall, inter alia, include-

(a) public documents, Government records such as Gazettes, Census, survey and settlement reports, maps, satellite imagery, working plans, management plans, micro-plans, forest enquiry reports, other forest records, record of rights by whatever name called, pattas or leases, reports of committees and commissions constituted by the Government, Government orders, notifications, circulars, resolutions;

(b) Government authorised documents such as voter identity card, ration card, passport, house tax receipts, domicile certificates;

(c) physical attributes such as house, huts and permanent improvements made to land including levelling, bunds, check dams and the like;

(d) quasi-judicial and judicial records including court orders and judgments;

(e) research studies, documentation of customs and traditions that illustrate the enjoyment of any forest rights and having the force of customary law, by reputed institutions, such as Anthropological Survey of India;

(f) any record including maps, record of rights, privileges, concessions, favours, from erstwhile princely States or provinces or other such intermediaries;

(g) traditional structures establishing antiquity such as wells, burial grounds, sacred places;

(h) genealogy tracing ancestry to individuals mentioned in earlier land records or recognized as having been legitimate resident of the village at an earlier period of time;

(i) statement of elders other than claimants, reduced in writing.

(2) An evidence for Community Forest Rights shall, inter alia, include-

(a) community rights such as nistar by whatever name called;

(b) traditional grazing grounds; areas for collection of roots and tubers, fodder, wild edible fruits and other minor forest produce; fishing grounds; irrigation systems; sources of water for human or livestock use, medicinal plant collection territories of herbal practitioners;

(c) remnants of structures built by the local community, sacred trees, groves and ponds or riverine areas, burial or cremation grounds;

3. The Gram Sabha, the Sub-Divisional Level Committee and the District Level Committee shall consider more than one of the above-mentioned evidences in determining the forest rights."

19. According to the petitioners, the nature of evidences enumerated under Rule 13 are merely illustrative and not exhaustive. The main grievance redressed by the petitioners

is that a satellite imagery has been shown as a piece of evidence under Rule 13, Clause (1), Sub-clause (a), but the authorities have been insisting for a satellite imagery provided only by Bhaskaracharya Institute of Space Applications and Geo Informatics, Gandhinagar. According to the petitioners, the said institute has been authorized by the respondents to use satellite imagery and have been entrusted with the duty of acquiring the imageries and preparing maps indicating the areas of cultivation as common plots. According to the petitioners, the respondents should also consider evidence of satellite imagery other than those provided by BISAG. It is also the case of the petitioners that under Rule 13, Clause (1), Sub-clause (c) the physical attributes such as house, huts and permanent improvements made to land including leveling, bands, check dams and the like are also pieces of evidences which the respondents are duty bound to consider while deciding the claims but the respondents have refused to consider the same despite the fact that the forest rights committee constituted under the Rules vested the lands in question and prepared panchnamas indicating such physical attributes.

20. According to the petitioners, under Section 4, Clause (3) of the Act, the claimants have to show that they had occupied the claimed forest land before 13th December 2005 and under Section 4, Clause (6) such claimed land should be under their occupation on the date of commencement of the Act i.e. 31st December 2007. The grievance of the petitioners is that although such physical attributes are noted subsequent to the above referred dates, the age of such physical attributes could be easily ascertained by the committee but such evidence has been refused to be considered by the SDLCs and DLCs.

21. It is also the complaint of the petitioners that Rule 13, Clause (1), sub-clause (d) permits quasi judicial and judicial records including the Court orders and judgments to be produced and considered and many of the claimants have produced such evidences but the respondents have ignored the same.

22. According to the petitioners, the SDLCs and DLCs are insisting upon only the record based evidence and that too of the authorized departments. The respondents have thought fit to consider only the following two kind of forest department records.

"(i) the list prepared by the forest department of those pre 1980 claims which were in principle approved under GR of 1992; but could not be given final formal orders;

(ii) the list of forest settlement officers' reports recommending deletion of the lands from the proposed forest areas;"

23. According to the petitioners, the SDLCs and DLCs, in cases where there is no forest department's record based evidence, were instructed to use satellite imageries. The petitioners have clarified that they do not have any objection to the use of such satellite imageries. However, their objection is that satellite imageries should not be the only piece of evidence to be considered for the purpose of deciding the claim. According to the petitioners, the following aspects are necessary to be kept in mind.

"(A) The user of satellite imageries is highly unscientific. The BISAG, which has been given the task of preparing maps from the satellite imageries, overlays the village map over the concerned satellite imageries of 2005 and 2007 and in the forest number, they earmark as common plots the areas where they find cultivation in year 2005 and 2007 and then prepare maps, the print-out of which are sent for the use of them by the SDLCs and DLCs. According to petitioners, this procedure is highly unscientific as it is very difficult to earmark the common plots thus prepared actually on the ground and more often than not SDLCs and DLCs do not resort to this, resultantly by assumption they decide the claims.

(B) Such method is also highly defective as could be seen from the maps prepared by BISAG. In almost every village 40-50% cultivated lands claimed by the petitioners are left out, as a result of which the deserving claims are rejected.

(C) The claimants themselves in many cases purchased the satellite imageries from NRCHyderabad, from where even BISAG gets the imageries. They, then, carry out GPS-PDA Survey of their claimed lands, this way they obtain the co-ordinates of the corners of the lands which they superimpose over the imageries and earmark their claimed lands over the satellite imagery. This will easily show whether in such an earmarked land, there is cultivation or not. According to the petitioners, the BISAG should also adopt this method, however they do not resort to such a simple method.

(D) The petitioners desire that such a prepared map on NRCimagery or such other imagery such as google earth etc should also be allowed to be produced and considered, as the same is to be considered under Rule 13, however, the respondents do not consider the same.

(E) The satellite imageries should not be treated as final and it should have been considered as only one of the evidence. However, the respondent consider the same to be final and if the imagery does not support the claim of the claimant, the same is being rejected by SDLCs and DLCs."

24. According to the petitioners, the instructions of the respondents issued on the SDLCs and DLCs which are annexed to the petition and marked as Annexures K, L, M, N, P, S and T deserve to be recalled and reconsidered.

25. In such circumstances, referred to above, the petitioners have prayed for appropriate reliefs as contained in paragraph 12 of both the petitions are concerned.

STANCE OF THE RESPONDENTS

26. On behalf of the respondent no. 2, the Additional Chief Secretary, Tribal Development Department, one Mr. TL Patel, Joint Director (FRA) Commissionerate of Tribal Department has affirmed an affidavit.

27. According to the respondent, many grievances of the petitioners would not survive as the same have been taken care of by the resolution of the State Government dated 12th October 2011. Vide resolution dated 12th October 2011, a decision has been taken to review all such cases wherein the claims of the persons have been rejected under the Act and the Rules.

28. According to the respondents, the provisions of the Act and the Rules are being implemented in letter and spirit. According to the respondents, the panchnama, forest offence receipt, etc. are just secondary evidence and the primary evidence should be obtained from other records to establish that the land was in possession of the claimant on the stipulated time and the date. The panchnamas drawn after 31st December 2007 fail to establish that the claimants were in possession on the stipulated date i.e. before 13th December 2005 and on 31st December 2007.

29. According to the respondent, the resolution passed by the State Level Monitoring Committee empowers the authorities to use satellite imageries of stipulated period to confirm the possession of the claimant. The satellite imageries are otherwise an acceptable piece of evidence as held by the Supreme Court in the case of Borivali National Park. According to the respondent, the satellite imageries are used in a

absolutely scientific manner so as to confirm the claim of the claimant and the villagers are permitted to participate in use of such imageries. The respondent has taken a stance that any suggestions from any corner will be taken into consideration so as to simplify the process, making it more transparent and thereby giving true effect to the object of enacting the Act.

30. We have heard Mr.Kirit Panwala, the learned counsel appearing for the petitioners of Writ Petition (PIL) No.100 of 2011 with Ms.Kruti M. Shah, Mr.Bhushan B. Oza, the learned counsel appearing for the petitioners of Writ Petition (PIL) No.168 of 2012 and Mr.Prakash K. Jani, the learned Government Pleader appearing for the State respondent.

31. Having heard the learned counsel for the respective parties and having gone through the materials on record, the only question that falls for our consideration in these petitions is whether the respondents are giving true effect to the provisions of the Scheduled Caste and Other Traditional Forest Dwellers (recognition of) Forest Rights Act, 2006 and the Rules framed thereunder in the interest of the persons for whom the legislature thought fit to enact such a piece of legislation.

32. At this stage, it would not be out of context to look into the objects and reasons of the Act, 2006. The preamble reads as under:

"An Act to recognise and vest the forest rights and occupation in forest land in forest dwelling Scheduled Tribes and other traditional forest dwellers who have been residing in such forests for generations but whose rights could not be recorded; to provide for a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land.

Whereas the recognised rights of the forest dwelling Scheduled Tribes and other traditional forest dwellers include the responsibilities and authority for sustainable use, conservation of biodiversity and maintenance of ecological balance and thereby strengthening the conservation regime of the forests while ensuring livelihood and food security of the forest dwelling Scheduled Tribes and other traditional forest dwellers;

AND WHEREAS the forest rights on ancestral lands their habitat were not adequately recognised in the consolidation of State forests during the colonial period as well as in independent India resulting in historical injustice to the forest dwelling Scheduled Tribes and other traditional forest dwellers who are integral to the very survival and sustainability of the forest ecosystem;

AND WHEREAS it has become necessary to address the long standing insecurity of tenurial and access rights of forest dwelling Scheduled Tribes and other traditional forest dwellers including those who were forced to relocate their dwelling due to State development interventions."

33. Chapter III provides for recognition, restoration and vesting of forest rights and related matters. Section 4 reads as under:

"4.(1) Notwithstanding anything contained in any other law for the time being in force, and subject to the provisions of this Act, the Central Government hereby recognises and vests forest rights in-

(a) the forest dwelling Scheduled Tribes in States or areas in States where they are declared as Scheduled Tribes in respect of all forest rights mentioned in section 3;

(b) the other traditional forest dwellers in respect of all forest rights mentioned

in section3.

(2) The forest rights recognised under this Act in critical wildlife habitats of National Parks and Sanctuaries may subsequently be modified or resettled, provided that no forest rights holders shall be resettled or have their rights in any manner affected for the purposes of creating inviolate areas for wildlife conservation except in case all the following conditions are satisfied, namely:
(a) the process of recognition and vesting of rights as specified in section 6 is complete in all the areas under consideration;

(b) it has been established by the concerned agencies of the State Government, in exercise of their powers under the Wild Life (Protection) Act, 1972 that the activities or impact of the presence of holders of rights upon wild animals is sufficient to cause irreversible damage and threaten the existence of said species and their habitat;

(c) the State Government has concluded that other reasonable options, such as, co-existence are not available;

(d) a resettlement or alternatives package has been prepared and communicated that provides a secure livelihood for the affected individuals and communities and fulfills the requirements of such affected individuals and communities given in the relevant laws and the policy of the Central Government;

(e) the free informed consent of the Gram Sabhas in the areas concerned to the proposed resettlement and to the package has been obtained in writing;

(f) no resettlement shall take place until facilities and land allocation at the resettlement location are complete as per the promised package;

Provided that the critical wildlife habitats from which rights holders are thus relocated for purposes of wildlife conservation shall not be subsequently diverted by the State Government or the Central Government or any other entity for other uses.

(3) The recognition and vesting of forest rights under this Act to the forest dwelling Scheduled Tribes and to other traditional forest dwellers in relation to any State or Union territory in respect of forest land and their habitat shall be subject to the condition that such Scheduled Tribes or tribal communities or other traditional forest dwellers had occupied forest land before the 13th day of December, 2005.

(4) A right conferred by sub-section (1) shall be heritable but not alienable or transferable and shall be registered jointly in the name of both the spouses in case of married persons and in the name of the single head in the case of a household headed by a single person and in the absence of a direct heir, the heritable right shall pass on to the next-of-kin.

(5) Save as otherwise provided, no member of a forest dwelling Scheduled Tribe or other traditional forest dweller shall be evicted or removed from forest land under his occupation till the recognition and verification procedure is complete.

(6) Where the forest rights recognised and vested by sub-section(1) are in respect of land mentioned in clause(a) of sub-section (1) of section 3 such land shall be under the occupation of an individual or family or community on the date

of commencement of this Act and shall be restricted to the area under actual occupation and shall in no case exceed an area of four hectares.

(7) The forest rights shall be conferred free of all encumbrances and procedural requirements, including clearance under the Forest (Conservation) Act, 1980, requirement of paying the 'net present value' and 'compensatory afforestation' for diversion of forest land, except those specified in this Act.

(8) The forest rights recognised and vested under this Act shall include the right of land to forest dwelling Scheduled Tribes and other traditional forest dwellers who can establish that they were displaced from their dwelling and cultivation without land compensation due to State development interventions, and where the land has not been used for the purpose for which it was acquired withing five years of the said acquisition.

5. The holders of any forest right, Gram Sabha and village level institutions in areas where there are holders of any forest right under this Act are empowered to-
(a) protect the wild life, forest and biodiversity;

(b) ensure that adjoining catchments are, water sources and other ecological sensitive areas are adequately protected;

(c) ensure that the habitat of forest dwelling Scheduled Tribes and other traditional forest dwellers is preserved from any form of destructive practices affecting their cultural and natural heritage;

(d) ensure that the decisions taken in the Gram Sabha to regulate access to community forest resources and stop any activity which adversely affects the wild animals, forest and the biodiversity are complied with."

34. Chapter 4 provides for the authorities and the procedure for vesting of forest rights, which reads as under:

"CHAPTER IV
AUTHORITIES AND PRCDURE FOR VESTING OF FOREST RIGHTS

6. (1) The Gram Sabha shall be the authority to initiate the process for determining the nature and extent of individual or community forest rights or both that may be given to the forest dwelling Scheduled Tribes and other traditional forest dwellers within the local limits of its jurisdiction under this Act by receiving claims, consolidation and verifying them and preparing a map delineating the area of each recommended claim in such manner as may be prescribed for exercise of such rights and the Gram Sabha shall, then, pass a resolution to that effect and thereafter forward a copy of the same to the Sub-Divisional Level Committee.

(2) Any person aggrieved by the resolution of the Gram Sabha may prefer a petition to the Sub-Divisional Level Committee constituted under sub-section(3) and the Sub-Divisional Level Committee shall consider and dispose of such petition;

Provided that every such petition shall be preferred within sixty days from the date of passing of the resolution by the Gram Sabha;

Provided further that no such petition shall be disposed of against the aggrieved

person, unless he has been given a reasonable opportunity to present his case.

(3) The State Government shall constitute a Sub-Divisional Level Committee to examine the resolution passed by the Gram Sabha and prepare the record of forest rights and forward it through the Sub-Divisional Officer to the District Level Committee for a final decision.

(4) Any person aggrieved by the decision of the Sub-Divisional Level Committee may prefer a petition to the District Level Committee within sixty days from the date of decision of the Sub-Divisional Level Committee and the District Level Committee shall consider and dispose of such petition:

Provided that no petition shall be preferred directly before the District Level Committee against the resolution of the Gram Sabha unless the same has been preferred before and considered by the Sub-Divisional Level Committee:

Provided further that no such petition shall be disposed of against the aggrieved person, unless he has been given a reasonable opportunity to present his case.

(5) The State Government shall constitute a District Level Committee to consider and finally approve the record of forest rights prepared by the Sub-Divisional Level Committee.

(6) The decision of the District Level Committee on the record of forest rights shall be final and binding.

(7) The State Government shall constitute a State Level Monitoring Committee to monitor the process of recognition and vesting of forest rights and to submit to the nodal agency such returns and reports as may be called for by that agency.

(8) The sub-Divisional Level Committee, the District Level Committee and the State Level Monitoring Committee shall consist of officers of the departments of Revenue Forest and Tribal Affairs of the State Government and three members of the Panchayati Raj Institutions at the appropriate level, appointed by the respective Panchayati Raj Institutions, of whom two shall be the Scheduled Tribe members and at least one shall be a woman, as may be prescribed.

(9) The composition and functions of the Sub-Divisional Level Committee, the District Level Committee and the State Level Monitoring Committee and the procedure to be followed by them in the discharge of their functions shall be such as may be prescribed."

35. Thus, it is evident from the above that the Act of 2006 is a benevolent piece of legislation for the members of the Scheduled Tribes and Other Forest Dwellers. Such members are a class of citizens of this country, who are under-priviledged and hail from a poor strata of the society. It appears that the Ministry of Tribal Affairs in exercise of the powers conferred by Sub-section (1) and (2) ofSection 14 of the Scheduled Caste and Other Traditional Forest Dwellers (recognition of) Forest Rights Act, 2006 amended the Rules of 2008 to be called the Scheduled Caste and Other Traditional Forest Dwellers (recognition of) Forest Rights Amendment Rules, 2012. For the purpose of deciding this petition, it is necessary to consider the amended Rule 12. Rule 12-A which provides for the process of recognition of rights is as under:

"12A. **Process of recognition of rights.**-

(1) On receipt of intimation from the Forest Rights Committee, the officials of the

Forest and Revenue departments shall remain present during the verification of the claims and the verification of evidences on the site and shall sign the proceedings with their designation, date and comments, if any.

(2) If any objections are made by the Forest or Revenue departments at a later date to a claim approved by the Gram Sabha, for the reason that their representatives were absent during filed verification, the claim shall be remanded to the Gram Sabha for re-verification by the committee where objection has been raised and if the representatives again fail to attend the verification process the Gram Sabha's decision on the filed verification shall be final.

(3) In the event of modification or rejection of a claim by the Gram Sabha or a recommendation for modification or rejection of a claim forwarded by the Sub-Divisional Level Committee to the District Level Committee, such decision or recommendation on the claim shall be communicated in person to the claimant to enable him to prefer a petition to the Sub-Divisional Level Committee or District Level Committee as the case may be, within a period of sixty days which shall be extendable to a period of thirty days at the discretion of the above said committees.

(4) If any other state agency desires to object to a decision of the Gram Sabha or the Sub-Divisional Level Committee, it shall file an appeal before the Sub-Divisional Level Committee or the District Level Committee, as the case may be, which shall be decided by the Committee (in the absence of the representative of the concerned agency, if any) after hearing the claimant.

(5) No petition of the aggrieved person shall be disposed of, unless he has been given a reasonable opportunity to present anything in support of his claim.

(6) The Sub-Divisional Level Committee or the District Level Committee shall remand the claim to the Gram Sabha for re-consideration instead of modifying or rejecting the same, in case the resolution or the recommendation of the Gram Sabha is found to be incomplete or prima-facie requires additional examination.

(7) In cases where the resolution passed by the Gram Sabha, recommending a claim, with supporting documents and evidence, is upheld by the Sub-Divisional Level Committee with or without modifications, but the same is not approved by the District Level Committee, the District Level Committee shall record detailed reasons for not accepting the recommendations of the Gram Sabha or the Sub-Divisional Level Committee as the case may be, in writing, and a copy of the order of the District Level Committee along with the reasons shall be made available to the claimant or the Gram Sabha or the Community as the case may be.

(8) The land rights for self-cultivation recognised under clause(a) of sub-section (1) of section 3shall be, within the specified limit, including the forest lands used for allied activities ancillary to cultivation, such as, for keeping cattle, for winnowing and other post-harvest activities, rotational fallows, tree crops and storage of produce.

(9) On completion of the process of settlement of rights and issue of titles as specified in Annexure II, III and IV of these rules, the Revenue and the Forest

departments shall prepare a final map of the forest land so vested and the concerned authorities shall incorporate the forest rights so vested in the revenue and forest records, as the case may be, within the specified period of record updation under the relevant State laws or within a period of three months, whichever is earlier.

(10) All decisions of the Sub-Divisional Level Committee and District Level Committee that involve modification or rejection of a Gram Sabha resolution or recommendation of the Sub Divisional Level Committee shall give detailed reasons for such modification or rejection, as the case may be:

Provided that no recommendation or rejection of claims shall be merely on any technical or procedural grounds:

Provided further that no committee (except the Gram Sabha or the Forest Rights Committee) at the Block or Panchayat or forest beat or range level, or any individual officer of any rank shall be empowered to receive claims or reject, modify, or decide any claim on forest rights.

(11) The Sub-Divisional Level Committee or the District Level Committee shall consider the evidence specified in rule 13 while deciding the claims and shall not insist upon any particular form of documentary evidence for consideration of a claim.

Explanation:

1. Fine receipts, encroacher lists, primary offence reports, forest settlement reports, and similar documentation by whatever name called, arisen during prior official exercise, or the lack thereof, shall not be the sole basis for rejection of any claim.

2. The satellite imagery and other uses of technology may supplement other form of evidence and shall not be treated as a replacement."

36. It also appears that the State Government vide resolution dated 12th October 2011 decided to review all the cases wherein the claims were rejected by the committees under the Act of 2006 and the Rules framed thereunder.

37. During the pendency of this writ petition, the Government of India in its department of Tribal Affairs which is a nodal agency under Section 11 has framed guidelines dated 12th July 2012. The guidelines as issued by the Government of India as regards notified forest rights are as under:

"(A) The officials of the Forest and Revenue department shall remain present during the verification of claims and evidence on the site.(i(a))

(B) The decision on the claim should be communicated to the claimant to enable him to prefer a petition.(i(b))

(C) The claim should be remanded for reconsideration in case the resolution or the recommendation of the Gram Sabha is found to be incomplete or prima-facie requires additional examination.(i(d))

(D) The SDLCs and DLCs should record reasons for not accepting the recommendation of Gram Sabha or SDLCs.(i(e))

(E) All decisions of the SDLCs and DLCs that involve modification or rejection of a Gram Sabha, resolution/recommendation should be in the form of speaking orders. (i(f))

(F) The SDLCs or DLCs should not reject any claim accompanied by any two forms of evidences specified in Rule13, and recommended by the Gram Sabha without giving reasons in writing and should not insist upon any particular form of evidence for consideration of a claim. Fine receipts, encroacher lists, primary offence report, forest settlement reports and similar documentation rooted in prior official exercises or lack there of would not be the sole basis for rejection of any claim.(i(g))

(G) Use of any technology, such as satellite imagery should be used to supplement evidences tendered by a claimant for consideration of the claim and not to replace other evidences submitted by him in support of his claim as the only form of evidence.(i(h))"

38. After declaring the aforesaid guidelines dated 12th July 2012, the Parliament thought fit to amend the Rules of 2007 and that is how Rule 12-A, as referred to above, came to be inserted.

39. Taking into consideration the aforesaid developments, we directed the respondent to file a supplementary affidavit disclosing the status of the pending claim applications and the review applications. The respondents were also directed to disclose in the affidavit whether Rule 12-A had been complied with while deciding the claim applications or the review applications. We also directed that if any fresh claim application or review application was to be disposed of then the amended Rule should be adhered to.

40. Pursuant to our order dated 24th January 2013, the respondent no. 4 affirmed an affidavit stating that they had complied with the provisions of the Act, the amended Rules and guidelines in its true letter and spirit and if the procedure under the amended Rule 12-A was not followed then the respondent would ensure that all necessary steps would be taken for the same.

41. According to the petitioners, the amended Rules are not complied with while deciding the pending claims as well as review applications. It has been submitted by Mr.Panwala as well as Mr.Oza that the instructions contained in Annexures K, L, M, N, P, S and T are still followed by the SDLCs and DLCs.

42. We are of the opinion, having regard to the object of the Act and the purpose for which the same has been enacted, that to demand from such a class of citizens strict proof as regards their rights would frustrate the very object with which the Act has been enacted. Needless to say that the Act 2006 is a social piece of legislation and the legislative intent is to protect the rights of the Scheduled Tribes dwelling in the forests. The objective of such social welfare measures, no doubt is to provide better, efficient and meaningful life to such forest dwellers. The primary duty of the Court, while interpreting the provisions of such Act, is to adopt a constructive approach to achieve the purpose of the Act. Any other interpretation that would defeat the very purpose of the Act is not permissible in law. One should not overlook or ignore the hard fact that the claim petitions are filed by the persons who are absolutely illiterate and would hardly possess any such cogent and convincing evidence to the satisfaction of the authorities. We do not propose to say that the authorities should consider the claims in a slipshod manner but at the same time to decide the entire claim based only on satellite imageries would also not subserve the object of the Act, ignoring other pieces of evidences.

43. In a very recent pronouncement of the Supreme Court dated 8th April 2013 in the case of *Orissa Mining Corporation vs. Ministry of Environment and Forest and Others* in Writ Petition (Civil) No.180 of 2011, the Supreme Court in detail explained the true scope and object of the Act, 2006. We would like to reproduce some of the paragraphs of the said judgment as they are very much relevant so far as the subject matter of the present petition is concerned.

"STS AND TFDS:

Scheduled Tribe, as such, is not defined in the Forest Rights Act, but the word Traditional Forest Dweller has been defined under Section 2(o) as any member or community who has at least three generations prior to the 13th day of December, 2005 primarily resided in and who depend on the forest or forests land for bona fide livelihood needs. Article 366(25) of the Constitution states that STs means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are defined under Article 342 to be the Scheduled Tribes. The President of India, in exercise of the powers conferred by Clause (1) of Article 342 of the Constitution, has made the Constitution (Schedule Tribes) Order, 1950. Part XII of the Order refers to the State of Orissa. Serial No. 31 refers to Dongaria Kondh, Kutia Kandha etc.

32. Before we examine the scope of the Forest Rights Act, let us examine, how the rights of indigenous people are generally viewed under our Constitution and the various International Conventions.

CONSTITUTIONAL RIGHTS AND CONVENTIONS

33. Article 244 (1) of the Constitution of India which appears in Part X provides that the administration of the Scheduled Areas and Scheduled Tribes in States (other than Assam, Meghalaya and Tripura) shall be according to the provisions of the Fifth Schedule and Clause (2) states that Sixth Schedule applies to the tribal areas in Assam, Meghalaya, Tripura and Mizoram. Evidently, the object of the Fifth Schedule and the Regulations made thereunder is to preserve tribal autonomy, their cultures and economic empowerment to ensure social, economic and political justice for the preservation of peace and good Governance in the Scheduled Area. This Court in *Samatha v. Andhra Pradesh* (1997) 8 SCC 191 ruled that all relevant clauses in the Schedule and the Regulations should be harmoniously and widely be read as to elongate the Constitutional objectives and dignity of person to the Scheduled Tribes and ensuring distributive justice as an integral scheme thereof. The Court noticed that agriculture is the only source of livelihood for the Scheduled Tribes apart from collection and sale of minor forest produce to supplement their income. Land is their most important natural and valuable asset and imperishable endowment from which the tribal derive their sustenance, social status, economic and social equality, permanent place of abode, work and living. Consequently, tribes have great emotional attachments to their lands.

34. Part B of the Fifth Schedule [Article 244(1)] speaks of the administration and control of Schedules Areas and Scheduled Tribes. Para 4 thereof speaks of Tribes Advisory Council. Tribes Advisory Council used to exercise the powers for those Scheduled Areas where Panchayat Raj system had not been extended. By way of the Constitution (73rd Amendment) Act, 1992, Part IX was inserted in the Constitution of India. Article 243-B of Part IX of the Constitution mandated that there shall be panchayats at village, intermediate and district levels in accordance with the provisions of that Part. Article 243-C of Chapter IX refers to the composition of Panchayats. Article 243-M (4)(b) states that Parliament may, by law, extend the provisions of

Part IX to the Scheduled Areas and the Tribal areas and to work out the modalities for the same. The Central Government appointed Bhuria Committee to undertake a detailed study and make recommendations as to whether the Panchayat Raj system could be extended to Scheduled Areas. The Committee submitted its report on 17.01.1995 and favoured democratic, decentralization in Scheduled Areas. Based on the recommendations, the Panchayat (Extension to Scheduled Areas) Act, 1996 (for short PESA Act) was enacted by the Parliament in the year 1996, extending the provisions of Part IX of the Constitution relating to Panchayats to the Scheduled Areas. The Statement of Objects and Reasons of the Act reads as follows:

> "There have been persistent demands from prominent leaders of the Scheduled Areas for extending the provisions of Part IX of the Constitution to these Areas so that Panchayati Raj Institutions may be established there. Accordingly, it is proposed to introduce a Bill to provide for the extension of the provisions of Part IX of the Constitution to the Scheduled Areas with certain modifications providing that, among other things, the State legislations that may be made shall be in consonance with the customary law, social and religious practices and traditional management practices of community resources;&.. The offices of the Chairpersons in the panchayats at all levels shall be reserved for the Scheduled Tribes; the reservations of seats at every panchayat for the Scheduled Tribes shall not be less than one-third of the total number of seats."

35. This court had occasion to consider the scope of PESA Act when the constitutional validity of the proviso to section 4(g) of the PESA Act and few sections of the Jharkhand Panchayat Raj Act, 2001 were challenged in *Union of India vs. Rakesh Kumar*, (2010) 4 SCC 50 and this Court upheld the Constitutional validity.

36. Section 4 of the PESA Act stipulates that the State legislation on Panchayats shall be made in consonance with the customary law, social and religious practices and traditional management practices of community resources. Clause (d) of Section states that every Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution. Further it also states in clause (i) of Section 4 that the Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before re-settling or rehabilitating persons affected by such projects in the Scheduled Areas and that the actual planning and implementation of the projects in the Scheduled Areas, shall be coordinated at the State level. Sub-clause (k) of Section 4 states that the recommendations of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory prior to grant of prospective licence or mining lease for minor minerals in the Scheduled Areas. Panchayat has also endowed with the powers and authority necessary to function as institutions of Self-Government.

37. The customary and cultural rights of indigenous people have also been the subject matter of various international conventions. International Labour Organization (ILO) Convention on Indigenous and Tribal Populations Convention, 1957 (No.107) was the first comprehensive international instrument setting forth the rights of indigenous and tribal populations which emphasized the necessity for the protection of social, political and cultural rights of indigenous people. Following that there were two other conventions ILO Convention (No. 169) and Indigenous and Tribal Peoples Convention, 1989 and United Nations Declaration on the rights of Indigenous Peoples (UNDRIP), 2007, India is a signatory only to the ILO Convention (No. 107).

38. Apart from giving legitimacy to the cultural rights by 1957 Convention, the Convention on the Biological Diversity (CBA) adopted at the Earth Summit (1992) highlighted necessity to preserve and maintain knowledge , innovation and practices of the local communities relevant for conservation and sustainable use of bio-diversity, India is a signatory to CBA. Rio Declaration on Environment and Development Agenda 21 and Forestry principle also encourage the promotion of customary practices conducive to conservation. The necessity to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources have also been recognized by United Nations in the United Nations Declaration on Rights of Indigenous Peoples. STs and other TFDs residing in the Scheduled Areas have a right to maintain their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands.

39. Many of the STs and other TFDs are totally unaware of their rights. They also experience lot of difficulties in obtaining effective access to justice because of their distinct culture and limited contact with mainstream society. Many a times, they do not have the financial resources to engage in any legal actions against development projects undertaken in their abode or the forest in which they stay. They have a vital role to play in the environmental management and development because of their knowledge and traditional practices. State has got a duty to recognize and duly support their identity, culture and interest so that they can effectively participate in achieving sustainable development.

40. We notice, bearing in mind the above objects, the Forest Rights Act has been enacted conferring powers on the Gram Sabha constituted under the Act to protect the community resources, individual rights, cultural and religious rights.

THE FOREST RIGHTS ACT

41. The Forest Rights Act was enacted by the Parliament to recognize and vest the forest rights and occupation in forest land in forest dwelling STs and other TFDs who have been residing in such forests for generations but whose rights could not be recorded and to provide for a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land. The Act also states that the recognized rights of the forest dwelling STs and other TFDs include the responsibilities and authority for sustainable use, conservation of bio-diversity and maintenance of ecological balance and thereby strengthening the conservation regime of the forests while ensuring livelihood and food security of the forest dwelling STs and other TFDs. The Act also noticed that the forest rights on ancestral lands and their habitat were not adequately recognized in the consolidation of State forests during the colonial period as well as in independent India resulting in historical injustice to them, who are integral to the very survival and sustainability of the forest ecosystem.

42. The Statement of Objects and Reasons of the Act states that forest dwelling tribal people and forests are inseparable and that the simplicity of tribals and their general ignorance of modern regulatory framework precluded them from asserting their genuine claims to resources in areas where they belong and depended upon and that only recently that forest management regimes have initiated action to recognize the occupation and other right of the forest dwellers. Of late, we have realized that forests have the best chance to survive if communities participate in their conservation and regeneration measures. The Legislature also has addressed

the long standing and genuine felt need of granting a secure and inalienable right to those communities whose right to life depends on right to forests and thereby strengthening the entire conservation regime by giving a permanent stake to the STs dwelling in the forests for generations in symbiotic relationship with the entire ecosystem.

43. We, have to bear in mind the above objects and reasons, while interpreting various provisions of the Forest Rights Act, which is a social welfare or remedial statute. The Act protects a wide range of rights of forest dwellers and STs including the customary rights to use forest land as a community forest resource and not restricted merely to property rights or to areas of habitation.

47. The definition clauses read with the above mentioned provisions give emphasis to customary rights, rights to collect, use and dispose of minor forest produce, community rights like grazing cattle, community tenure of habitat and habitation for primitive tribal groups, traditional rights customarily enjoyed etc. Legislative intention is, therefore, clear that the Act intends to protect custom, usage, forms, practices and ceremonies which are appropriate to the traditional practices of forest dwellers.

48. Chapter IV of the Act deals with the authorities and procedure for vesting of forest rights. That chapter has only one section i.e. Section 6, which has to be read along with The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Amendment Rules, 2007 and the Amendment Rules 2012.

49. Ministry of Tribal Affairs has noticed several problems which are impeding the implementation of the Act in its letter and spirit. For proper and effective implementation of the Act, the Ministry has issued certain guidelines and communicated to all the States and UTs vide their letter dated 12.7.2012. The operative portion of the same reads as follows:

"GUIDELINES

I) PROCESS OF RECOGNITION OF RIGHTS

(a) The State Governments should ensure that on receipt of intimation from the Forest Rights Committee, the officials of the Forest and Revenue Departments remain present during the verification of the claims and the evidence on the site.

b) In the event of modification or rejection of a claim by the Gram Sabha or by the Sub-Divisional Level Committee or the District Level Committee, the decision on the claim should be communicated to the claimant to enable the aggrieved person to prefer a petition to the Sub Divisional Level Committee or the District Level Committee, as the case may be, within the sixty days period prescribed under the Act and no such petition should be disposed of against the aggrieved person, unless he has been given a reasonable opportunity to present his case.

c) The Sub-Divisional Level Committee or the District Level Committee should, if deemed necessary, remand the claim to the Gram Sabha for reconsideration instead of rejecting or modifying the same, in case the resolution or the recommendation of the Gram Sabha is found to be incomplete or prima-facie requires additional examination.

In cases where the resolution passed by the Gram Sabha, recommending a claim, is upheld by Sub-Divisional Level committee, but the same is not approved by

the District Level Committee, the District Level Committee should record the reasons for not accepting the recommendations of the Gram Sabha and the Sub-Divisional Level Committee, in writing, and a copy of the order should be supplied to the claimant.

e) On completion of the process of settlement of rights and issue of titles as specified in Annexures II, III & IV of the Rules, the Revenue / Forest Departments shall prepare a final map of the forest land so vested and the concerned authorities shall incorporate the forest rights so vested in the revenue and forest records, as the case may be, within the prescribed cycle of record updation.

f) All decisions of the Sub-Divisional Level Committee and District Level Committee that involve modification or rejection of a Gram Sabha resolution/ recommendation should be in the form of speaking orders.

g) The Sub-Divisional Level Committee or the District Level committee should not reject any claim accompanied by any two forms of evidences, specified in Rule 13, and recommended by the Gram Sabha, without giving reasons in writing and should not insist upon any particular form of evidence for consideration of a claim. Fine receipts, encroacher lists, primary offence reports, forest settlement reports, and similar documentation rooted in prior official exercises, or the lack -thereof, would not be the sole basis for rejection of any claim.

h) Use of any technology, such as, satellite imagery, should be used to supplement evidences tendered by a claimant for consideration of the claim and not to replace other evidences submitted by him in support of his claim as the only form of evidence.

i) The status of all the claims, namely, the total number of claims filed, the number of claims approved by the District Level Committee for title, the number of titles actually distributed, the number of claims rejected, etc. should be made available at the village and panchayat levels through appropriate forms of communications, including conventional methods, such as, display of notices, beat of drum etc.

j) A question has been raised whether the four hectare limit specified in Section 4(6) of the Act, which provides for recognition of forest rights in respect of the land mentioned in clause (a) of sub-section (1) of section 3 of the Act, applies to other forest rights mentioned in Section 3(1) of the Act. It is clarified that the four hectare limit specified in Section 4(6) applies to rights undersection 3(1)(a) of the Act only and not to any other right under section 3(1), such as conversion of pattas or leases, conversion of forest villages into revenue villages etc.

II) MINOR FOREST PRODUCE:

(a) The State Government should ensure that the forest rights relating to MFPs under Section 3(1)(c) of the Act are recognized in respect of all MFPs, as defined under Section 2(i) of the Act, in all forest areas, and state policies are brought in alignment with the provisions of the Act. Section 2(i) of the Act defines the term minor forest produce to include “all non-timber produce of plant origin, including bamboo, brush wood, stumps, cane, tussar, cocoons, honey, wax, lac, tendu or kendu leaves, medicinal plants and herbs, roots, tubers, and the like”.

(b) The monopoly of the Forest Corporations in the trade of MFP in many States,

especially in case of high value MFP, such as, tendu patta, is against the spirit of the Act and should henceforth be done away with.

c) The forest right holders or their cooperatives/federations should be allowed full freedom to sell such MFPs to anyone or to undertake individual or collective processing, value addition, marketing, for livelihood within and outside forest area by using locally appropriate means of transport.

The State Governments should exempt movement of all MFPs from the purview of the transit rules of the State Government and, for this purpose, the transit rules be amended suitably. Even a transit permit from Gram Sabha should not be required. Imposition of any fee/charges/royalties on the processing, value addition, marketing of MFP collected individually or collectively by the cooperatives/ federations of the rights holders would also be ultra vires of the Act.

(e) The State Governments need to play the facilitating role in not only transferring unhindered absolute rights over MFP to forest dwelling Scheduled Tribes and other traditional forest dwellers but also in getting them remunerative prices for the MFP, collected and processed by them.

III) COMMUNITY RIGHTS

(a) The District Level Committee should ensure that the records of prior recorded nistari or other traditional community rights (such as Khatian part II in Jharkhand, and traditional forest produce rights in Himachal and Uttarakhand) are provided to Gram Sabhas, and if claims are filed for recognition of such age-old usufructory rights, such claims are not rejected except for valid reasons, to be recorded in writing, for denial of such recorded rights;

(b) The District Level Committee should also facilitate the filing of claims by pastoralists before the concerned Gram Sabha (s) since they would be a floating population for the Gram Sabha(s) of the area used traditionally.

In view of the differential vulnerability of Particularly Vulnerable Tribal Groups (PTGs) amongst the forest dwellers, District Level Committee should play a pro-active role in ensuring that all PTGs receive habitat rights in consultation with the concerned PTGs traditional institutions and their claims for habitat rights are filed before the concerned Gram Sabhas.

(d) The forest villages are very old entities, at times of pre-independent era, duly existing in the forest records. The establishment of these villages was in fact encouraged by the forest authorities in the pre-independent era for availability of labour within the forest areas. The well defined record of each forest village, including the area, number of inhabitants, etc. exists with the State Forest Departments. There are also unrecorded settlements and old habitations that are not in any Government record. Section 3(1)(h) of the Act recognizes the right of forest dwelling Scheduled Tribes and other traditional forest dwellers relating to settlement and conversion on forest villages, old habitation, un-surveyed villages and other villages and forests, whether recorded, notified or not into revenue villages. The conversion of all forest villages into revenue villages and recognition of the forest rights of the inhabitants thereof should actually have been completed immediately on enactment of the Act. The State Governments may, therefore, convert all such erstwhile forest villages, unrecorded settlements

and old habitations into revenue villages with a sense of urgency in a time bound manner. The conversion would include the actual land-use of the village in its entirety, including lands required for current or future community uses, like, schools, health facilities, public spaces etc. Records of the forest villages maintained by the Forest Department may thereafter be suitably updated on recognition of this right.

IV) COMMUNITY FOREST RESOURCE RIGHTS:

(a) The State Government should ensure that the forest rights under Section 3(1)(i) of the Act relating to protection, regeneration or conservation or management of any community forest resource, which forest dwellers might have traditionally been protecting and conserving for sustainable use, are recognized in all villages and the titles are issued as soon as the prescribed Forms for claiming Rights to Community Forest Resource and the Form of Title for Community Forest Resources are incorporated in the Rules. Any restriction, such as, time limit, on use of community forest resources other than what is traditionally imposed would be against the spirit of the Act.

b) In case no community forest resource rights are recognized in a village, the reasons for the same should be recorded. Reference can be made to existing records of community and joint forest management, van panchayats, etc. for this purpose.

c) The Gram Sabha would initially demarcate the boundaries of the community forest resource as defined in Section 2(a) of the Act for the purposes of filing claims for recognition of forest right under Section 3(1)(i) of the Act.

d) The Committees constituted under Rule 4(e) of the Forest Rights Rules, 2008 would work under the control of Gram Sabha. The State Agencies should facilitate this process.

e) Consequent upon the recognition of forest right in Section 3(i) of the Act to protect, regenerate or conserve or manage any community forest resource, the powers of the Gram Sabha would be in consonance with the duties as defined in Section 5(d), wherein the Gram Sabha is empowered to regulate access to community forest resources and stop any activity which adversely affects the wild animals, forest and the bio-diversity. Any activity that prejudicially affects the wild-life, forest and bio-diversity in forest area would be dealt with under the provisions of the relevant Acts.

V) PROTECTION AGAINST EVICTION, DIVERSION OF FOREST LANDS AND FORCED RELOCATION

(a) Section 4(5) of the Act is very specific and provides that no member of a forest dwelling Scheduled Tribe or other traditional forest dwellers shall be evicted or removed from the forest land under his occupation till the recognition and verification procedure is complete. This clause is of an absolute nature and excludes all possibilities of eviction of forest dwelling Scheduled Tribes or other traditional forest dwellers without settlement of their forest rights as this Section opens with the words Save as otherwise provided . The rationale behind this protective clause against eviction is to ensure that in no case a forest dweller should be evicted without recognition of his rights as the same entitles him to a due compensation in case of eventuality of displacement in cases, where

even after recognition of rights, a forest area is to be declared as inviolate for wildlife conservation or diverted for any other purpose. In any case, Section 4(1) has the effect of recognizing and vesting forest rights in eligible forest dwellers. Therefore, no eviction should take place till the process of recognition and vesting of forest rights under the Act is complete.

(b) The Ministry of Environment & Forests, vide their letter No.11-9/1998-FC(pt.) dated 30.07.2009, as modified by their subsequent letter of the same number dated 03.08.2009, has issued directions, requiring the State/ UT Governments to enclose certain evidences relating to completion of the process of settlement of rights under the Scheduled Tribes and otherTraditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, while formulating unconditional proposals for diversion of forest land for non-forest purposes under the Forest (Conservation) Act, 1980. The State Government should ensure that all diversions of forest land for non-forest purposes under the Forest (Conservation) Act, 1980 take place in compliance with the instructions contained in the Ministry of Environment & Forest s letter dated 30.07.2009, as modified on 03.08.2009.

(c) There may be some cases of major diversions of forest land for non-forest purposes under theForest (Conservation) Act, 1980 after the enactment of the Scheduled Tribes and otherTraditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 but before the issue of Ministry of Environment & Forests letter dated 30.07.2009, referred to above. In case, any evictions of forest dwelling Scheduled Tribes and other traditional forest dwellers have taken place without settlement of their rights due to such major diversions of forest land under theForest (Conservation) Act, 1980, the District Level Committees may be advised to bring such cases of evictions, if any, to the notice of the State Level Monitoring Committee for appropriate action against violation of the provisions contained in Section 4(5) of the Act.

(d) The Act envisages the recognition and vesting of forest rights in forest dwelling Scheduled Tribes and other traditional forest dwellers over all forest lands, including National Parks and Sanctuaries. Under Section 2(b) of the Act, the Ministry of Environment & Forests is responsible for determination and notification of critical wildlife habitats in the National Parks and Sanctuaries for the purpose of creating inviolate areas for wildlife conservation, as per the procedure laid down. In fact, the rights of the forest dwellers residing in the National Parks and Sanctuaries are required to be recognized without waiting of notification of critical wildlife habitats in these areas. Further, Section 4(2) of the Act provides for certain safeguards for protection of the forest rights of the forest rights holders recognized under the Act in the critical wildlife habitats of National Parks and Sanctuaries, when their rights are either to be modified or resettled for the purposes of creating inviolate areas for wildlife conservation. No exercise for modification of the rights of the forest dwellers or their resettlement from the National Parks and Sanctuaries can be undertaken, unless their rights have been recognized and vested under the Act. In view of the provisions of Section 4(5) of the Act, no eviction and resettlement is permissible from the National Parks and sanctuaries till all the formalities relating to recognition and verification of their claims are completed. The State/ UT Governments may, therefore, ensure that the rights of the forest dwelling Scheduled Tribes and other traditional forest dwellers, residing in National Parks and Sanctuaries are recognized first before any exercise for modification of their rights or their resettlement, if necessary, is undertaken and no member of the forest dwelling Scheduled Tribe or other traditional forest dweller is evicted from such areas without the settlement of

their rights and completion of all other actions required under section 4(2) of the Act.

(e) The State Level Monitoring Committee should monitor compliance of the provisions ofSection 3(1)(m) of the Act, which recognizes the right to in situ rehabilitation including alternative land in cases where the forest dwelling Scheduled Tribes and other traditional forest dwellers have been illegally evicted or displaced from forest land without receiving their legal entitlement to rehabilitation, and also of the provisions of Section 4(8) of the Act, which recognizes their right to land when they are displaced from their dwelling and cultivation without land compensation due to State development interventions.

VI) AWARENESS-RAISING, MONITORING AND GRIEVANCE REDRESSAL:

a) Each State should prepare suitable communication and training material in local language for effective implementation of the Act.

b) The State Nodal Agency should ensure that the Sub Divisional Level Committee and the District Level Committee make district-wise plans for trainings of revenue, forest and tribal welfare departments' field staff, officials, Forest Rights Committees and Panchayat representatives. Public meetings for awareness generation in those villages where process of recognition is not complete need to be held.

c) In order to generate awareness about the various provisions of the Act and the Rules, especially the process of filing petitions, the State Government should organize public hearings on local bazaar days or at other appropriate locations on a quarterly basis till the process of recognition is complete. It will be helpful if some members of Sub Divisional Level Committee are present in the public hearings. The Gram Sabhas also need to be actively involved in the task of awareness raising.

d) If any forest dwelling Scheduled Tribe in case of a dispute relating to a resolution of a Gram Sabha or Gram Sabha through a resolution against any higher authority or Committee or officer or member of such authority or Committee gives a notice as per Section 8 of the Act regarding contravention of any provision of the Act or any rule made thereunder concerning recognition of forest rights to the State Level Monitoring Committees, the State Level Monitoring Committee should hold an inquiry on the basis of the said notice within sixty days from the receipt of the notice and take action, if any, that is required. The complainant and the Gram Sabha should be informed about the outcome of the inquiry."

GRAM SABHA AND OTHER AUTHORITIES

51. Under Section 6 of the Act, Gram Sabha shall be the authority to initiate the process for determining the nature and extent of individual or community forest rights or both and that may be given to the forest dwelling STs and other TFDs within the local limits of the jurisdiction. For the said purpose it receive claims, and after consolidating and verifying them it has to prepare a plan delineating the area of each recommended claim in such manner as may be prescribed for exercise of such rights. The Gram Sabha shall, then, pass a resolution to that effect and thereafter forward a copy of the same to the Sub-Divisional Level Committee. Any aggrieved person may move a petition before the Sub-Divisional Level Committee against the resolution of the Gram Sabha. Sub-section (4) of Section 6 confers a right on the aggrieved person to prefer a petition to the

District Level Committee against the decision of the Sub-Divisional Level Committee. Sub-section (7) of Section 6 enables the State Government to constitute a State Level Monitoring Committee to monitor the process of recognition and vesting of forest rights and to submit to the nodal agency. Such returns and reports shall be called for by that agency.

52. Functions of the Gram Sabha, Sub-Divisional Level Committee, District Level Committee, State Level Monitoring Committee and procedure to be followed and the process of verification of claims etc. have been elaborately dealt with in 2007 Rules read with 2012 Amendment Rules. Elaborate procedures have therefore been laid down by Forest Rights Act read with 2007 and 2012 Amendment Rules with regard to the manner in which the nature and extent of individual or customary forest rights or both have to be decided. Reference has already been made to the details of forest rights which have been conferred on the forest dwelling STs as well as TFDs in the earlier part of the Judgment.

INDIVIDUAL/COMMUNITY RIGHTS

53. Forest Rights Act prescribed various rights to tribals/forest dwellers as per Section 3 of the Act. As per Section 6 of the Act, power is conferred on the Gram Sabha to process for determining the nature and the extent of individual or community forests read with or both that may be given to forest dwelling STs and other TFDs, by receiving claims, consolidate it, and verifying them and preparing a map, delineating area of each recommended claim in such a manner as may be prescribed. The Gram Sabha has received a large number of individual claims and community claims from the Rayagada District as well as the Kalahandi District. From Rayagada District Gram Sabha received 185 individual claims, of -which 145 claims have been considered and settled by granting alternate rights over 263.5 acres of land. 40 Individual claims pending before the Gram Sabha pertain to areas which falls outside the mining lease area. In respect of Kalahandi District 31 individual claims have been considered and settled by granting alternate rights over an area of 61 acres.

54. Gram Sabha has not received any community claim from the District of Rayagada. However, in respect of Kalahandi District 6 community claims had been received by the Gram Sabha of which 3 had been considered and settled by granting an alternate area of 160.55 acres. The balance 3 claims are pending consideration.

CUSTOMARY AND RELIGIOUS RIGHTS (SACRED RIGHTS)

55. Religious freedom guaranteed to STs and the TFDs under Articles 25 and 26 of the Constitution is intended to be a guide to a community of life and social demands. The above mentioned Articles guarantee them the right to practice and propagate not only matters of faith or belief, but all those rituals and observations which are regarded as integral part of their religion. Their right to worship the deity Niyam-Raja has, therefore, to be protected and preserved.

56. Gram Sabha has a role to play in safeguarding the customary and religious rights of the STs and other TFDs under the Forest Rights Act. Section 6 of the Act confers powers on the Gram Sabha to determine the nature and extent of individual or community rights . In this connection, reference may also be made to Section 13 of the Act coupled with the provisions of PESA Act, which deal with the powers of Gram Sabha. Section 13 of the Forest Rights Act reads as under:

"13. Act not in derogation of any other law.

Save as otherwise provided in this Act and the provisions of the Panchayats (Extension of the Scheduled Areas) Act, 1996 (40 of 1996), the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force."

57. PESA Act has been enacted, as already stated, to provide for the extension of the provisions of Part IX of the Constitution relating to Panchayats to the Scheduled Areas. Section 4(d) of the Act says that every Gram Sabha shall be competent to safeguard and preserve the traditions, customs of the people, their cultural identity, community resources and community mode of dispute resolution. Therefore, Grama Sabha functioning under the Forest Rights Act read with Section 4(d) of PESA Act has an obligation to safeguard and preserve the traditions and customs of the STs and other forest dwellers, their cultural identity, community resources etc., which they have to discharge following the guidelines issued by the Ministry of Tribal Affairs vide its letter dated 12.7.2012."

44. In the aforesaid context, we would like to quote with profit the observations of the Supreme Court in the case of *Delhi Jal Board v. National Campaign for Dignity and Rights of Sewerage and Allied Workers and Others* reported in AIR 2011 SC (Supp) 828. In paragraph 15 of the decision, the Supreme Court made the following observations.

"15. In last 63 years, Parliament and State Legislatures have enacted several laws for achieving the goals set out in the preamble but their implementation has been extremely inadequate and tardy and benefit of welfare measures enshrined in those legislations has not reached millions of poor, downtrodden and disadvantaged sections of the society and the efforts to bridge the gap between the haves and have-nots have not yield the desired result. The most unfortunate part of the scenario is that whenever one of the three constituents of the State i.e., judiciary, has issued directions for ensuring that the right to equality, life and liberty no longer remains illusory for those who suffer from the handicaps of poverty, illiteracy and ignorance and directions are given for implementation of the laws enacted by the legislature for the benefit of the have-nots, a theoretical debate is started by raising the bogey of judicial activism or judicial overreach and the orders issued for benefit of the weaker sections of the society are invariably subjected to challenge in the higher Courts. In large number of cases, the sole object of this litigative exercise is to tire out those who genuinely espouse the cause of the weak and poor."

45. In such circumstances, we would like to dispose of both the petitions by issuing following directions which will protect the interest of the claimants as well as the State.

(I) The respondents are directed to strictly comply with Rule 13 and the amended Rule 12-A while disposing of a fresh claim application or a review application, which is already disposed of. In other words, even if a review application has been disposed of then in such circumstances the respondents shall reconsider the claim after complying with Rule 13 and Rule-12A of the Rules.

(II) According to the respondents there are 1,28,866 pending claims as on 7th February 2013. We direct that all such claims be decided by strictly complying with Rule 13 and the amended Rule 12-A.

(III) The respondents are directed to take into consideration the following evidences while deciding the pending 1,28,866 claims.

(a) Field verification panchnamas along with photographs describing the physical attributes of the land indicating occupation prior to 2005 and 2007.

(b) Records of Civil and Criminal Court cases.

(c) Receipts or purchase agreement from erstwhile Princely States.

(d) Government records like above receipts issued by the Forest Department.

(e) Revenue Department receipts.

(f) Satellite imageries and/or maps prepared from imageries other than BISAG and/or maps prepared from other authorized imageries.

(g) The applications made in the past i.e. before 2005 for regularization of the claimed lands.

(IV) We direct the State Government to recall or withdraw the instructions as contained in Annexures K, L, M, N, P, S and T, in light of the amended Rule 12-A.

(V) The respondents shall assign cogent reasons for rejection or modification of the claim, according to the Government guidelines dated 12th July 2012 and the amended Rule 12-A. The copy of such decision should be made available to the claimant at the earliest.

(VI) The respondents are directed to communicate the decision of rejection or modification of the claim, according to Government guidelines dated 12th July 2012 and the amended Rule 12-A, so as to enable the claimants to approach the higher forum in accordance with law.

(VII) The respondents are directed to expedite the process of deciding the pending 1,28,866 claims as well as the process of recognition of community rights over forest resources and also expedite the process of conversion of forest settlement villages into revenue villages.

(VIII) The order of status quo passed by us in Civil Application No.5630 of 2012 shall continue till the disposal of 1,28,866 claims which will be in tune with the provisions of Section 4, Clause (5) of the Act.

46. We are of the view that the directions which we have issued should take care of the grievances voiced by the petitioners. The petitions along with Civil Application are accordingly disposed of with the above directions with no order as to costs.

Bariya Monghiben Shanabhai & Ors. vs. Programme Administrator & Ors.

SCA NO. 11259 OF 2014
HIGH COURT OF GUJARAT AT AHMEDABAD
14.08.2014
CORAM: K.M. THAKER, J.
CITATION: 2014 SCC ONLINE GUJ 9141

SUMMARY

The petitioners are the heirs of one Mr. Shanabhai Galabbhai Baria who had filed an application for recognition of forest rights as far back as 2008. Although he is since deceased, the writ petitioners who are his heirs are claiming protection under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) as well as the detailed judgment passed by the High Court in *Action Research in Community Health & Development (ARCH) & Ors. vs. State of Gujarat & Ors*[44]. They point out to the Court that they have been cultivating the land in question even prior to 1984, but recently the officials of the State Forest Department are making attempts to dispossess them, and prevent them from cultivating these lands.

The Court took note of the fact that subsequent to the decision of the High Court in the *ARCH case* (supra) a number of similar matters have come before this Court, and that there is a specific provision under Section 4(5) of FRA protecting the forest dwellers from dispossession while their applications for recognition of rights are pending.

Accordingly, the Court passed the following directions:

(i) The application of late Mr. Baria be decided by the competent authority as expeditiously as possible, and until such application is finally disposed of, if the petitioners are in actual possession of the land in question, their possession shall not be disturbed.

(ii) The authorities shall decide the application of the petitioners strictly in

[44] Judgment dt. 3.5.2013 in WP (PIL) No. 100 of 2011 etc., Gujarat High Court. This judgment is extracted elsewhere in this compendium.

accordance with the directions issued by the High Court in the *ARCH case* and connected matters, relevant policy, notifications and circulars.

EDITOR'S NOTE

This decision is one among a large number of petitions which have been filed by individual or small groups of forest dwellers seeking the protection of the Court in light of its previous directions contained in the *ARCH case*. It is illustrative of the difficulties faced by the beneficiaries of a legislation such as the FRA in claiming their lawful and statutory rights on the ground.

ORAL ORDER

1. Heard Ms. Barot, learned advocate for the petitioners, and Mr. Yagnik, learned AGP for the respondent - State, who has appeared on advance service of copy of the petition.

2. In present petition, the petitioners have prayed, inter alia, that:

> "6(B) YOUR LORDSHIPS be pleased to issue appropriate writ, order or direction, directing the respondent authorities and their agents, servants, etc. not to harass the petitioners or cause any disturbance in peaceful possession, cultivation and taking crops from land bearing Survey no.49 of village Chalali, Taluka-Shahera, District-Panchmahal, as per directions of this Hon'ble Court in Writ Petition (PIL) No.100/2011, until the final disposal of the application made by petitioners before respondent no. 3 Pranth Officer, in the interest of justice;
>
> (C) YOUR LORDSHIPS be pleased to respondent authorities or their agents, servants, etc. not to harass the petitioners or cause any disturbance in peaceful possession, cultivation and taking crops from land bearing Survey no.49 of village Chalali, Taluka-Shahera, District-Panchmahal, until the final disposal of application given by petitioners to respondent no.3-Pranth Officer, pending the admission, hearing and final disposal of this petition;"

3. To support and justify the request made in the petition, the petitioners have averred, inter alia, that:

> "3.1 The Petitioners are cultivating the land bearing Survey No.49 situated at village Chalali, Taluka-Shahera, District-Panchmahal. The petitioners are growing tuver, bhindi, danger, bajri, banti, kodar, etc. since many years on these lands.
>
> 3.2 The petitioners are cultivating these lands much prior to 1984 and thereafter till date.
>
> 3.3 The petitioners submit that in the year 2002- 03, the officers of respondent forest department tried to dispossess the petitioners from the aforesaid lands. However, the petitioners did not vacate the land and continued the possession.
>
> 3.4 The petitioners submit that recently, in June 2014 on commencement of monsoon season, though the petitioners are doing agricultural activities, the officers of forest department are trying to harass the petitioners and to vacate the petitioners from the aforesaid lands. The petitioners have also filed application before the Pranth Officer, Lunavada under the Forest Act. One such case is registered as Case

No.0155043, a copy of which is annexed herewith and marked as Annexure-A.

3.5 The petitioners submit that some complaints for the offences punishable under the Indian Forest Act are also filed by Range Forest Officer, Shahera against some of the petitioners by alleging that the petitioners have destroyed trees, grass, etc. by illegally entering into and cultivating forest land. In the said complaints charge sheet appears to have been filed and the case were committed for trial before the Ld. JMFC, Shahera. The said cases were registered as Criminal Case no.2280/1984 and 2103/1985. Copy of the receipt of payment towards fine issued by Ld. Magistrate are annexed herewith and marked as Annexure-B Colly.

3.6 The petitioners submit that since July 2014, the respondent no. 2 and the officers of respondent department are harassing the petitioners and not permitting the petitioners to cultivate the aforesaid lands.

3.7 The petitioners submit that as per Rule 4(5) of Forest Rules, 2006 and as per the order passed by this Hon'ble Court in Writ Petition (PIL) No.100/2011, until the final disposal of the application filed by petitioners, the petitioners should not be harassed or their possession should not be disturbed. However, there is clear violation of the above direction committed by respondents. The impugned action of the respondents is illegal, arbitrary, in violation of direction given by this Hon'ble Court in Writ Petition (PIL) No.100 of 2012 and also, in violation of Forest Act and Rules and bad in law. The petitioners are therefore constrained to approach this Hon'ble Court by way of this petition.

3.8 The petitioner submits that thus, from the above facts and circumstances, it is admitted position on record that the petitioner are in possession of the land bearing Survey No.49 since 1984 uninterruptedly. The petitioners have been cultivating the subject land for all these years. The petitioners are entitled to continue to hold the subject land for cultivation as per the provisions of the Forest Act and Government Notifications issued from time to time."

4. At the time of hearing, learned advocate for the petitioners relied on CAV Judgment dated 3.5.2013 in Writ Petition (PIL) Nos.100 of 2011 and connected matters.

5. For the present purpose, the final directions issued by the Hon'ble Division Bench in the said CAV Judgment dated 3.5.2013 are relevant. Therefore, they are quoted hereinbelow:

"45. In such circumstances, we would like to dispose of both the petitions by issuing following directions which will protect the interest of the claimants as well as the State.

I. The respondents are directed to strictly comply with Rule 13 and the amended Rule 12-A while disposing of a fresh claim application or a review application, which is already disposed of. In other words, even if a review application has been disposed of then in such circumstances the respondents shall reconsider the claim after complying with Rule 13 and Rule-12A of the Rules.

II. According to the respondents there are 1,28,866 pending claims as on 7th February 2013. We direct that all such claims be decided by strictly complying with Rule 13 and the amended Rule 12-A.

III. The respondents are directed to take into consideration the following evidences while deciding the pending 1,28,866 claims.

(a) Field verification panchnamas along with photographs describing the physical attributes of the land indicating occupation prior to 2005 and 2007.
(b) Records of Civil and Criminal Court cases.
(c) Receipts or purchase agreement from erstwhile Princely States.
(d) Government records like above receipts issued by the Forest Department.
(e) Revenue Department receipts.
(f) Satellite imageries and/or maps prepared from imageries other than BISAG and/or maps prepared from other authorized imageries.
(g) The applications made in the past i.e. before 2005 for regularization of the claimed lands.

IV. We direct the State Government to recall or withdraw the instructions as contained in Annexures K, L, M, N, P, S and T, in light of the amended Rule 12-A.

V. The respondents shall assign cogent reasons for rejection or modification of the claim, according to the Government guidelines dated 12th July 2012 and the amended Rule 12-A. The copy of such decision should be made available to the claimant at the earliest.

VI. The respondents are directed to communicate the decision of rejection or modification of the claim, according to Government guidelines dated 12th July 2012 and the amended Rule 12- A, so as to enable the claimants to approach the higher forum in accordance with law.

VII. The respondents are directed to expedite the process of deciding the pending 1,28,866 claims as well as the process of recognition of community rights over forest resources and also expedite the process of conversion of forest settlement villages into revenue villages.

VIII. The order of status quo passed by us in Civil Application No.5630 of 2012 shall continue till the disposal of 1,28,866 claims which will be in tune with the provisions of Section 4, Clause (5) of the Act.

46. We are of the view that the directions which we have issued should take care of the grievances voiced by the petitioners. The petitions along with Civil Application are accordingly disposed of with the above directions with no order as to costs."

6. It is not in dispute that in view of the said decision, certain other matters have been entertained by this Court. Learned AGP fairly submitted that in certain other petitions, interim directions have been passed directing the authorities not to disturb the possession of the petitioners until the application / suit filed by the petitioners claiming forest rights are decided.

7. So far as present case is concerned, it appears that the petitioners herein have filed an application / suit before the competent authority seeking forest rights and the said application / suit is pending before the authority since 2008. The said application / suit came to be filed by Mr. Shanabhai Galabbhai Baria, who died during pendency of the said application / suit, and his heirs / legal representatives have taken out present petition. It is claimed that the application / suit filed by Mr. Baria is pending before the authorities. Learned advocate for the petitioners also relied on the orders dated 22.8.2013 in Special Civil Application No.13191 of 2013 and dated 28.2.2014 in Special Civil Application No.3128 of 2014.

8. Having regard to the said orders and upon considering the directions issued by the Hon'ble Division Bench in order dated 3.5.2013, it appears that present petition can be disposed of, at this stage, with below mentioned observations and clarifications:

8.1 If the application / suit filed by Mr. Shanabhai Galabbhai Baria is pending before the competent authority, then, the same may be decided as expeditiously as possible, and until Page 8 C/SCA/11259/2014 ORDER the said application / suit is not finally decided and disposed of, if the petitioners are in actual and physical possession of the land bearing Survey No.49 of village Chalali, Taluka - Shahera, District - Panchmahals and if the said application / suit filed by Mr. Shanabhai Galabbhai Baria is in connection with the said parcel of land, then, their possession may not be disturbed until the said application / suit is finally decided.

8.2 The authorities shall act and decide the application / suit in accordance with the directions issued by the Hon'ble Division Bench in above referred CAV Judgment dated 3.5.2013 in Writ Petition (PIL) Nos.100 of 2011 and connected matters and relevant policy, notifications, circulars.

The authority may also endeavour to decide the application/suit as expeditiously as possible and preferably within six months.

With aforesaid clarifications and observations, present petition stands disposed of.

Direct service is permitted.

Bariya Parvatsinh Shankarbhai & Ors. vs. Programme Administrator & Ors.

SCA NO.12126 OF 2014
HIGH COURT OF GUJARAT
08.09.2014
CORAM: K.M. THAKER, J.
CITATION: 2014 SCC ONLINE GUJ 9929

SUMMARY

A common writ petition was filed by 20 persons seeking implementation of the directions passed by the High Court in *Action Research in Community Health & Development & Ors. vs. State of Gujarat & Ors*[45]. and also seeking protection from dispossession in terms of Section 4(5) of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA). The Court elected to decide each case separately.

The first petitioner asserted that he has been cultivating the forest land at village Chalali, District Panchmahal before 1984. In 2002-03, the officers of respondent Forest Department tried to dispossess him from the aforesaid land, but the petitioner did not vacate the land and continued in possession. In June 2014, the respondent Forest Department again tried to evict the petitioner, and also initiated proceedings for allegedly destroying trees and grass by illegal entry and cultivation of forest land.

The Court reiterated the directions given in the *ARCH case*[46] and directed that the petitioner's application for recognition of forest rights under the FRA, which had been pending since 2008, be disposed of expeditiously by the competent authority.

The Court further directed that the petitioner's possession must not be disturbed until the application/ suit is finally decided and disposed of.

[45] Judgment dated 03.05.2013 in WP (PIL) No. 100/2011, Gujarat High Court. This judgment is extracted elsewhere in this compendium.

[46] Ibid.

EDITOR'S NOTE

As stated earlier, a series of petitions have been filed before the High Court of Gujarat over the last few years seeking implementation of the directions issued by the Court in the *ARCH case* (supra). The fact that these petitioners have approached the Court is a reflection of the high level of awareness regarding the FRA in Gujarat, as also an indicator of how difficult this fundamental law has been to implement in letter and spirit.

ORDER

1. Heard Ms. Nidhi P. Barot, learned advocate for the petitioners and Mr. Rakesh Patel, learned AGP who has appeared on advance service of copy of present petition.

2. In appears that different cases are pending with reference to different petitioners and it has emerged that in view of different set of facts it will not be appropriate to entertain common petition by almost 20 petitioners.

3. Each of the petitioner has different facts and has filed different cases before the authority which are registered as separate cases.

4. Therefore, present petition is restricted to the petitioner No.1 only and other petitioners can take out separate petition.

4.1 It is clarified that if common but full Court fees is paid in respect of all the petitioners then it will be open to the other 19 petitioners to claim set off so far as Court fees is concerned.

5. If all the petitioners have signed and executed common Vakalatnama in favour of the learned advocate then it would be open to said other petitioners to request the registry to accept said Vakalatnama in respect of other matters and if the registry is satisfied that other 19 persons have signed the Vakalatnama then the Vakalatnama in each case, after proper verification, may be dispensed with

6. Present petition is restricted to the petitioner No.1 i.e. Bariya Parvatsinh Shankarbhai.

7. In present petition, the petitioner has prayed, inter alia, that:

> 6(B) YOUR LORDSHIPS be pleased to issue appropriate writ, order or direction, directing the respondent authorities and their agents, servants, etc. not to harass the petitioners or cause any disturbance in peaceful possession, cultivation and taking crops from land bearing Survey no.27 of village Chalali, Taluka-Shahera, District-Panchmahal, as per directions of this Hon'ble Court in Writ Petition (PIL) No.100/2011, until the final disposal of the application made by petitioners before respondent no. 3 Pranth Officer, in the interest of justice;
>
> C. YOUR LORDSHIPS be pleased to respondent authorities or their agents, servants, etc. not to harass the petitioners or cause any disturbance in peaceful possession, cultivation and taking crops from land bearing Survey no.27 of village Chalali, Taluka- Shahera, District-Panchmahal, until the final disposal of application given by petitioners to respondent no.3-Pranth Officer, pending the admission, hearing and final disposal of this petition;

8. To support and justify the request made in the petition, the petitioner has averred, inter alia, that:

> "3.1 The Petitioner is cultivating the land bearing Survey No.27 situated at village Chalali, Taluka - Shahera, District - Panchmahal. The petitioner is growing tuver, bhindi, danger, bajri, banti, kodar, etc. since many years on these lands.
>
> 3.2 The petitioner is cultivating these lands much prior to 1984 and thereafter till date.
>
> 3.3 The petitioner submits that in the year 2002-03, the officers of respondent forest department tried to dispossess the petitioner from the aforesaid lands. However, the petitioner did not vacate the land and continued the possession.
>
> 3.4 The petitioner submits that recently, in June 2014 commencement of monsoon season, though the petitioner is doing agricultural activities, the officers of forest department are trying to harass the petitioner and to vacate the petitioner from the aforesaid lands. The petitioner has also filed application before the Pranth Officer, Lunavada under the Forest Act.
>
> 3.5 The petitioner submits that some complaints for the offences punishable under the Indian Forest Act are also filed by Range Forest Officer, Shahera against some of the petitioners by alleging that the petitioners have destroyed trees, grass, etc. by illegally entering into and cultivating forest land.
>
> In the said complaints Ld. Magistrate has passed order directing the accused to pay file and in default of payment of fine to undergo simile imprisonment for 7 days.
>
> 3.6 The petitioners submit that since August 2014, the respondent no. 2 and the officers of respondent department are harassing the petitioner and not permitting the petitioner to cultivate the aforesaid lands.
>
> 3.7 The petitioner submits that as per Rule 4(5) of Forest Rules, 2006 and as per the order passed by this Hon'ble Court in Writ Petition (PIL) No.100/2011, until the final disposal of the application filed by petitioner, the petitioner should not be harassed or their possession should not be disturbed. However, there is clear violation of the above direction committed by respondents. The impugned action of the respondents is illegal, arbitrary, in violation of direction given by this Hon'ble Court in Writ Petition (PIL) No.100 of 2012 and also, in violation of Forest Act and Rules and bad in law. The petitioner is therefore constrained to approach this Hon'ble Court by way of this petition.
>
> 3.8 The petitioner submits that thus, from the above facts and circumstances, it is admitted position on record that the petitioner is in possession of the land bearing Survey No.27 since 1984 uninterruptedly. The petitioner has been cultivating the subject land for all these years. The petitioner is entitled to continue to hold the subject land for cultivation as per the provisions of the Forest Act and Government Notifications issued from time to time."

9. At the time of hearing, learned advocate for the petitioner relied on CAV Judgment dated 3.5.2013 in Writ Petition (PIL) Nos.100 of 2011 and connected matters.

10. For the present purpose, what is relevant is the final directions issued by the Hon'ble Division Bench in the said CAV Judgment dated 3.5.2013. Therefore, they are quoted hereinbelow:

45. In such circumstances, we would like to dispose of both the petitions by issuing following directions which will protect the interest of the claimants as well as the State.

I. The respondents are directed to strictly comply with Rule 13 and the amended Rule 12-A while disposing of a fresh claim application or a review application, which is already disposed of. In other words, even if a review application has been disposed of then in such circumstances the respondents shall reconsider the claim after complying with Rule 13 and Rule-12A of the Rules.

II. According to the respondents there are 1,28,866 pending claims as on 7th February 2013. We direct that all such claims be decided by strictly complying with Rule 13 and the amended Rule 12-A. III. The respondents are directed to take into consideration the following evidences while deciding the pending 1,28,866 claims.

(a) Field verification panchnamas along with photographs describing the physical attributes of the land indicating occupation prior to 2005 and 2007.
(b) Records of Civil and Criminal Court cases.
(c) Receipts or purchase agreement from erstwhile Princely States.
(d) Government records like above receipts issued by the Forest Department.
(e) Revenue Department receipts.
(f) Satellite imageries and/or maps prepared from imageries other than BISAG and/or maps prepared from other authorized imageries.
(g) The applications made in the past i.e. before 2005 for regularization of the claimed lands.

IV. We direct the State Government to recall or withdraw the instructions as contained in Annexures K, L, M, N, P, S and T, in light of the amended Rule 12-A.

V. The respondents shall assign cogent reasons for rejection or modification of the claim, according to the Government guidelines dated 12th July 2012 and the amended Rule 12-A. The copy of such decision should be made available to the claimant at the earliest.

VI. The respondents are directed to communicate the decision of rejection or modification of the claim, according to Government guidelines dated 12th July 2012 and the amended Rule 12-A, so as to enable the claimants to approach the higher forum in accordance with law.

VII. The respondents are directed to expedite the process of deciding the pending 1,28,866 claims as well as the process of recognition of community rights over forest resources and also expedite the process of conversion of forest settlement villages into revenue villages.

VIII. The order of status quo passed by us in Civil Application No.5630 of 2012 shall continue till the disposal of 1,28,866 claims which will be in tune with the provisions of Section 4, Clause (5) of the Act.

46. We are of the view that the directions which we have issued should take care of the grievances voiced by the petitioners. The petitions along with Civil Application are accordingly disposed of with the above directions with no order as to costs.

11. It is not in dispute that in view of the said decision, certain other matters have been entertained by this Court. Learned AGP fairly submitted that in certain other petitions,

interim directions have been passed directing the authorities not to disturb the possession of the petitioners until the application / suit filed by the petitioners claiming forest rights are decided.

12. So far as present case is concerned, the petitioner has claimed that he has filed an application / suit before the competent authority seeking forest rights and the said application / suit No. 0155104 is pending before the authority since 2008.

13. The learned advocate for the petitioner also relied on the orders dated 22.8.2013 in Special Civil Application No.13191 of 2013 and dated 28.2.2014 in Special Civil Application No.3128 of 2014.

14. Having regard to the said orders and upon considering the directions issued by the Hon'ble Division Bench in order dated 3.5.2013, it appears that present petition can be disposed of, at this stage, with below mentioned observations and clarifications:

15. If the application / suit filed by the petitioner is pending before the competent authority, then, the same may be decided as expeditiously as possible, and until the said application / suit is not finally decided and disposed of, if the petitioner is in actual and physical possession of the land in question and if the said application / suit filed by the petitioners is in connection with the said parcel of land, then, their possession may not be disturbed until the said application / suit is finally decided.

16. The authorities shall act and decide the application / suit in accordance with the directions issued by the Hon'ble Division Bench in above referred CAV Judgment dated 3.5.2013 in Writ Petition (PIL) Nos.100 of 2011 and connected matters and relevant policy, notifications, circulars. The authority may also endeavour to decide the application/ suit as expeditiously as possible and preferably within six months.

With aforesaid clarifications and observations, present petition stands disposed of. Direct service is permitted.

Prahladbhai Maganlal Jani @ Chunriwala Mataji vs. Action Research in Community Health and Development (ARCH) & Ors.

MISC. CIVIL APPLICATION NO. 2452 OF 2014 IN WP (PIL) NO. 100 OF 2011
HIGH COURT OF GUJARAT, AHMEDABADBENCH
12.09.2014
CORAM: BHASKAR BHATTACHARYA, C.J. AND J.B. PARDIWALA, J.
CITATION: 2014 SCC ONLINE GUJ 10488

SUMMARY

The applicant sought strict implementation of the judgment and order dated 03.05.2013 passed by the High Court in *Action Research in Community Health & Development & Ors. vs. State of Gujarat & Ors*[47]. which directed the respondent authorities to follow certain directions while deciding claims under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA). In particular, the Court had directed that pending the disposal of 1,28,866 claims under the FRA, the possession of the claimants will not be disturbed.

The applicant submitted that the respondent authorities are trying to disturb his possession of the forest land, even though he is one of the 1,28,866 applicants aforesaid, and his claim is pending.

Accepting the assertion of the respondent State, made through its counsel, that it will not threaten dispossession of any person whose claim under the FRA is pending, the Court disposed of the application.

ORDER

1. By this application, the applicant has prayed for modification of our order dated 3rd May

[47] Judgment dated 3.5.2013 in WP (PIL) No.100/2011, Gujarat High Court. This judgment is extracted elsewhere in this compendium.

2013 by directing the respondent-authorities to decide the application/claim submitted by the applicant under Forest Rights Act/Rules in the light of our direction issued by us vide the said order dated 3rd May 2013 passed in Writ Petition (PIL) No. 100 of 2011.

2. It appears that while disposing of the Public Interest Litigation, we passed the following directions in paragraph 45 which are quoted below:

"45. In such circumstances, we would like to dispose of both the petitions by issuing following directions which will protect the interest of the claimants as well as the State.

I. The respondents are directed to strictly comply with Rule 13 and the amended Rule 12-A while disposing of a fresh claim application or a review application, which is already disposed of. In other words, even if a review application has been disposed of then in such circumstances the respondents shall reconsider the claim after complying with Rule 13 and Rule-12A of the Rules.

II. According to the respondents there are 1,28,866 pending claims as on 7th February 2013. We direct that all such claims be decided by strictly complying with Rule 13 and the amended Rule 12-A.

III. The respondents are directed to take into consideration the following evidences while deciding the pending 1,28,866 claims.

(a) Field verification panchnamas along with photographs describing the physical attributes of the land indicating occupation prior to 2005 and 2007.
(b) Records of Civil and Criminal Court cases.
(c) Receipts or purchase agreement from erstwhile Princely States.
(d) Government records like above receipts issued by the Forest Department.
(e) Revenue Department receipts.
(f) Satellite imageries and/or maps prepared from imageries other than BISAG and/or maps prepared from other authorized imageries.
(g) The applications made in the past i.e. before 2005 for regularization of the claimed lands.

IV. We direct the State Government to recall or withdraw the instructions as contained in Annexures K, L, M, N, P, S and T, in light of the amended Rule 12-A.

V. The respondents shall assign cogent reasons for rejection or modification of the claim, according to the Government guidelines dated 12th July 2012 and the amended Rule 12-A. The copy of such decision should be made available to the claimant at the earliest.

VI. The respondents are directed to communicate the decision of rejection or modification of the claim, according to Government guidelines dated 12th July 2012 and the amended Rule 12-A, so as to enable the claimants to approach the higher forum in accordance with law.

VII. The respondents are directed to expedite the process of deciding the pending 1,28,866 claims as well as the process of recognition of community rights over forest resources and also expedite the process of conversion of forest settlement villages into revenue villages.

VIII. The order of status quo passed by us in Civil Application No.5630 of 2012 shall continue till the disposal of 1,28,866 claims which will be in tune with the provisions of Section 4, Clause (5) of the Act."

3. The grievance of Mr. Oza, the learned Senior Advocate appearing on behalf of the applicant is that in spite of specific direction given by us that the possession of none of the applicants numbering 1,28,866 who filed their claim should not be disturbed before the disposal of the application, the said authority is trying to disturb the possession of the applicant even though his application has not been disposed of.

4. It appears that the applicant is one of the claimants amongst 1,28,866 as would appear from the application and receipt produced and annexed to this application at pages 91 to 95.

5. Mr. Baxi, the learned AGP appearing on behalf of the State Government, on instruction, submits that the State Government will not threaten dispossession of any of the persons whose applications or claims are pending and pursuant to our earlier decision they will comply with the directions contained in paragraph 45.

6. In view of such assertion of Mr Baxi, we do not find any reason to modify or clarify our earlier order.

7. The application is, thus, disposed of.

8. Direct service is permitted.

Saurashtra Dalit Sangathan & Anr. vs. State of Gujarat & Ors.

WRIT PETITION (PIL) NO. 264 OF 2014
HIGH COURT OF GUJARAT AT AHMEDABAD
06.02.2015
CORAM: VIJAY MANOHAR SAHAI, ACTING C.J., AND R.P.DHOLARIA, J.

SUMMARY

The petitioners filed this writ petition as a public interest litigation seeking directions from the High Court for implementation of the detailed judgment in *Action Research in Community Health and Development (ARCH) vs. State of Gujarat & Ors.*[48], especially in the Gir-Somnath District and other non-Scheduled Areas in the State of Gujarat. In particular, the petitioners sought the directions of the Court in the following terms:

(A) Time-bound implementation of the Forest Rights Act by:

(i) convening the Gram Sabha as contemplated under Rule-3 of the Forest Rights Rules.

(ii) Constituting the various Forest Rights Committees from the village level to the District and State level as contemplated by the Rules.

(B) Pending the disposal of this petition, to restrain the respondents from disturbing the possession of the forest dwellers of Gir-Somnath District until the rights recognition procedure is complete, in terms of Section 4(5) of the Forest Rights Act.

While issuing notice to the respondent- State government when the writ petition came up for hearing on 3.9.2014, the Court also directed that in its affidavit of response, the State government must explain whether the detailed directions issued in PIL 100 of 2011 are being followed.[49]

Thereafter, when the writ petition came up for hearing on 18.12.2014, the Court

[48] Judgment dated 3rd May, 2013 in WP (PIL) No. 100 of 2011, Gujarat High Court. This judgment is extracted elsewhere in this compendium.

[49] Order dt. 3.9.2014 in WP(PIL) No.264 of 2014, Gujarat High Court.

examined the affidavit of the State government that a hundred such Committees had been set up, only to find that there were no details provided regarding these Committees, which Gram Sabhas they relate to, and whether they are empowered to exercise powers under Section 6 of the FRA. Accordingly, the Court issued the following direction to the State government:

> **"Learned AGP Mr. Parth Bhatt is directed to file affidavit of the concerned authority clearly stating therein in a tabular form with regard to Gir-Somnath District that in which Taluka a particular Gram Sabha is situated and which of the villages are forming part of that Gram Sabha and whether the Committee under Section 6 of the Act has been constituted in the Gram Sabha or not and if is constituted, names of the Members of the Committee be given. The aforesaid affidavit shall be filed by learned AGP within a period of one month."**[50]

Keeping the matter pending until the machinery for implementation of the FRA was in place to its satisfaction, the Court finally disposed of the matter through a detailed judgment on 6.2.2015. The Court examined the material placed on record by the State government giving detailed information regarding the formation of the various Committees under the FRA. The Court further expressed its expectation that the meetings of these Committees will be duly convened without further delay, so that the forest rights recognition process under the FRA can commence. It also observed that in the event the petitioners find these meetings are not being convened, it will be open to them to make representations to the concerned authority for this purpose.

EDITOR'S NOTE

The High Court, by treating the writ petition as a continuing mandamus and keeping it pending until its directions, as sought by the petitioners, have been fully complied with, sent an unambiguous and unequivocal message to the State executive that the judgment dt. 3.5.2013 in the *ARCH case* (supra) is binding precedent.

JUDGMENT

(The judgment of the Court was delivered by R.P. Dholaria, J.)

1. By way of this Writ Petition in the nature of Public Interest Litigation, the petitioners have prayed for the following reliefs:

   "(A) The Hon'ble Court may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction, directing the respondents to immediately initiate the process of implementation of the Act as per the provisions laid down in the Act, and the Rules in Gir Somnath District in particular and other non-scheduled districts in general in a time bound framework by :

   (i) convening the Gram Sabha as contemplated under Rule-3 of the Rules.

   (ii) Constituting the various Forest Rights Committees from the village level to District and State level as contemplated by the Rules.

[50] Order dt. 8.12.2014 in WP(PIL) No.264 of 2014, Gujarat High Court.

(B) Pending admission and final disposal of this petition, the Hon'ble Court may be pleased to restrain the respondents from evicting or disturbing the occupation and possession of the forest dwellers of Gir Somnath District till the recognition and verification procedure as contemplated under Section 4(5) of the Act is complete.

(C) Your Lordships may be pleased to permit the petitioners to add, amend, alter or delete any of the grounds as and when it becomes necessary to dose."

2. Upon issuance of the notice to the respondents-Authorities, affidavit-in-reply has been filed by the respondent No.3-Collector, Gir-Somnath District, wherein he has placed the list of Forest Rights Committee constituted in the Taluka: Veraval of Gir Somnath District in a tabular form and more particularly, he has placed the aforesaid list vide Annexure-1 commencing from page235 to 317.

3. We have heard the learned advocates appearing for the respective parties and on going through the material available on record, it is clearly established that the competent Authority has already constituted the Committee as per the provisions of the aforesaid Act. Therefore, so far as the prayer as regard to not constituting the Committees are concerned, the dispute no more survives as the Committees are already constituted in accordance with the provisions of the Act. Now the only question remains so far as the convening the Gram Sabha meeting of the aforesaid Committee as contemplated under the Act as well as Rules, the Chairman of the Committee is obliged to convene the meeting as per the provisions of the Gujarat Panchayat Act as well as the provisions of The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and the Rules thereunder.

4. Once the Committees are constituted for each one of the villages, who are comprising in the aforesaid non-scheduled districts of the State of Gujarat, we hope and trust that the meeting shall be convened as per the provisions of the Act. If the petitioners find that the meeting is not convened, they shall be at liberty to make representation before the concerned Authority for convening the same.

5. With the aforesaid directions, this Writ Petition in the nature of Public Interest Litigation stands finally disposed of. Notice is discharged. There shall be no orders as to costs.

Amrabhai Maganbhai Patel vs. Programme Administrator

SCA NO. 4697 OF 2014
HIGH COURT OF GUJARAT
01.05.2015
CORAM: A.J.DESAI, J.

SUMMARY

The petitioner, a Scheduled Tribe, filed this writ petition challenging the order dated 18.02.2014 passed by the Deputy Collector whereby his application for regularisation of the forest land which is under his cultivation was rejected.

The petitioner argued that he was unaware of the procedure for regularization of his possession and could not apply within time. When he belatedly made his application, it was rejected by the Deputy Collector.

The respondent State government stated that although there is a procedure under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) to regularize the land, at present no such task is being undertaken.

Without going into the merits, the Court directed the concerned authority in the petitioner's village to inform him in advance when such regularization procedure is undertaken. Thereafter, the petitioner must apply immediately to the concerned authority with regard to his claim.

EDITOR'S NOTE

It is apparent that neither the Court nor the lawyers on either side expended much time attempting to explore the intricacies of the FRA. This is surprising, given the wealth of judicial precedent on FRA emerging from the Gujarat High Court. All the same, the Court through this order recognized the need to ensure that the "end of justice" is met, and a remedy which had previously been closed to the petitioner, is re-opened.

ORDER

1. Rule. Mr. K. M. Antani, learned AGP waives service of notice of Rule on behalf of respondent Nos. 1 to 3.

2. Ms. Nidhi Barot, learned advocate for the petitioner would submit that the petitioner is from schedule tribe and was not aware about the procedure for regularizing the land, which is under his cultivation, situated in forest area, he could not apply for the same within time. She would further submit that the petitioner did apply for regularizing the same, however, the application was rejected by order dated 18.02.2014 passed by the Deputy Collector. She would further submit that the responsibility may be directed to consider the case of the petitioner.

4. On the other hand, Mr. KM Antani, learned AGP, by taking me through the impugned order dated 18.02.2014 passed by the Deputy Collector, would submit that there is a procedure for regularizing the land under the provisions of Scheduled Tribes & Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and at present, there is no such task undertaken by the authority.

5. Heard learned advocates for the respective parties. Perused the documents annexed with the petition with regard to the disputed land and the order dated 18.02.2014 passed by the Deputy Collector.

6. Considering the facts and circumstances of the case, I am of theopinion that the following order would meet the end of justice:

   [i] The concerned department or president or secretary of village, where the land is situated, shall inform the petitioner in advance at the address mentioned in the cause title of the petition as and when the procedure to regularize such lands is undertaken.

   [ii] The petitioner shall, thereafter, apply immediately to the concerned authority with regard to his claim.

8. Rule made absolute to the aforesaid extent.

9. It is hereby made clear that this Court has not gone into the merits of the case and the authority shall consider the same in accordance with law.

10. It would be open for the petitioner to serve the copy of the order to the President or Secretary, Village Bamroli Khurd (Bhekhadia), Taluka Godhra, District Panchmahal.

HIMACHAL PRADESH HIGH COURT

TABLE OF JUDGMENTS AND ORDERS

Court on its Own Motion vs. State of Himachal Pradesh & Ors.

CWPIL NO. 38 OF 2009
HIGH COURT OF HIMACHAL PRADESH
13.01.2012
CORAM: DEEPAK GUPTA AND RAJIV SHARMA, JJ.
CITATION: 2012 SCC ONLINE HP 423

SUMMARY

The Court took suo motu notice of this matter through newsreports, where it was mentioned that power transmission lines are being laid, as part of a project by Jai Prakash Hydro Power Limited and Power Grid Corporation, on the left bank of the Sutlej river thereby endangering the flora and fauna of the area and leading to cutting of 15,000 trees.

The Court issued notices and impleaded a variety of stakeholders as respondent parties, including the elected Pradhans of several villages in the area, the State government, the project proponents, the Central Electricity Authority, and so on[51]. The village Pradhan's pointed out to the Court that the project is located in

[51] The respondents appearing in this case are as under:
1. State of H.P. through its Principal Secretary (Industries)
2. Secretary (Environment) to the Government of HP
3. Additional Chief Secretary (Forest) to the Government of HP
4. Principal Chief Conservator of Forest, HP
5. Shri Bhanu Pratap Singh Bisht, Village Shagag, P.O. Sarahan Bushahr, Tehsil Rampur Bushahr, District Shimla, H.P.
6. Smt. Savitri Negi, presently Pradhan, Gram Panchayat Sungra, District Kinnaur, H.P.
7. Smt. Kamla Negi, presently Pradhan, Gram Panchayat Nichar, District Kinnaur, H.P.
8. Shri Subhash Negi, presently Pradhan, Gram Panchayat Ponda, Tehsil Nichar, District Kinnaur, H.P.
9. Smt. Tara Moyan, presently Pradhan, Gram Panchayat Tranda, Tehsil Nichar, District Kinnaur, H.P.
10. M/s. Jay Pee Power Grid Limited, through Shri Vinod Sharma, Director, Jay Pee Power Grid Limited, R/o D1/3, Safdarjung Enclave, New Delhi-29.
11. The Inspector General of Forests, Government of India, Ministry of Forest and Environment (FC Div).
12. Union of India through Secretary, Ministry of Environment and Forest (FC Div)
13. Central Electricity Regulatory Commissioner, Chanderlok Building, Janpath, New Delhi, through its Chairman.
14. Power Grid Corporation of India Ltd.,through its Chairman and Managing Director.
15. Central Electricity Authority through its Chairman.

Kinnaur District, which is a Scheduled Area covered by the Panchayats (Extension to Scheduled Areas) Act, 1996, and also claimed certain rights under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA). They further informed the Court that although early in the project the alternative route on the right bank, where there are no trees, was considered, this was subsequently ignored for no good reason.

The Court took note of the fact that this project had received the in-principle approval of the Supreme Court of India on 3.10.2008[52] on the basis of recommendations made by the CEC. Expressing its inability to enter into the decision to grant in-principle approval by the Supreme Court, the High Court made it clear that it was constrained to take this position "though we are of the opinion that all the relevant facts were not correctly place before the Apex Court." The Court observed:

> **"As noted by us earlier, the right bank of the river Sutlej, especially in Kinnaur and upper areas of Shimla District near Rampur and, in fact, almost up to Slapper, is more sparsely populated than the left bank. The right bank has much less trees and is almost barren. However, for reasons best known to the Forest officials, they chose to just accept the proposal of the project proponent without even examining the feasibility of the other two alternate routes." (@para 25)**

The Court finally had to close the proceedings by issuing detailed directions to be followed by the State government in future projects, finding itself unable to pass any directions to remedy the present situation.

EDITOR'S NOTE

Although the decision of the Court does not refer to or rely upon the FRA, other than mentioning that the villages affected argue they have rights under it, it is clear that the Court is dismayed by the fact that it is unable to issue any directions in this case due to the previous orders of the Supreme Court. It must be pointed out, however, that this decision was pronounced before the historic judgment of the Supreme Court in the *Niyamgiri case*[53] where the centrality of the Gram Sabha in the decision-making process has been clearly articulated. If the Court was to take a decision today on the same facts, a different result could emerge.

ORDER

(The Order of the Court was pronounced by Deepak Gupta, J.)

1. This Court took suo-motu notice of a news item which appeared in the Hindustan Times, Chandigarh edition on 4th December, 2009, in which it was mentioned that power transmission lines are being laid on the left bank of Sutlej which will endanger the flora and fauna of the area and lead to the cutting of more than 15000 trees. These power lines are being laid by Jai Prakash Hydro Power Limited and Power Grid Corporation of India. The news item itself was registered as a Public Interest Writ Petition.

[52] Vide order dt. 3.10.2008 in the matter of *T.N. Godavarman Thirumalpad vs. Union of India*, WP (C) 202 of 1995, Supreme Court of India, unreported.

[53] *Orissa Mining Corporation vs. Ministry of Environment and Forests & Ors.* (2013) 6 SCC 476.

2. Notice was issued on this petition on 9.12.2009. Thereafter, applications were moved by certain residents of the area who prayed that they may be impleaded as parties in the petition. These applications were allowed and they were impleaded as respondents No. 5 to 9 in the petition. They have also placed on record certain material to support the petition.

3. The grievance of the respondents 5 to 9 is that in case the power corridor from Karcham-Wangtu at Kinnaur in Himachal Pradesh to Abdullapur in State of Haryana is laid on the left bank of the river Sutlej many trees will have to be felled. It has been submitted that whereas the left bank is covered with trees the right bank is barren and has no trees and therefore, it would be in interest of all concerned if the power corridor is laid on the right bank thus preventing immense damage which is likely to be caused to the environment in District Kinnaur. Kinnaur is a tribal area and the petitioners have made reference to the H.P. Transfer of Land (Regulation) Act, 1968, the Panchayats (Extension to the Scheduled Areas) Act, 1996 and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and claim certain rights therein. They submit that the permission was obtained by the respondent No. 4 for conversion of the forest area to non-forest use by withholding facts and without informing the concerned parties about the fact that the right bank of Sutlej is barren and in case power line is laid to the right bank it will cause minimum damage to the environment.

4. They also allege that respondent No. 10 had obtained the requisite permissions without holding public hearing and the people of the area were not taken into confidence. In case that had been done the said respondents would have pointed out that it would be for the benefit of all concerned if the power corridor is laid on the right side of the Sutlej river. The petitioners have also submitted that after they came to know about the proposal made by respondent No. 10 there was wide spread agitation in the area and the Deputy Commissioner himself visited the concerned areas and suggested that the land should be taken on the right side of the Sutlej river.

5. Our attention has been specifically drawn to the letter dated 3rd January, 2009 sent in this behalf by the Secretary (Forests) to the Government of Himachal Pradesh to the Senior Assistant Inspector General of Forests, which reads as follows:

> *"In continuation to this department's letters of even No. dated 5th February, 2008 and 10th December, 2008 on the subject cited above I am directed to say that various written objections have been received to this alignment from Deputy Commissioner Kinnaur and NGOs as well as residents of villages falling in the corridor. The D.C. Kinnaur suggested that the line should be taken on the right bank of the Sutlej River and not on the left bank as the present alignment is causing huge social and environmental problems including more than 20,000 tree. We are asking the Power Department and HP Power Transmission Corporation for their comments.*
>
> *It is, therefore, requested that the above diversion case may not be processed/finalised till the alignment is finalised."*

6. According to respondents 5 to 9 this letter has not been considered at all either by the Apex Court or by the Central Empowered Committee or by the Ministry of Environment and Forest while granting approval in favour of respondent No. 10.

7. The stand of respondent No. 10 is that they have obtained all requisite permissions from the Central Electricity Regulatory Commission, the Govt. of India, the Ministry of Environment and Forest (MoEF), Central Empowered Committee (CEM) appointed by the Apex Court and by the Apex Court itself.8. We may make a reference to an order dated 3.10.2008 passed by the Apex Court in T.N. Godavarman v. Union of India. The

relevant portion of the order in so far it relates to the present case reads as follows:

> "M/s Jaypee Power Grid Ltd., Sholtu within the jurisdiction of Kinnaur, Rampur, Tehog, Rajgarh and Nahan Forest Divisions in Kinnaur, Shimla and Sirmour districts of Himachal Pradesh seeks permission for diversion of 322.6538 ha. of forest land for 400 Kv D.C. KarchamWangtoo-Abdullapur transmission line in its favour. The CEC has made certain observations after considering the project. The suggestions made by CEC are acceptable to the applicant. MoEF may take a decision after considering the observations made by CEC.
>
> The application as regards the applicant is disposed of accordingly."

9. It cannot be disputed that whereas the left bank of the river Sutlej is covered with forests, there is very little forest growth on the right bank. However, since permission has been obtained by respondent No. 10 from the Apex Court this Court cannot now deal with that aspect of the matter. Whether the permission was obtained without disclosing relevant facts is a question we cannot decide in this proceeding. The aggrieved persons, if so advised, may approach the Apex Court in this regard but we are clearly of the view that we cannot exercise any jurisdiction as far as this issue is concerned.

10. A perusal of the order of the Apex Court clearly shows that the Apex Court gave "in principle" approval for diversion of forest land in view of the report of the Central Empowered Committee. The MoEF was directed to take a decision after considering the observations made by the CEC. We find that the Ministry of Environment and Forest while granting permission has laid down the following amongst other conditions:

> "xxx.. xxx.. xxx...
>
> 5(iv) In case the Transmission Line is to be constructed in hilly areas, where adequate clearance is already available, trees shall not be felled.
>
> xxx. xxx. Xxx...
>
> 7. The User Agency shall ensure minimum felling of trees and maximum heights of towers in the forest area.
>
> 8. Any tree felling shall be done only when it is unavoidable under strict supervision of the State Forest Department.
>
> xxx.. xxx.. xxx..
>
> 12. No damage to the flora and fauna of the area shall be caused.
>
> 13. xxx. xxx.. xxx..
>
> 14. The User agency shall provide retaining walls to avoid huge earth cuttings for fixing the legs of the towers wherever necessary."

11. These conditions are very salutary and even if the power corridor is to be established on the left bank it is imperative that these conditions are followed in letter and spirit. Minimum trees should be felled and the height of the towers should be raised so that the maximum number of trees can be protected. The conditions provide that the height of the towers in the forest area will be maximum to ensure minimum felling of trees.

12. Despite our queries none of the parties represented before us has been able to tell us who is the authority to decide what should be the height of the towers in a particular

area? Who will oversee the protection of the trees? We cannot expect the User Agency to police and monitor its own action. This must be done by an independent body to ensure that the conditions laid down are followed in letter and spirit.

13. Therefore, we had also impleaded the Inspector General of Forests, Union of India through Secretary, Ministry of Environment and Forests and Power Grid Corporation of India as respondents in the petition. Vide our order dated 20th March, 2010, we had directed the respondents to answer the following questions:
    "1. Who determines the height of the transmission towers?
    2. On what basis is the height of the transmission towers determined?
    3. Is the height of the Transmission towers changed in hilly and forest areas to protect the trees?
    4. What is the height of the towers proposed by the User Agency?
    5. What is the height of the transmission lines?
    6. What is the clearance required between the tops of the trees and the transmission lines?
    7. Can the height of the towers be raised in such a manner that more trees are protected?"

14. Thereafter, it was pointed out to us that the Central Electricity Authority is also a necessary party and the same was also impleaded as party-respondent in this case.

15. On 16.11.2010, after considering the matter in detail, we had passed the following order:
    "We have considered the matter in some detail. On a perusal of the various provisions of the Electricity Act we find that the Central Transmission Utility is not only duty bound to transmit electricity but has been clothed with the role of regulator and appraisor of the Projects. In this behalf reference may be made to Sections 12, 14, 15, 17, 19, 28(1) to (10) of the Act.

    In the present case, the Central Transmission Utility i.e. the Power Grid Corporation of India is also one of the members of the joint venture. We at this moment are not going into the question as to whether an authority can be Judge in its own cause or not but when a dual role is cast upon any authority, we are prima facie of the view that transparency has to be even greater.

    From the material on record especially the communication dated 17th July, 2007 sent by the Under Secretary to the Government of India, Ministry of Power to the Managing Director of the JaypeePowergrid Ltd. it is apparent that three corridors had been presented as being feasible before the Ministry of Power. In the said letter following observations were made:

    "It is also advised to ensure that while obtaining forest clearance for Karcham-Wangtoo-Abdullapur 400 kv D/C Line, requirement of forest clearance for all the three corridors, feasibility of which has been verified by JaypeePowergrid, may be intimated to the authority concerned."

    Before embarking upon a more detailed analysis and hearing of the case, we are of the considered view that respondents No. 10 & 14 should file an affidavit before us stating therein which were the three corridors which were identified as being feasible for this Project.

    Respondent No. 14 shall also on its affidavit specifically deal with the question as to whether it looked into the environment aspects which it was required to in terms of the Transmission Regulations of 2003 which were prevalent at that time.

Respondent No. 12, the Secretary, Ministry of Environment and Forests, is also directed to file an affidavit that while considering the proposal for obtaining forest clearance for Karcham-Wangtoo-Abdullapur transmission line only one proposal for one corridor was submitted or whether some other proposals for transmission of above Project were submitted. Needful be done within four weeks."

16. Affidavits were filed and we found that the Under Secretary to the Government of India, Ministry of Power, had addressed a letter to the Managing Director of the Jay Pee Power Grid Limited giving the following advice to the Corporation:

"It is also advised to ensure that while obtaining forest clearance for Karcham-Wangtoo-Adbullapur 400 kv D/C Line, requirement of forest clearance for all the three corridors, feasibility of which has been verified by JaypeePowergrid, may be intimated to the authority concerned."

17. Thereafter, the matter was considered in detail vide order dated 28th April, 2011, where we had made the following observations:

"The affidavits which has been filed now reveal that only one proposal for one corridor on the left bank, i.e., corridor on which the transmission line is being built was sent to the Ministry of Environment and Forest. A chart has also been filed wherein the comparative assessment of the three routes were given, one for the proposed route on the left bank of Sutlej river on which construction is being done, the second is the alternative route-I on the left bank itself and the third is the alternative route-II on the right bank.

This Court in its order dated 20.3.2010 has already observed that there is very little forest growth on the right bank of the river Sutlej as it flows down from the heights of the Himalayans towards Bilaspur and beyond. In the comparative chart prepared, the column relating to trees, crops and damage has been answered in very cryptic language, i.e., "to be decided at the time of detailed survey and tower spotting". Thus it is apparent that what was the real damage which was to be caused to the trees was not assessed at that time. The approximate forest area on the right bank of Sutlej river was the lowest.

We also found that in column No. 4 relating to construction problem, it is stated that the alternative route-II through the right bank would pass through densely populated area. Normally, Judges do not bring in personal knowledge in cases but this is a Public Interest Litigation and both of us are aware of the fact that as compared to the left bank, the population of the right bank of river Sutlej is much lower.

Surprisingly, when the proposal was forwarded to the Ministry of Environment and Forests, the alternative routes were neither mentioned despite the specific instructions of the Under Secretary to the Government of India, Ministry of Power quoted hereinabove. We are also not oblivious to the fact, which fact is clear from our order dated 16.11.2010, that the Central Transmission Utility, i.e., Power Grid Corporation of India-respondent No. 14 before us is virtually a judge in its own cause since it is a part and parcel of respondent No. 10 and has substantial share holding in respondent No. 10.

We, therefore, direct the Managing Directors of respondents No. 10 and 14 to file their personal affidavit with regard to the following:

1. Why were the alternative routes not mentioned in the proposal submitted to the Ministry of Environment and Forest?

2. On the next date, the respondent No. 14 shall produce the complete records including the noting sheets in this regard.

The Principal Secretary (Revenue) shall also file his affidavit on or before the next date stating the names of the villages alongwith the population on the proposed route, alternative route-I and alternative route-II on the right bank of river Sutlej. The Chief Secretary to the Government of Himachal Pradesh shall also file an affidavit stating what was the information/evidence before the State when it recommended the proposed route and were the alternative routes considered before recommending same."

18. Consequent to the aforesaid directions, affidavits have been filed. We have gone through the affidavits as well as the record produced before us carefully.

19. At the outset, we may again repeat that in view of the fact that in principal approval was granted by the Apex Court, this Court cannot go into this aspect of the matter, though, we are of the opinion that all the relevant facts were not correctly placed before the Apex Court. If any party was aggrieved, it should have approached the apex Court for clarification or modification of its orders and it is not for this Court to do so.

20. Having said so, there are certain important issues which arise before us and which we are bound to consider. The case set up by respondent No. 10 in the affidavit filed by it is that it had engaged the Consultancy Division of the Central Transmission Utility to undertake the route alignment study for construction of the Project and that three routes were recommended by the Central Transmission Utility for detailed survey: one the proposed route and two alternative routes. According to respondent No. 10, all the three alternative routes were mapped and filed alongwith Form-A seeking prior permission of the Ministry of Environment and Forest, under Section 2 of the Forest (Conservation) Act, 1980. The State Government recommended the proposed corridor for grant of permission and, thereafter, its recommendations were placed before the Hon'ble Apex Court through the Central Empowered Committee.

21. The stand of respondent No. 14, the Managing Director of the Power Grid Corporation, is on similar lines. It is stated in the affidavit as follows:

"The respondent No. 14 also considered the construction and operational issues including environmental consideration, like forest involvement and its extent, while selecting the routes of transmission lines and proposed three alternate corridors, two being on the left bank of river Satluj and one being on the right bank of the river Satluj as stated supra. These proposals were submitted to the respondent No. 10 for further necessary action. POWERGRID has subsequently proceeded for detailed survey of the most optimum route (route having line length of 213.85 km on the left bank of Satluj river). It is further to mention that the respondent No. 10, i.e., Jaypee Powergrid Ltd. was to obtain further necessary approval in accordance with the provisions of Forest (Conservation) Act, 1980 and the rules made thereunder."

22. It is apparent that respondent No. 14, on the one hand, was the Central Transmission Utility. It is also one of the members of the venture/consortium which was to construct the project. It was a beneficiary of the project. The question that is agitating us is whether one can expect the person, who is one of the beneficiaries of the project, to be objective in its own case. Obviously, the project proponent and/or the company and/or the licensee setting up the transmission line will favour the project which is most beneficial to it in economic terms. When the Central Transmission Utility is itself a member of the consortium, we would have expected that the consultant should have been some other body. Even assuming that a different wing of the Central Transmission

Utility could be the consultant to the project, we are of the considered view that in such a case, a greater responsibility is cast on the State Government, the Central Electricity Authority and the Ministry of Environment and Forests to ensure that the correct facts are brought to the notice of all concerned, including the Central Empowered Committee in this case. We are constrained to observe that all these authorities and functionaries abdicated their duties and did not perform them in a proper manner.

23. It is more than apparent that the letter dated 17.07.2007 sent by the Under Secretary to the Government of India, Ministry of Power, to the Managing Director of the JaypeePowergrid Ltd., wherein it was clearly advised that all three corridors should be presented to the Authority, was not followed in letter and spirit. As far as the State of Himachal Pradesh is concerned, the affidavit of the Principal Secretary (Forests) to the Government of Himachal Pradesh filed in response to our order reads as follows:

> "That the information with regard to villages and population covered by the Karchham to Wangtoo - Abdulapur 400KV/DC transmission line, alternate Routes-I and II is not available with the department. Efforts were made to collect the information from the concerned districts but they have supplied information only in respect of villages and population on proposed route and on the right bank of Satlujriver in Kinnaur.
>
> The Deputy Commissioner, Shimla, Kinnaur and Sirmour have submitted the entire information regarding route of the transmission line through Alternate Routes-I and II is not available with them.
>
> As per the information collected from the J.P. Company and supplied by the D.C. Kinnaur, the detailed survey has only been carried out on the proposed route and the Company does not have the all details of villages and towns on Alternate Route-I and Alternate Route-II apart from the information enclosed as Annexure "B" (P-9). This information is scanty and not in a form that permits making available details of census villages and population. The information with regard to villages/ population on the proposed route as well as on the right bank of Satluj in Kinnaur as mentioned above is submitted for kind information of this Hon'ble Court."

24. We fail to understand how the State supported the route as proposed by respondents No. 10 and 14, when it did not have sufficient information before it. Even before this Court, the State has failed to give any information and has clearly stated that the entire information regarding route of the transmission line through alternate routes-I and II is not available with them. It is, thus, clear that nobody surveyed the alternate routes. No person from the Forest Department of the State cared to look into this aspect of the matter to find out whether there would be less ecological damage on alternative routes-I and II or not. The affidavit quoted hereinabove clearly shows that no information was available with the State.

25. As noted by us earlier, the right bank of the river Sutlej, especially in Kinnaur and upper areas of Shimla District near Rampur and, in fact, almost up to Slapper, is more sparsely populated than the left bank. The right bank has much less trees and is almost barren. However, for reasons best known to the Forest officials, they chose to just accept the proposal of the project proponent without even examining the feasibility of the other two alternate routes.

26. Another important question, which arises, is with regard to the role of the Central Electricity Authority. The said Authority is constituted under Section 70 of the Electricity Act, 2003, and its functions are defined in Section 73 of the Act, relevant portion of which reads as follows:

"**73. Functions and duties of Authority.**

xxxxxxxxx

(a) advise the Central Government on the matters relating to the national electricity policy, formulate short-term and perspective plans for development of the electricity system and co-ordinate the activities of the planning agencies for the optimal utilisation of resources to subserve the interests of the national economy and to provide reliable and affordable electricity for all consumers;

(b) specify the technical standards for construction of electrical plants, electric lines and connectivity to the grid;

(c) specify the safety requirements for construction, operation and maintenance of electrical plants and electric lines;

(d) specify the Grid Standards for operation and maintenance of transmission lines;

(e) specify the conditions for installation of meters for transmission and supply of electricity;

xxxxxxxxx

(o) discharge such other functions as may be provided under this Act."

It is, thus, clear that it is the one of the duties and functions of the Central Electricity Authority to advise the Central Government with regard to the technical standards of electric lines, connectivity to the grid, grid standards and safety requirements for construction, operation and maintenance of such lines etc.

27. Though, we had issued notice to the Central Electricity Authority, it chose to appear only once before this Court and did not appear again and did not even care to file any response to the petition. When huge projects of this nature are to be constructed, then it is the duty of the Central Electricity Authority to ensure that it monitors such projects and ensures that they comply with the standard specifications, safety requirements etc., as approved by the Central Electricity Authority.

28. The Central Transmission Utility has been constituted under Section 38 of the Electricity Act, 2003. The Section specifically provides that the Central Transmission Utility should not engage in the business of generation of electricity or trading in electricity. The functions of the Central Transmission Utility have been prescribed in Section 38(2) of the Electricity Act, 2003, and the main function is to undertake transmission of electricity through inter-State transmission system. However, there are other functions also, which the Central Transmission Utility is required to perform.

29. Under Section 12 of the Electricity Act, it is only an authorized person, who can transmit electricity and as pointed out above, the main role of the Central Transmission Utility is to transmit electricity throughout the country. Section 14 of the Act provides that the appropriate Commission constituted by the appropriate Government, may, on an application filed under Section 15, grant a license to any person to transmit electricity. Section 15 of the Act provides the procedure for grant of licenses. For our purpose, sub-sections (3) and (4) are relevant. Under subsection (3) of Section 15 of the Act, the applicant, for grant of transmission license, has to forward a copy of

such application to the Central Transmission Utility and under sub-section (4), the concerned Transmission Utility has to send its recommendations to the appropriate Commission. The Commission has to consider all the suggestions or objections and recommendations of the concerned Transmission Utility, which, in the present case, was the Central Transmission Utility. Notices are required to be issued and, thereafter, hearing conducted and orders passed in the application.

30. The Central Transmission Utility has, therefore, a very important function. Once the Central Transmission Utility is itself the applicant or part of a joint venture, which is seeking license for transmission of electricity, then in our considered opinion, it cannot also take on the role of the consultant and make recommendations. Obviously, recommendations will be in its own favour. In such an eventuality, the concerned State Electricity Commission and the Central Electricity Regulatory Commission, must intervene and be more careful in the matter.

31. In the present case, we find that as far as the State Government is concerned, its officers, especially the officers belonging to the Forest Department and the officers vested with the duty to ensure that the environment is protected, such as, the Secretary (Environment) did not at all examine the proposal. Files running into hundreds of pages have been placed before us. On going through the files, we find that other than accepting the joint proposal of respondents No. 10 and 14, no official of the State Government has given any noting or has commented as to what is the feasibility, usefulness or otherwise of the other two alternative routes.

32. The whole idea of giving three alternative routes is that the project proponent has found these three routes which are viable. Now, it is for the authorities to decide which route has the least impact on the environment and the ecology. The authorities must decide which route is better for the people. However, in this case, they did not carry out this exercise but only approved the route which was better for the project proponent. It is for the Government officials including the Forest officials to ensure that they make a comparative analysis of the project and after making such analysis, submit their comments as to how one route is better than the other and is more environment friendly. The role of the Forest Department is to recommend that route which causes the least damage to the forest and the environment. This has not been done in the present case.

33. We hope, expect and direct that in future, all functionaries of the State of Himachal Pradesh shall ensure that in all projects of this nature, a proper and comparative analysis is done. The recommendations of the project proponent are not to be accepted just for the asking. The officials of the State of Himachal Pradesh have to do some spade work on the ground and then analyze all the proposals and make their independent recommendations in all cases. Their recommendations should be based on the interest of the State, in the interest of protecting the environment and in the interest of the local people, so that minimum land is acquired and the agricultural lands of the local people are damaged to the minimum possible extent. The Chief Secretary to the Government of Himachal Pradesh is held responsible to ensure that such directions are complied with in letter and spirit and there is no violation of the same in future.

34. We also find that there is virtually no application of mind by the various authorities, such as the Central Electricity Authority as to how the height of the transmission towers is to be determined. It has been pointed out to us that in case the height of the towers is increased, then a wider base is required. In case, the base can be provided in an area which is barren or where not many trees are required to be cut, then if lopping, chopping of the tops of the trees and felling of trees can be prevented or in any

manner decreased, then these aspects must be looked into so as to protect more trees. While determining the places where the towers are to be set up, the Central Electricity Authority and Central Transmission Utility must take into consideration every factor, such as availability of road, etc. Great havoc has been caused to the left bank of the river Sutlej and the lives and properties of private persons and the Government have been put at great risk. In future, the Central Electricity Authority and Central Transmission Utility will ensure that each aspect is examined in the light of our observations made hereinabove and sanction is not granted at the mere behest of the project proponent. It is the duty of the Central Electricity Authority and the Central Transmission Utility to ensure that all factors are taken into consideration.

35. Even the Ministry of Environment and Forests must, in future, ensure that steps are taken by the project proponent to cause minimum damage to the environment. It should also look into the questions as to whether the Regulatory and other authorities have done their work or not. If it finds that there has been no examination of the proposals, especially alternative proposals, like in the present case, then it should remit the matter to the concerned authority/agency to send its recommendations after carrying out a complete analysis of the various proposals put forth by the project proponent.

36. The writ petition is disposed of with the aforesaid directions. The Registrar General of this Court is directed to send a copy of this judgment to the Secretary, Ministry of Environment and Forest, Government of India, the Central Electricity Authority, Central Electricity Regulatory Commission, H.P. State Regulatory Commission, the Chief Secretary to the Government of Himachal Pradesh, the Inspector General of Forests and the Secretary, H.P. State Pollution Control Board, who shall ensure that in future, action is taken strictly in accordance with what we have stated in this judgment.

Mangi Ram & Ors. vs. Union of India & Ors.

CWP NO. 2083 OF 2012, ETC.
HIMACHAL PRADESH HIGH COURT
22.05.2013
CORAM: A.M. KHANWILKAR, C.J. AND R.B. MISRA, J.

SUMMARY

Three writ petitions were disposed of by this common judgment. The first two petitions (PIL) sought directions against the State government to discontinue the proposed Bajoli-Holi Hydroelectric Power Project at River Ravi in District Chamba, as it was opposed to the sentiments of the local people and in violation of various environmental laws. The third petition was filed by the project proponent company about the "obstructionist attitude" of a few of the villagers inspite of obtaining clearance from the concerned authorities. One of the issues framed by the Court related to the failure of the State government to implement the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA).

FINDINGS OF THE COURT

The findings of the Court regarding other environmental issues are not being examined. On the FRA, the Court examined a letter issued by the Central Ministry of Tribal Affairs, deprecating the failure of several State governments in implementing the FRA, and further deprecating the exemption from FRA processes granted by the MoEF for such States, including Himachal Pradesh, in grant of forest clearances. The Court also noticed the judgment of the Supreme Court in *Orissa Mining Corporation vs. Ministry of Environment and Forests & Ors* 2013 (6) SCALE 57 (wrongly described as "unreported") where the necessity for FRA compliance and Gram Sabha decision regarding diversion of forest land is explicated. The High Court was of the view this is "completely devoid of merit and has been raised only on the basis of some assumptions or figment of imagination of petitioners which are not supported by any tangible material and decisive enough to interdict the activities for setting up the proposed project".

The first two writ petitions were dismissed with costs quantified at Rs. 25,000/-, to be paid within 4 weeks by each of the petitioners to the respondents, including the project proponent, GMR Bajoli-Holi Hydro Power Pvt. Ltd., failing which, the

Collector, Chamba was directed to recover the aggregate amount of Rs. 1.25 lakhs, jointly and severally, from the Petitioners within 8 weeks as arrears of land revenue, and deposit that amount in the Registry of the Court to be made over to the concerned respondents.

EDITOR'S NOTE

It may be noted that the judgment is under appeal in the Supreme Court and is pending adjudication. Clearly, the judgment is erroneous in failing to follow a binding precedent laid down by the Supreme Court under Article 141 of the Constitution of India in the *Orissa Mining Corporation case* (supra) and dismissing the same as "unreported".

JUDGMENT

(the judgment of the Court was delivered by A.M. Khanwilkar, CJ

1. We have heard counsel for the parties at length. We propose to dispose of all the three writ petitions together by this common judgment.

2. The first petition (CWP No. 2980 of 2012) has been filed by four petitioners in February, 2012, questioning the proposed Bajoli-Holi Hydroelectric Project at river Ravi in District Chamba. The reliefs claimed in this petition, purportedly filed as Public Interest Litigation, read thus:

> "(A) The environment clearance dated 24.1.2011 issued by Respondent no. 3 (Annexure- P14) in favour of the Respondent no. 7 may be quashed and set aside.
>
> (B) The in-principle approval dated 08-07-2011 (Annexure P-13) issued by Respondent no. 1 and 4 for diversion of 75.303 hectare forest land may be quashed and set aside.
>
> (C) The Respondents no. 1 and 3 may be directed not to issue further clearances without taking into consideration the Pre Feasibility Report prepared by the Respondent no. 6.
>
> (D) The Respondent no. 1 and 3 may be directed to implement the provisions of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 while issuing clearances if any to the project proponents in the state of Himachal Pradesh including to the Respondent No. 7.
>
> (E) The recommendations given and proceedings conducted by the Respondent no. 5 may also be quashed and Respondent no. 5 may be directed to associate Respondent no. 6 in future.
>
> (F) Any other writ, order or direction which this Hon'ble Court may deem fit in the facts and circumstances of the case may also be passed in favour of the petitioner."

3. The second petition (CWP No. 9980 of 2012) has been filed by sole petitioner in November, 2012, another resident of Tehsil Holi, District Chamba, questioning the continuance of selfsame proposed project after the grant of stage II approval thereto. The reliefs claimed in the second petition reads thus:

"The final approval of forest land dated 20.10.2012 (Annexure P-12) issued by Respondent no. 1 granting diversion of 75.303 hectare forest land may be quashed and set aside.

Any other writ, order or direction which this Hon'ble Court may deem fit in the facts and circumstances of the case may also be passed in favour of the petitioner."

4. As both these petitions, purportedly filed as Public Interest Litigation, are in respect of same project, though filed on different dates, seek overlapping direction against the State Authorities to discontinue the project being opposed to the sentiments of the locals in the area, and including the possibility of violations of environmental laws. As a result, both these petitions were heard together.

5. The third petition (CWP No. 349 of 2013) has been filed by the project proponent-Company about the obstructionist attitude of some of the villagers for continuance of the proposed project and to the construction activity undertaken in that regard, inspite of obtaining clearance from the concerned Authorities. On this assertion, the project proponent has prayed for following reliefs:

"(i) That the respondents No. 1 to 4 may be directed to create congenial atmosphere so as to enable the petitioner to undertake the tasks pertaining to the execution of Bajoli-Holi Hydroelectric Project.

(ii) That the respondents 1 to 4 may further be directed to ensure that the respondents 5 to 11 themselves or through their agents, do not stop the construction activities of Bajoli-Holi Hydroelectric Project.

(iii) That the respondents 6 to 11 may be restrained from interfering in the construction activities of Bajoli-Holi Hydroelectric Project themselves or through their agents by blocking the road leading to the project site or in any other way whatsoever.

(iv) Any other order deemed just and proper may also be passed in the facts and circumstances stated hereinabove in favour of the petitioner."

6. Even this petition was ordered to be heard alongwith other two petitions filed by the villagers, opposing the continuance of proposed Hydel Project on river Ravi, District Chamba.

7. These matters were taken up for admission on 13.5.2013. Counsel appearing for the writ petitioners in the first two matters addressed the Court for quite some time, for almost an hour but was unable to make out any specific issue warranting interference by this Court in exercise of writ jurisdiction albeit, as Public Interest Litigation. Rather it was noticed that he was making incoherent submissions. Therefore, we adjourned the hearing of these matters to give him some time to prepare the matter properly, so that he can articulate the issues which the said petitioners, wanted to pursue before this Court. Accordingly, all three matters were ordered to be listed on 17.5.2013 for further argument. On that day, at the outset, the counsel for the said petitioners submitted that he would confine the challenge to the proposed project only on three counts mentioned hereunder:

i) The proposed project was to be set up on the right bank of river Ravi but at the instance of the project proponent, it has been unilaterally shifted to the left bank, disregarding the fact that the damage and loss to be caused to the land coming under the project on the left bank and in particular, the forest area would be far greater. Moreover, the decision to shift the project on the left bank has been taken without consulting the Expert Body.

ii) The project proponent has been permitted to continue with the proposal to set up the project without discharging the obligation, as per condition No. 5, imposed by

the Ministry of Environment & Forest (FC Division) Government of India (MoEF for short) vide letter dated 8.7.2011 of assessment of impact on landscape in general and wildlife ecological aspects in specific before the final sanction is accorded.

iii) The final approval has been granted to the project proponent by the concerned Authority, without complying with condition No. 16, imposed by the MoEF vide selfsame communication dated 8.7.2011, of obtaining clearance under the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and including of submitting certificate towards the settlement of all claims and rights over the proposed forest land under the Act as per advisory issued by the MoEF on 3.8.2009.

8. These are the only three points, finally urged during the argument by the counsel for the petitioners in first two writ petitions. The State Authorities, MoEF (Government of India), Himachal Pradesh Electricity Board (HPSEB) and the project proponent have opposed the said writ petitions, firstly on the ground that the same suffer from laches and unexplained delay. Secondly, the petitioner in the first petition is the Pradhan of the Gram Panchayat, who now wants to oppose the project notwithstanding the 'No Objection Certificate' to the proposed project is granted by that Gram Panchayat in the past. Moreover, the said petitioner had attended the public hearing, but did not raise the three points, now urged before this Court. During the public hearing, the objection taken by the said petitioner was duly considered by the Chairman of the meeting and the solution offered was accepted by all the persons present in the meeting. The petitions as filed by the villagers, are not only mischievous but also motivated. On merits, the counsel appearing for the respondents have relied on contemporaneous record to substantiate their argument to counter each of the points urged by the petitioners in the first two petitions being devoid of merit and untenable. Both sides, in support of their respective contentions have relied upon the judgments of the Supreme Court and the unreported judgment of the Division Bench of this Court. We shall advert to those decisions a little later.

9. As regards the first contention pursued by the petitioners in the first two petitions, we have no hesitation in taking the view that the said petitioners have been ill-advised to rely on the communications and documents which do not reflect the authoritative opinion of the Department and the Expert Body. The first contention pertains to shifting of the project to the left bank from the original proposal of establishing the same on the right bank. The argument proceeds that the villagers are opposed to the shifting of the project on the left bank, as it would cause greater damage to the forest area, as large number of trees and habitation will be swept because of the project. Whereas, if the project was to be established on the right bank, it would result in very minimal loss and damage to the trees and the habitation. Moreover, the Gram Sabha of Naya Gram as also Gram Sabha of Holi have gone on record that they were opposed to establishing the project on the left bank. Even the officials were of the opinion that shifting the project on the left bank would cause more damage and loss and shall not be feasible, as is evident from the communications on record. It is further argued that the decision of shifting the project was unilateral and at the behest of the project proponent to favour the project proponent. However, when called upon to point out the averments in the writ petitions in support of this argument, the counsel for the said petitioners gave up that argument. He, however, submitted that there was material on record which is indicative of the fact that the land on the right side of the bank was barren and was more suited for the proposed project than the land on the left side of the bank, which is a thick forest.

10. The respondents have not only refuted these contentions but have pointed out from the record that the argument under consideration was founded on either misin-

-formation or more particularly distorted presentation of the record. On the other hand, the decision to shift the project on the left bank from the right bank was taken after observing due diligence and because the Expert Body found it more appropriate and feasible than on the right bank. For that, reliance has been placed on the official record as to how the proposal for shifting was necessitated and was finally taken at the highest level and more so, having received approval even of the Ministry of Environment and Forest. The learned Advocate General has handed over comparative chart prepared by the officials about the tree enumeration on the left bank vis-a-vis on the right bank and which is indicative of how the establishment of the project on the left bank was more beneficial. The said chart reads thus:

COMPARISON OF TREE ENUMERATION LEFT BANK VS RIGHT BANK					
LEFT BANK TREE ENUMERATION			RIGHT BANK TREE ENUMERATION		
NO.	COMPONENT	NO. OF TREES	NO.	COMPONENT	NO. OF TREES
1.	Bajol (Reservoir Area)	540	1.	Bajol (Reservoir Area)	540
2.	Dam Site Faculty Area & Dumping Yard	841	2.	Dam Site Faculty Area & Dumping Yard	841
3.	Dam Site & Intake	171	3.	Dam Site & Intake	171
4.	Naya Gram Facility Area	35	4.	Naya Gram Facility Area	35
5.	Dam Site Alternate Dumping Yard	51	5.	Dam Site Alternate Dumping Yard	51
6.	Adit-2 and Road (300 m) & Dumping Yard	178	6.	Adit-2 and Road (300 m) & Dumping Yard	400
7.	Adit-3 and Road	23	7.	Adit-3 and Road	410
8.	Quarry Area	33	8.	Quarry Area	33
9.	Quarry Area Road	23	9.	Quarry Area Road	23
10.	Contractor Colony	797	10.	Contractor Colony	797
11.	Adit-4 and Road	55	11.	Adit-4 and Road (6000 m) & Dumping Yard	6000
12.	Road to Cresher Plant & Dumping Yard	64	12.	Road to Cresher Plant & Dumping Yard	64
13.	Adit-5, Dumping Yard & Road	529	13.	Adit-5, Dumping Yard & Road	150
14.	Dumping Yard & Workshop Area	100	14.	Dumping Yard & Workshop Area	100

15.	Powerhouse Dumping Yard	367	15.	Powerhouse Dumping Yard	367
16.	Powerhouse Area	95	16.	Powerhouse Area	15
17.	Adit-6, Surge Shaft & Surge Shaft Road	1013	17.	Adit-6, Surge Shaft & Surge Shaft Road	400
Total No of Trees		**4915**			**5397**

LAND REQUIREMENT COMPARISON LEFT BANK SCHEME AND RIGHT BANK SCHEME		
TYPE OF LAND	**LEFT BANK**	**RIGHT BANK**
Forest Open	60.318	64.034
Forest (Under Ground)	14.986	13.065
Government	0.898	0
Private	9.563	13.267
Total	**85.67**	**90.366**

11. Notably, the project proponent on affidavit, filed to oppose these writ petitions, dated 27.6.2012, has graphically described not only about the feasibility of the project on the left bank but also about the imperativeness of such shifting. It is justly pointed out that the plea raised by the petitioners is in the backdrop of pre-feasibility report, prepared by HPSEB, which was not decisive. It was prepared only with a view to initiate the proposal. Indisputably, that report was prepared without any field visit. However, after the in principle decision is taken by the State Government and recourse to international bidding on onerous terms such as deposit of substantial amount as upfront payment; and upon execution of pre-implementation agreement in favour of the successful bidder, and becoming the project proponent and authorized to carry out necessary survey and investigations as per the Hydro Power Policy, 2006, submitted proposal, that became the base document for further consideration. Reliance has been placed on Clause (viii) of Chapter-V of the said policy, which applies to project above 5 MW capacity, as in the present case. The same reads thus:

> "(viii) The scope of the work will be from concept to commissioning and operation thereafter, including, inter-alia, survey and investigations, identification of transmission system for the evacuation of power and preparation/review of DPR. The transmission system for evacuation of power shall form part of the Project and shall be included in the DPR in consultation with HPSEB, keeping in view the integrated system requirements."

12. It is stated that keeping in view the said policy, the project proponent after carrying out survey and investigations, the details whereof are delineated in the said affidavit, which reads thus:

> "The details of the investigations carried out by the Company for DPR approval are as under:
>
> (i) 1262.0 m. of Geological Core drilling for 32 numbers of Drill Holes.

(ii) 260 m of Exploratory Drifting work at 5 locations.

(iii) Additionally 2500 hectares of the topographical survey work along with 150 nos. of river cross section.

(iv) Extensive Laboratory investigations are also carried out to ascertain the actual site conditions.

(v) Hydro metrological data from Indian Metrological Department, GoI and other Government Departments are also collected for further optimization studies.

(vi) Market survey for getting the base date for the basic material rate for major construction material requirements like Cement and Steel is also done.

(vii) Transport logistic survey for checking the feasibility of the road conditions are limiting dimension of the road was carried out.

(viii) Construction Material Survey for suitability of the in situ materials are also carried out.

(ix) Additional date collection work for three seasons required for assessment under environmental consideration for flora and fauna in the project are were carried out.

(x) Socio Economic Survey of the Project area was also carried out for environmental consideration."

13. These investigations were carried out in time span of one and half year from February, 2008 (granting of POR by MoEF to November, 2009, submission of DPR) and on the basis of the information collated during such investigations, the project proponent submitted DPR to the appropriate Authorities. That (DPR) addresses all aspects including the technical aspects about the feasibility and environmental issues.

14. In the affidavit, it is then stated that due to shifting of the project on the left bank, there would be hardly any rehabilitation. For, only two families having house/shop are likely to be displaced. The said two families are already having a house in upper terrace and in any case, suitable compensation will be paid, as per Government of Himachal Pradesh (GoHP) and Government of India (GoI) Rehabilitation and Settlement Policy. As against that, the setting up of the project on the right bank would result in affectation of entire villages having about 40 families and their displacement. Similarly, the adverse impact to the environment would be far severe if the project were to be set up on the right bank. It is also stated that the petitioners have been ill-advised to rely on the reports of respondent No. 6 as that respondent was not competent Authority for approval of the project being valued more than Rs. 500 crores cost, in terms of Government notification and the appropriate Authority for the subject project is CEA.

15. In substance, it is stated on affidavit that all necessary care and caution has been taken by the project proponent and only after being fully convinced that shifting of the project on the left bank was imperative, such proposal was submitted to the appropriate Authority and which has been approved right upto MoEF, vide communication dated 2.12.2008. That permission was followed by the decision of the Government of Himachal Pradesh, conveyed by the Principal Secretary (Powers) vide letter dated 9.4.2009. Moreover, the Chief Engineer Energy, Directorate of Energy also confirmed the location of the project on the left bank vide letter dated 13.10.2010. The

respondents have also relied on the communication issued under the signature of the Deputy Commissioner, Chamba, District dated 26.2.2011, sent to the Principal Secretary (Powers) that no objection was raised by the locals regarding the shifting of the project component from right bank to left bank of river Ravi. Lastly, the Government of Himachal Pradesh confirmed and conveyed to the Chairman and Ex-officio Secretary of the Government of India, Central Electricity Authority (CEA) vide letter dated 7.3.2011 that respondent No. 7/project proponent-company has been allowed to shift the project component from right bank to left bank of the river Ravi. The proposal was accompanied by a "detailed note of justification for exploring water conductor system and power house complex on left bank", sent alongwith letter of the project proponent dated 20.10.2008 to the Principal Secretary (Powers) to the Government of Himachal Pradesh. Similar communication was sent to the Additional Director MoEF, New Delhi. It is further stated that the HPSEB through Chief Engineer (PSP) while referring to their meeting with the project proponent through their consultants recommended that request of the project proponent for shifting the project components from right bank to left bank may be considered and approved, vide letter dated 23.3.2009. It is stated that in any case, respondent No. 6 HPSEB has a limited role in processing the proposal in question as it is above 100 MW capacity and involving cost of rupees more than 500 crores, by virtue of notification dated 18.4.2006.

16. Notably, the petitioners have not controverted the assertions so made by the respondents on affidavit. Rather, each fact is supported by contemporaneous record. The petitioners, however, for pursuing the ground under consideration, placed reliance on the communication dated 11.2.2008, issued under the signature of Additional Director MoEF, Government of India, addressed to the Associate Vice President of the project proponent, which refers to the fact that on setting up the proposed project on the left bank no forest land and habitation will be sub-merged and that clearance was granted to the proposed project on that understanding. In the first place, much water had flown after issuance of this communication by the MoEF, Government of India. Moreover, the observation in this communication was not after doing comparative study of pros and cons, as at that time the project was conceived to be on the right bank only. As aforesaid, the project proponent undertook survey and investigations from February, 2008 to November, 2009 and submitted DPR. On the basis of the said DPR approval/permission from the competent Authorities for setting up the proposed project on the left bank was sought, which request was supported by justification statement. That received favourable response from the competent Authorities and including the Ministry of Environment and Forest, Government of India. Suffice it to observe that the position recorded in the communication dated 11.2.2008, became redundant because of the subsequent permission/approval granted by the competent Authorities and including the Ministry of Environment, Government of India.

17. Indeed, the said petitioners had relied on the subsequent communication of Chief Engineer (I & P) HPSEB dated 22.2.2011, which has concluded that the right bank of the river Ravi was best suited for construction of the project, taking into consideration all the aspects necessitated for economical and social consideration. He further concluded that there seems that no aspects substantiated to shift the project to left bank as proposed by the company by quoting various self vested reasons/grounds. This communication is addressed to the Deputy Commissioner, District Chamba. We are afraid, this communication cannot be the basis to disregard the formal approvals/ permissions given by the appropriate Authorities at the highest level and including the Ministry of Environment and Forest, Government of India. In fact, the respondents have rightly contended that HPSEB has had no concern with the subject project which is for above 100 MW capacity and involving cost of more than Rs. 500 crores, by virtue of notification dated 18.4.2006, issued under the Electricity Act, 2003. It is only, the CEA,

whose opinion could have influenced the final approval/permission by the competent Authority.

18. The attempt of the petitioners, we find, is to place reliance on materials which have no bearing whatsoever on the final permission/approval granted by the competent Authority. Instead, reliance is placed on contents of inter departmental correspondence at different levels. Suffice it to observe that we are more than satisfied that requisite procedure has been followed and due diligence has been taken by all concerned before granting approval/permission for shifting of the project on the left bank, instead of original proposal to set-up the same on the right bank of the River. The justification note and the proposal submitted by the project proponent refers to all the relative aspects and including the necessity of setting-up the project on the left bank. The Competent Authorities having granted approval/permission after considering those matters, it is not open for this Court to take another view. Assuming that two opinions are possible, it is not open to this Court to act upon the observation of some authority other than the competent Authority and answer the matter in issue. The Apex Court in the case of *Narmada Bachao Andolan vs. Union of India & others*[54], in paragraph 234 has observed that if a considered policy decision has been taken which is not in conflict with any law or is not mala fide, it will not be in public interest to require the Court to go into and investigate those areas which are the function of the executive. The Court further opined that for any project, which is approved after due deliberation, the Court should refrain from being asked to review the decision just because a petitioner in filing a public interest litigation alleges that such a decision should not have been taken because an opposite view against the undertaking of the project, which view may have been considered by the Government, is possible. The Court plainly observed that when two or more options or views are possible and after considering them the Government takes a policy decision, it is then not the function of the Court to go into the matter afresh and in any way and sit in appeal over such a policy decision. Applying the principle under-lying this exposition, the argument of the petitioners under consideration deserves to be stated to be rejected.

19. To get over this position, the other shade of the first contention was at the public hearing on 19.4.2010, the villagers had vigorously opposed the setting up of the project on the left bank. Moreover, besides the Gram Sabha Naya Gram, even the Gram Sabha Holi had gone on record that they were opposed to setting up the project on the left bank of the River. In view of the objection taken by the villagers in the Gram Sabha, the permission should not have been granted by the competent Authorities in favour of shifting of the project on the left bank. This argument will have to be negatived for more than one reason. Firstly because, upon perusal of the minutes of the meeting dated 19.4.2010, it is seen that the objection taken by the petitioner No. 1 Mangi Ram was that the project on the left bank may cause damage to Gharoh and for which reason, suitable measures be taken to avoid such damage to Gharoh. He further stated that some of the locals, who could not remain present, may be given opportunity of hearing. In that sense, the objection was not pointedly to the shifting of the project on the left bank but only expressing apprehension about the damage likely to be caused to Gharoh and to take corrective measures in that behalf. That aspect was duly considered and suggestions made by the Chairman of the meeting were taken note of and finally, everyone present in the public meeting approved the proposal for setting up of the project on the left bank. As regards the suggestion of giving opportunity to locals, who could not remain present, considering the fact that sufficient public notice was given about public hearing and the public hearing was held on two different dates, firstly on

[54] (2000) 10 SCC 664

19.4.2010 and the second public hearing was on 30.10.2010; coupled with the fact that the public hearing on 30.10.2010 was held in two sessions at 11.00 am. and the second at 3.00 p.m. and after considering all the aspects, final decision was taken. Therefore, no fault can be found with the Authorities having proceeded with the matter on the basis of such record. In other words, the challenge to the permission/approval granted by the competent Authority on the ground that it has been given without observing the requirement of public hearing and taking note of the opposition of the locals, to say the least, is ill-advised. The record substantiates the fact that sufficient notice was given about the scheduled public hearing and all persons during the meeting were allowed to raise their objections and the objections so raised were duly considered and redressed before recording final resolution of approving the setting up the plant on the left bank of the river. Further, the objection taken was limited to apprehension of damage to one area, Gharoh and not to the entire proposal of shifting the project on the left bank. Therefore, we have no hesitation in taking the view that the argument under consideration is an argument of desperation.

20. Counsel for the petitioners had relied upon the un-reported decision of this Court in Harish Chander & another vs. State of H.P. & others dated 13.12.2010 in CWP No. 3659 of 2009 and companion matters. However, this decision proceeds on the finding that the authorities has committed manifest error in dispensing with the convening of the public meeting. The other aspect considered in this decision is about the procedural infirmity in the process of acquisition of land and about the impact of environment because of reducing the distance from 800 meters to 200 meters from the forest area. Suffice it to observe that this decision is of no avail to the petitioners herein.

21. During the rejoinder, the counsel for the said petitioners once again made a faint attempt to raise the argument that the decision to shift the project on the left bank has been taken without consultation of the experts. As noted earlier, the counsel for the petitioners had given up this ground, as he could not point out any pleading from the petition in support of the said ground. That being a factual matter, in absence of foundation in the writ petition in that behalf, it cannot be taken forward. Nevertheless, we are of the considered opinion that the proposal for shifting has been processed through proper channel and upto the highest level before granting of permission by the Ministry of Environment and Forest, Government of India. Even the Expert Appraisal Committee had examined the same, as can be discerned from the communication dated 24.1.2011, issued under the signature of Additional Director and Member-Secretary, EAC, addressed to the president of respondent No. 7/project proponent-Company. In paragraph 3 of this communication, it is stated that the proposal was considered by the Expert Appraisal Committee for referred Hydel Electricity Project in its meeting dated 20th/21st December, 2010. In other words, even this contention of the petitioners is frivolous, vexatious and has not been substantiated from the record. Taking overall view of the matter, therefore, we find that the first contention raised by the petitioners is not only devoid of merit but also unsubstantiated and motivated and has been raised for the reasons best known to them. Hence the same is rejected.

22. That takes us to the second ground urged by the said petitioners. According to them, the project proponent was under obligation to assess the impact on landscape in general and wildlife ecological aspects in specific before final sanction is accorded, as predicated by Clause-5 of the communication dated 08.07.2011, addressed to the Principal Secretary (Forest), H.P. Govt., issued under the signature of Assistant Inspector General of Forest, MoEF, Government of India. The said clause reads thus:.

> "A cumulative study may be carried out by the State Government on the behest of all project proponents on Ravi River to assess the impact on landscape in general, and wildlife and ecological aspects in specific before the final sanction is accorded.

The FAC seeks special emphasis on the issues of forest fragmentation and landscape level changes due to direct and indirect impact of the project. The study should take into account on micro-hydel projects, existing and proposed in the project basin may be provided with maps."

23. It is alleged that the approval has been accorded without preparing such impact assessment report. However, it is noticed that the Assistant Inspector General (Forests) MoEF, Government of India, issued another communication dated 29.08.2011, addressed to the Principal Secretary (Forest), Government of Himachal Pradesh, being partial modification of condition No. 5 reproduced above. The said communication reads thus:

F. No. 8-43/2011-FC
Government of India
Ministry of Environment & Forest
(FC Division)

To
The Principal Secretary (Forests),
Government of Himachal Pradesh,
Shimla

Sub: Partial modification is condition no. 5 of the in-principal approval dated 08.07.2011 in respect of diversion of 75.304 Ha of forest land for implementation of 180 MW Bajoli Hydro Electric Project in favour of M/s. GMR Bajoli Holi Hydro Power Pvt. Limited in Bharmour Forest Division in Chamba District of Himachal Pradesh.

Sir,

I am directed to refer to this Ministry's letter of even no. dated 08th July, 2011 on the subject mentioned above communicated the in-principal approval of this Ministry and to say that condition no. 5 of this letter may be read as given below:

A cumulative study may be carried out by the State Government on behest of all project proponents on Ravi River to assess the impact on landscape in general and wildlife and ecological aspects in specific and the user agency shall submit an undertaking to comply with the additional conditions that the Central Government may stipulate based on outcome of the said study. Issues of forest fragmentation and landscape level changes due to direct and indirect impact of the project shall be specifically dealt in the said study. The study should also take into account on micro-hydel projects, existing and proposed in the project basin may be provided with maps.

I am further directed to request the State Government to kindly keep this Ministry informed on quarterly basis regarding the progress of the cumulative study.

Yours faithfully,

-sd-

(Anita Karn)
Assistant Inspector General Forests

(emphasis supplied)

24. It was submitted that by the subsequent communication, the authority has diluted condition No. 5, to favour respondent No. 7/project proponent-company. We are not impressed by this submission at all. For, the reply-affidavit filed by respondent No. 2, Principal Secretary (Forest), Government of Himachal Pradesh, belies this plea. In paragraph 2 of the reply-affidavit dated 21.09.2012 filed in compliance to the order of the Court dated 23.11.2012, is stated as follows:

> "2. That in this regard it is submitted that vide condition no. 5 of the in principal approval, the liability was imposed upon the State Govt. to carry out the study and assess the cumulative impact on landscape in general and wild life and ecological aspect in specific of the river basin study taking into account the Micro Hydel Projects in Ravi basin before according the final sanction. Accordingly the Forest Land was recommended to be diverted for the purpose of the basis of undertaking given by the respondent No. 3 that any condition imposed in connection with the outcome of the aforesaid study conducted by the replying respondent shall be complied with the additional conditions that the central Government may stipulate based on the outcome of aforesaid study. In this connection it is submitted that the Government of H.P. committed to carry the cumulative environment impact assessment (CEIA) study for the Ravi basin along with other river basin of Satluj, Chenab, Beas and Yamuna and the work has been entrusted to the Directorate of Energy. River basin studies of Satluj and Chenab rivers are in progress and the work of cumulative environment impact assessment study in basins of Beas and Ravi rivers are yet to be awarded to executing agencies by the Directorate of Energy to carry out the detailed study and that the measures required to be taken for overcoming the impacts which may be caused due to the implementation of the projects. Therefore, considering the importance and necessity of the implementation of the projects and the huge minority loss involved due to delay in implementation, the Government of India i.e. respondent No. 1 had partially modified the condition No. 5 vide its letter No. F. No. 8-43/2011-FC dated 29th August, 2011 copy annexed as Annexure R-1. Therefore, the replying respondent had no malafide intension in any manner to implement and allow the sanctions/execution of the projects."

25. Further, the respondent No. 7/project proponent-company has also invited our attention to the communication dated 13.08.2010, issued under the signature of Vice President and Head Hydel Project of respondent No. 7/project proponent-company, addressed to the Principal Secretary of the State Pollution Control Board, placing on record that out of five Gram Sabhas, four Gram Sabhas have given 'No Objection Certificates' and 5th Gram Sabha, Kuleth, was still processing the proposal. The NOCs were issued under the signature of Authorized Officer(s) of four Gram Sabhas including Naya Gram and Holi dated 01.08.2010 and 19.09.2010 respectively. The same were forwarded along with the said communication. Respondent No. 7/project proponent-company has also relied on the aspects considered during the public hearing dated 19.04.2010 as also on 30.10.2010 and including the communication issued under the signature of Principal Secretary, HP State Pollution Control Board dated 18.11.2010, addressed to the Director (Environment, S & T), Department of Environment Science and Technology, Government of Himachal Pradesh. Said communication reads thus:

H.P. STATE POLLUTION CONTROL BOARD
HIM PARIVESH, PHASE-III,
NEW DELHI-171009

No. HPSPCB(47)/Bajoli-Holi-HEP, Chamba/10-16330-39
Dated: 18.12.2010

From: Member Secretary

To
The Director (Env., S & T),
Department of Environment, Science and Technology,
Narayan Villa, Near Wood Villa Palace, Shimla-2.

Subject: Environment Public Hearing on the proposal submitted by M/s. GMR Bajoli Holi Hydro Power Pvt. Ltd., Old Uddan Bhawan, 2nd floor, Terminal-1, IGI Air Port, Palam New Delhi-110037 for setting up of 180 MW Bajoli-Holi Hydroelectric Project based on River Ravi with diversion works near Bajoli village at an elevation of about 1975 m above MSL and Power House located on the left bank of River Ravi near village Barola, District Chamba, (H.P.).

Sir,

According to the provisions of EIA Notification No. SO 1533 dated 14.09.2006 and the procedure prescribed therein, HP State Pollution Control Board had organized a Public Hearing under the Chairmanship of the District Collector-cum-Deputy Commissioner, Chamba, on the proposal of M/s. GMR Bajoli Hydro Power Pvt. Ltd. Old Uddan Bhawan, 2nd Floor, Terminal-1, IGI Air Port, Palam New Delhi - 110037 for setting up of 180 MW Bajoli-Holi Hydroelectric Project based on River Ravi with diversion works near Bajoli village at an elevation of about 1975 to above MSL in District Chamba and Power House located on the left bank of River Ravi near village Barola, District Chamba (H.P.) in Holi Town, near Forest Guest House, Tehsil Bharmour, District Chamba, H.P., on 19-04-2010 at 11.00 AM.

On the basis of the issue raised by the Public related to change of alignment of the project from the right bank to left bank of river Ravi without consultation and NOCs from the Gram Sabhas; it was concluded during the proceedings of the said Public Hearing held under the Chairmanship of the District Collector-cum-Deputy Commissioner, Chamba that the Project Proponent shall approach the affected Gram Sabhas and apprise them on the technical view as to why the project is aligned on the left bank instead of right bank and obtain their No Objection Certificate. It was also concluded that after the proponent obtains the No Objection Certificates from the affected Gram Sabhas; the Public Hearing would be organized again.

The Deputy Commissioner-cum-District Collector, Chamba, vide Letter No. RRO/CBA/Bajoli-Holi HEP/2010-4136-39 dated 25.09.2010 had informed that the Proponent has obtained No Objection Certificates from all the Panchayats which are to be affected due to construction of Bajoli Holi Hydroelectric Project and had advised to fix the Public Hearing on 30-10-2010.

In view of above and according to the provision of notification No. SO 1533 (E) Dated 14-09-2006 and the procedure prescribed therein the State Board has again conducted the Public Hearing on 30-10-2010 under the Chairmanship of District Magistrate, Chamba on the proposal of M/s. GMR Bajoli Holi Hydro Power Pvt. Ltd., Old Uddan Bhawan, 2nd floor, Terminal-1, IGI Air port, Palam New Delhi-110037 for setting up of 180 MW Bajoli-Holi Hydroelectric Project based on River Ravi with diversion works near Bajoli Village at an elevation of about 1975 in above MSL and Power House located on the left bank of River near village Barola, District Chamba, (H.P.).

Further in view of the contents of notification by the State Govt. issued vide No. STE/Restructuring of ST, E, BT & PC (Vol-I)/2007 dated 13-04-2007, please find enclosed herewith: (i) Proceedings of the Public Hearing in Hindi with attendance sheet

alongwith representations received during the public hearings, (ii) Statement of issues in English as raised in the Public Hearing; (iii) CD/Videotape of the proceedings of the Public Hearing; (iv) copies of Public Notices in English and Hindi published by the State Board in the new papers.

The proceedings and above-mentioned information are being sent to you for further necessary action in view of notification referred to above.

Encls: As above

Yours faithfully,
Member Secretary

26. After considering the above material, we have no hesitation in taking the view that the argument under consideration about not discharging the obligation as per condition No. 5 of the communication dated 08.07.2011 is devoid of merit. As is noticed, the said condition came to be modified by the Competent Authority. Notably, it is not the case of the petitioners that the said Authority could not have modified that condition. Nor it is possible to disregard the justification given in the response filed before this Court by respondent No. 2. In that sense, the modification effected by the Competent Authority vide communication dated 29.08.2007, ought to prevail. As per that condition, the State Government would carry out a cumulative study of all project proponents on Ravi River to assess the impact in general, and wildlife and ecological aspects in specific. The user agency is required to give undertaking to comply with the additional condition that the Central Government may stipulate on the basis of the outcome of such study.

27. In the first petition, the petitioners have merely referred to the communication imposing condition No. 5 (un-amended) dated 08.07.2011. Communication dated 29.08.2011 modifying that condition, however, was brought on record by the respondent along with reply-affidavit. That, indisputably, is a material document. Yet, it was conveniently not produced by the petitioners and no explanation in that behalf has been offered by the said petitioners. Be that as it may, the second ground urged by the petitioners, to say the least, is an attempt to cause confusion and misinformation. That cannot be countenanced in view of the modification of condition No. 5. Accordingly, even the second ground, pressed into service, does not commend to us.

28. That takes us to the third ground agitated by the said petitioners in the context of condition No. 16 contained in the communication dated 08.07.2011 issued under the signature of Assistant Inspector General of Forest, MoEF, Government of India, addressed to the Principal Secretary (Forests), Government of Himachal Pradesh. The same reads thus:

> "16. The user agency will obtain the clearance under the provisions of ST&-OTFD (Recognition of Forest Rights) Act, 2006 before the final approval and will submit certificate towards the settlement of all claims and rights over the proposed forest land under the Act along with the as per the advisory dated 03.08.2009 issued by MoEF."

29. The said petitioners have also pressed into service communication dated 03.08.2009 sent by the Senior Assistant Inspector General of Forest of MoEF (FC Division) Division, Government of India, addressed to the Chief Secretaries of all the States and Union Territories. The same reads thus:

F.N. 11-9/1998-FC(pt)
Government of India
Ministry of Environment and Forests
(FC Division)

Paryavaran Bhawan,
CGO Complex, Lodhi Road,
New Delhi - 110510.

Dated: 03.08.2009

To
The Chief Secretary/Administrator,
(All State/UT Governments except J & K)

Subject: Diversion of forest land for non-forest purpose under the Forest (Conservation) Act, 1980 - ensuring compliance of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006.

Sir,

In continuation to this Ministry's letter of even number dated 30.07.2009, I am directed to invite the attention of the State Government to the operationalization of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 which has become effective from 01.01.2008. It is observed that the proposals under the Forest (Conservation) Act, 1980 are being received from different States/UT Governments with the submission that the settlement of rights under the FRA will be correlated later on.

Accordingly, to formulate unconditional proposals under the Forest (Conservation) Act, 1980, the State/UT Governments are, wherever the process of settlement of Rights under the FRA has been completed or currently under process, required to enclose evidences **for having initiated and completed the above process, especially among other sections, Sections 3(1)(i), 3(1)(e) and 4(5)**. These enclosures of evidence shall be in the form of following:

a. A letter from the State Government certifying that the complete process for identification and settlement of rights under the FRA has been carried out for the entire forest area proposed for diversion, with a record of all consultations and meetings held;

b. A letter from the State Government certifying that proposals for such diversion (with full details of the project and its implications, in vernacular/local languages) have been placed before each concerned Gram Sabha of forest-dwellers, who are eligible under the FRA;

c. A letter from each of the concerned Gram Sabhas, indicating that all formalities/processes under the FRA have been carried out, and that they have given their consent to the proposed diversion and the compensatory and ameliorative measures if any, having understood the purposes and details of proposed diversion.

d. A letter from the State Government certifying that the diversion of forest land for facilities managed by the Government as required under section 3(2) of the

FRA have been completed and that the Gram Sabhas have consented to it.

e. A letter from the State Government certifying that discussions and decisions on such proposals had taken place only when there was a quorum of minimum 50% of members of the Gram Sabha present;

f. Obtaining the written consent or rejection of the Gram Sabha to the proposal.

g. A letter from the State Government certifying that the rights of Primitive Tribal Groups and Pre-Agricultural Communities, where applicable, have been specifically safeguarded as per section 3(1)(e) of the FRA.

h. Any other aspect having bearing on operationalisation of the FRA.

The State/UT Governments, where process of settlement of Rights under the FRA is yet to begin, are required to enclose evidences supporting that settlement of rights under FRA 2006 will be initiated and completed before the final approval for proposals.

This is issued with the approval of the Minister of Environment and Forests.

Sd/-

(C.D. Singh)
Sr. Assistant Inspector General of Forests.

30. Reliance is also placed on another communication sent by the Assistant Inspector General of Forests, MoEF (FC Division), Government of India, addressed to the Principal Secretary (Forests), State of Himachal Pradesh, dated 20.09.2012, the same reads thus:

F.N. 11-9/98-FC(pt)
Government of India
Ministry of Environment & Forest
(FC Division)

Paryavaran Bhawan,
CGO Complex, Lodhi Road,
New Delhi - 110003

Dated: 20th September, 2012

To
The Principal Secretary (Forests),
Himachal Pradesh,
Shimla.

Sub: Diversion of Forest land for non-forest purpose under the Forest (Conservation) Act, 1980 - ensuring compliance of the Scheduled Tribes and Other Traditional Forest, Dwellers (Recognition of Forest Rights) Act, 2006.

Sir,

In continuation of this Ministry's letter of even No. dated 3.8.2009 on the above mentioned subject, I am directed to say that this ministry has considered specific

situation as intimated by the Hon'ble Chief Ministry, Himachal Pradesh vide his D.O. No. MPP-F-(10) 5/2012 Dated 19.04.2012 where according to Hon'ble Chief Ministers rights and concessions on forest land throughout the State including the tribal areas have been settled long back and recorded in settlement reports, and that no FRA compliance issues exist which need to be settled.

Accordingly, I am directed to say that after examination of the matter, this Ministry has accepted the request of the Hon'ble Chief Minister, Himachal Pradesh that in case of Himachal Pradesh, a certificate issued by Collector cum District Commissioner of the District concerned that no claim under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 exists on pending in respect of forest land, be considered as sufficient evidence to meet procedural requirement of the afore-mentioned Act. To ensure proper scrutiny, in all such cases, stage-II approval will however, be accorded only after obtaining specific approval from the Competent Authority.

This issue with approval of the Hon'ble Minister of State (Independent Charge) for Environment and Forests.

Yours faithfully,

-sd-

(H.C. Chaudhary)
Assistant Inspector General Forests.

31. The argument proceeds that the opinion recorded in this communication is contrary to the provisions of law. The provisions of Act of 2006, mandate proper proceedings, issuance of certificate by the Competent Authority under that Act mentioning the Forest dwelling Scheduled Tribes in the State or in the areas where they have been declared as Scheduled Tribes in respect of all forest rights mentioned in Section 3; and the other traditional forest dwellers in respect of all forest rights mentioned in Section 3 are duly recognized and vested in them. Moreover in the communication dated 03.08.2009, the Gram Sabha was expected to issue communication indicating that all formalities/processes under the Act of 2006 have been carried out and consented for setting up of the proposed project. It is contended that, therefore, the Chief Minister could not have issued a general letter and in any case that cannot be made basis to assume that compliance of all the formalities have been effected.

32. The argument though attractive at the first blush, in our opinion, deserves to be stated to be rejected. Before dilating further, we deem it apposite to advert to the contents of the communication sent by the Chief Minister on 19.,09.2012, addressed to the Ministry of Environment and Forest, Government of India. The same reads thus:

"Guidelines issued by the MoEF on 03.08.2009 require prior settlement of all claims and rights over the proposed forest land under the provisions of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, before granting forest clearance. In Himachal Pradesh, the position is that the Rights and Concessions on forest land throughout the State including the tribal areas have long been settled and recorded in Settlement Reports. These rights are inheritable through succession and local people/right holders have been enjoying them without any infringement, since their admission. The communities living in the tribal districts of H.P. do not fall in the category of Primitive Tribal Groups for Pre-Agricultural Communities specified for entitlement under this Act. These communities (ST and Others) are not even forest dwelling (Van-vasis/banbasis)

communities.

Given the above position, it would be seen that the guidelines of the MoEF are adequately complied with in Himachal Pradesh. However, certificates issued by Collector-cum-Deputy Commissioner of the District concerned that no claim under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 is pending in respect of forestland and submitted along with the specific proposals for environment forest clearance is not being considered by MoEF as sufficient evidence to meet the procedural requirement of the Act. This is unduly delaying clearance of many development projects and specially hydel projects.

I had raised this issue along with other clearance related concerns vide my earlier D.O. letter No. MPP-F(10)13/2010 dated 24th September, 2011 (copy enclosed) also but so far no resolution has been conveyed. I would, therefore, request your personal intervention to resolve the matter which is impeding the rapid development of the Hydro Power potential of Himachal Pradesh."

It is on the basis of this communication, the Ministry of Environment and Forest responded and noted that the statement made in the communication of the Chief Minister was accepted and considered as sufficient evidence to meet the procedural requirement of the Act of 2006. In addition, the Deputy Commissioner, Chamba, on 04.10.2012 issued requisite certificate regarding compliance of necessary formalities under the Act of 2006 and in particular with reference to the subject project. The said certificate reads thus:

CERTIFICATE

REGARDING COMPLIANCE OF SCHEDULED TRIBES & OTHER TRADITIONAL FOREST DWELLERS (RCGNITION OF FOREST RIGHTS) ACT, 2006 IN RESPECT OF DIVERSION OF FOREST LAND MEASURING 75.304 HECTARES TO M/s. GMR BAJOLI HOLI HYDROPOWER PRIVATE LIMITED FORCNSTRCION OF 180 MW BAJOLI HOLI HYDRO ELECTRCPROJECT IN SUB-TEHSIL-HOLI, DISTRC CHAMBA, HIMACHAL PRADESH.

1. It is certified that the complete process for diversion and settlement of rights under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 has been carried out for the entire Forest area of 75.304 Hectares proposed for diversion for construction of Bajoli Holi hydro Electric project in Tehsil Holi, district Chamba, Himachal Pradesh.

2. As per verification duly conducted through field functionaries i.e. Sub Divisional Officer (c) Bharmour/Tehsildar Bharmour cum incharge Sub-Tehsil Holi as per report of revenue agencies, there is no Primitive Tribe Groups (Schedule Tribe) and Pre Agriculture Communities (Other Traditional Forest Dwellers) were available on the proposed forest land proposed to be diverted and whose forest Right Act, 2006.

3. It is certified that on the basis of field verification there are no such facilities managed by Government requiring diversion of Forest land under section 3(2) of Forest Rights Act, 2006 exist over the forest land proposed for diversion.

Place: Chamba

-sd-

Deputy Commissioner

Chamba, Himachal Pradesh.

33. Notably, neither the decision of the Ministry of Environment and Forest noted in communication dated 20.09.2012 nor the certificate issued by the Deputy Commissioner dated 04.10.2012 has been specifically challenged or any relief claimed in that behalf. If it is so, the question of examining the grievance of the said petitioners any further does not arise. In other words, the condition stipulated in Clause 16 of communication dated 08.07.2011 has been fulfilled by the project proponent. The argument of the said petitioners, however, is that, it is not necessary to challenge every decision of the concerned authorities or for that matter any communication which has been made basis for permitting the project proponent to continue with the setting up of the proposed project. This argument does not commend to us. The petitioners cannot expect the Court to make a roving enquiry; and more so take the opposite party by surprise during the argument. The grounds of challenge ought to have been properly articulated and including necessary reliefs claimed in the writ petition. We cannot countenance the argument that law of pleadings will have no application to the writ petitions filed as Public Interest Litigation. No doubt, in the matter of Public Interest Litigation, the Court may be somewhat liberal if the larger public interest warrants interference by the Court; and not to non-suit the cause at the threshold on technicalities or hyper technical approach. That however, does not mean that when the petitioners who have the benefit of competent legal advice and are represented by a Lawyer before the Court and were well advised to file detailed pleadings and including bringing on record several official documents coupled with the fact that they were fully aware of the stand taken by the respondents in the affidavit filed to oppose their writ petition, such petitioners cannot be permitted to use the shield of Public Interest Litigation to disregard the palpable infirmity in their pleadings. Notably, inspite of repeated indication given by the Court, the petitioners did not deem it appropriate to take remedial steps if they were so serious about pursuing the argument under consideration. Suffice it to observe that no argument worth the name has been advanced to demonstrate that the Authority, who has accepted the stand taken by the State Government as incorporated in the communication sent by the Chief Minister, could not have done so or such stand could not be taken by the State; or for that matter to doubt the competency of the Deputy Commissioner in issuing the certificate dated 04.10.2012. In our opinion, the record does indicate that necessary compliance of condition No. 16 in the communication dated 08.07.2011, has been made.

34. We may also advert to the stand taken by the Learned Assistant Solicitor General appearing for the Ministry of Environment and Forests, who has stated that the said Department had taken a conscious decision as reflected in the communication dated 20.09.2012; and there was no infirmity in the view so recorded. In his submission, the communication sent by the Chief Minister of the State reflects the stand of the State and was valid in all respects. For that reason, no fault can be found with the opinion recorded in the communication dated 20.09.2012 and more so when the Competent Authority, namely, Deputy Commissioner has already issued certificate on 04.10.2012. He submits that some interdepartmental communication between the FC division of MoEF and the Tribal Affairs Ministry, cannot be the basis to assume that the certificate issued by the Competent Authority of the State is erroneous. We find substance in this argument. Besides, the communication sent by Ministry of Tribal Affairs titled as Office Memorandum, issued under the signature of Director (SG) Ministry of Tribal Affairs, dated 01.04.2013, is a general stand of the said Ministry and not specific much less to impact the approvals/permissions already granted by the Ministry of Environment to the subject project. We deem it apposite to reproduce the said communication dated 01.04.2013, which reads thus:

F. No. 23011/22/2010-FRA
Ministry of Tribal Affairs
FRA division
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Room No. 401 'B' Wing,
Shastri Bhawan, New Delhi,

Dated 01.04.2013

Office Memorandum

1. The Ministry of Environment and Forests vide letter no. F. No. 11-9/98-FC (pt) dated 20.09.2012 (copy attached) addressed to Principal Secretary (Forest) Himachal Pradesh has accepted the request of the Hon'ble Chief Minister, Himachal Pradesh that in case of Himachal Pradesh, a certificate issued by the Collector of the District concerned that no claim under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 exists or pending in respect of forest land, can be considered as a sufficient evidence to meet procedural requirement of the afore-mentioned Act. This letter has been brought to the notice of this Ministry recently.

2. The Hon'ble Chief Minister, Himachal Pradesh vide his D.O. letter no. MPP-F-(10)5/2012 dated 19.04.2012 had sought exemption from compliance of FRA regarding diversion of forest land for non-forest purposes on the ground that rights and concession on forest land throughout the state including the tribal areas have been settled long back and recorded in settlement reports and that no FRA compliance issues exist which need to be settled.

3. This Ministry is concerned about the letter issued by MoEF cited above. In this connection, I would like to once again bring to your notice that FRA has been enacted with the purpose clearly laid down in Preamble of the Act, firstly to recognize and record rights of the forest dwellers who have been residing in such forests for generations and whose rights could not be recorded; secondly to empower them and their community institutions as statutory authorities with the power to protect and manage forests. The Preamble of the Act stipulates that both these measures are required to ensure conservation of forests and address historical injustice done to the forest dwellers, including those forced to relocate due to State development interventions.

4. It is pertinent to mention here that this letter of MoEF to the State of Himachal Pradesh is not only violative of the spirit of the FRA, 2006, but also goes against the circular issued by MoEF on 3.08.2009 wherein clause (c) requires certification of Gram Sabha indicating that all formalities and processes under FRA have been carried out. Since claims under FRA are first received by the Gram Sabha, therefore, certificates from the Gram Sabha(s) must be obtained before concluding that all rights under FRA have been settled.

5. Hon'ble Minister of Tribal Affairs also in his letter to Hon'ble MoS (I/C), MoEF dated 7.12.2012 (copy attached) had reiterated that "any takeover or diversion of forest land under any other law has to respect both parts of the Forest Rights Act as mentioned above. In particular, it cannot take place until the recognition of rights is complete in the areas and the forest dwellers have expressed their collective prior informed consent to the destruction and/or takeover of the forest

and to the rehabilitation/compensation plan that is being provided to them." The same letter also points that Under Section 6(1) and Rule 11, "Gram Sabha is the institution that initiates rights recognition and may extend it as long as required. Hence it must certify that the process is done."

6. Further Hon'ble Minister of Tribal Affairs has recently written to Hon'ble Chief Minister of Himachal Pradesh (D.O. No. 23011/26/2012-FRA(pt) dated 28.02.2013 (copy attached) stating that "The State Government has been consistently been taking the stand that rights over forest land has been settled long back and recorded in settlement and therefore there is limited scope of implementation of Forest Rights Act in the State of Himachal Pradesh. This stand is not correct as in many States, rights over forest land has been settled but that rights of forest dwellers were not recorded properly and as the Preamble of FRA states, that this Act is meant to undo the historical injustice. It is also pertinent to mention that even after settlement, fresh rights accrue over a period time. Therefore, implementation of FRA cannot be set aside due to settlements done in the past".

7. Therefore, it is requested that this letter is immediately withdrawn and the State of Himachal Pradesh is directed to comply with the circular of MoEF issued on 3.08.2009 and ensure that all rights are recognized and vested before any forest land is diverted for non-forest purpose. I would also request you that in future, the Ministry of Tribal Affairs must be consulted before any directions are issued in matters relating to ensuring compliance of FRA in diversion of forest land for non-forest purposes.

(Asit Gopal)
Dir(SG)

(emphasis supplied)

35. The stand taken by the learned Assistant Solicitor General is reinforced from this communication and/or on fair reading of Clause 6 of this communication, it contains general remark that " in many States" rights over Forest land have been settled but that rights of dwellers were not recorded properly. The petitioners are not in a position to demonstrate that the Ministry of Tribal Affairs has issued any communication specifically with reference to the subject project and indicating that the procedure followed by the State Authorities and approved by the Ministry of MoEF, Government of India was not in accordance with law, much less, void-abinitio. Considering the above and taking over all view of the matter, we have no hesitation in concluding that even the third ground under consideration is completely devoid of merit and has been raised only on the basis of some assumptions or figment of imagination of the petitioners which are not supported by any tangible material and decisive enough to interdict the activities for setting up of the proposed project.

36. Counsel for the said petitioners would then rely on the unreported decision of the Apex Court in the case of Orissa Mining Corporation Limited Versus Ministry of Environment and Forests and others, being writ petition No. 180 of 2011, decided on 18.04.2013. Emphasis was placed on paragraph 49, in which guidelines issued by the Ministry of Environment and Forests vide letter dated 12.07.2012 have been reproduced. One of the guideline pertains to the community rights and in particular relates to the forest produce rights inter alia in the State of Himachal Pradesh. The guidelines from which the District Level Committee should ensure that the records of prior recorded nistri or other traditional community rights are provided to Gram Sabhas and if claims are filed for recognition of such age-old usufructory rights, such claims are not rejected except

for valid reason. We fail to understand as to how this guideline has any bearing on the factual matrix of this case and in particular in the backdrop of acceptance of the stand taken by the State of Himachal Pradesh about the compliance of necessary formalities under the Act of 2006, as noted in the communication of Ministry of Environment and Forests dated 20.09.2012. Learned counsel for the petitioners has not adverted to any other portion of the said unreported judgment in support of the third ground which is under consideration. Therefore, we do not deem it necessary to dilate any further on this judgment.

35. We may now turn to the preliminary objections taken by the respondents that the first two writ petitions filed as Public Interest Litigation, suffer from delay and laches and for which reason, the Court must be loath to interfere at this stage when the project proponent has acted to its detriment on the basis of the approval/permission given by the competent Authorities. It is submitted that the project proponent responded to the international bidding in August, 2007. As per the onerous conditions to participate in the said bidding, it had to pay substantial upfront amount, and after being successful bidder, at the time of execution of pre-implementation agreement dated 15.2.2008, the project proponent paid further amount of Rs. 42 crores as one of the stipulation for execution of the said agreement. After executing that agreement, the project proponent undertook survey and investigations and considering all aspects, including of sustainable development, DPR was submitted on 18.11.2009. The same was done within the time specified by the State Government, as per the conditions in the agreement. Not only that, information regarding setting up of the proposed project was in public domain and the stage-I approvals/permissions were accorded by the competent Authority, only after compliance of all the formalities and after taking into account the objections received from different quarters, including the locals. The five Gram Panchayats gave 'No Objection Certificates' for the setting up of the proposed project. Notably, public hearing was held on more than one occasion. At that time, not only representatives of the concerned Gram Sabha, but also the locals participated. All objections raised during the said meetings were discussed and solution was offered in those meetings. Even the Expert Appraisal Committee accorded approval to the setting up of the proposed project on the left bank of the river. On the basis of the pre-appraisal report, the Revenue Department, in the first place issued Inescapability Certificate in the year 2010, which was followed by the Essentiality Certificate, issued by the Director of Energy on 4.9.2010. The project proponent then proactively pursued the proposal and without waiting for the culmination of the proceedings under the Land Acquisition Act, acquired the lands required for the proposed project by private negotiations with the concerned land owners. Land to the extent of 90%, required for the project has already been purchased by the project proponent by paying compensation to the extent of Rs. 4 crores. All these activities were in public domain and after due notice to all concerned. However, it is only after grant of stage-I approval to the proposed project, the petitioners in the first petition chose to file writ petition in February, 2012, asking for limited reliefs. After the stage-II approval was accorded by the competent Authorities, the second writ petition came to be filed on 18.11.2012, seeking further reliefs, through the same Advocate, without challenging the basic permissions and decisions of the competent Authorities. Considering the above, it was submitted by the counsel for the project proponent that, both the petitions should be dismissed at the threshold on the ground of unexplained delay and laches. To buttress this submission, reliance was placed on the dictum of the Apex Court in the case of *State of M.P. v. Nandlal* [55]. In paragraph 22 of this decision, the Court adverted to facts of that case and found that the writ petition was filed after 11 months from the passing

[55] AIR 1987 SC 251

of the policy decision and the respondents having acted on the said decision and spent substantial amount of Rs. 1.5 crores, the petition cannot be entertained. Apex Court, in paragraph 23 of the decision, noted thus:

> "23. Now, it is well settled that the power of the High Court to issue an appropriate writ under Article 226 of the Constitution is discretionary and the High Court in the exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is inordinate delay on the part of the petitioner in filing a writ petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction. The evolution of this rule of laches or delay is premised upon a number of factors. The High Court does not ordinarily permit a belated resort to the extraordinary remedy under the writ jurisdiction because it is likely to cause confusion and public inconvenience and bring in its train new injustices. The rights of third parties may intervene and if the writ jurisdiction is exercised on a writ petition filed after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. When the writ jurisdiction of the High Court is invoked, unexplained delay coupled with the creation of third party rights in the meanwhile is an important factor which always weighs with the High Court in deciding whether or not to exercise such jurisdiction. We do not think it necessary to burden this judgment with reference to various decisions of this Court where it has been emphasized time and again that where there is inordinate and unexplained delay and third party rights are created in the intervening period, the High Court would decline to interfere, even if the State action complained of is unconstitutional or illegal. We may only mention in the passing two decisions of this Court one in *Ramanna Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCR 1014 : AIR 1979 SC 1628) and the other in *Ashok Kumar v. Collector, Raipur* (1980) 1 SCR 491 : AIR 1980 SC 112). We may point out that in R.D. Shetty's case (supra), even though the State action was held to be unconstitutional as being violative of Article 14 of the Constitution, this Court refused to grant relief to the petitioner on the ground that the writ petition had been filed by the petitioner more than five months after the acceptance of the tender of the fourth respondent and during that period, the fourth respondent had incurred considerable expenditure, aggregating to about Rs. 1.25 lakhs, in making arrangements for putting up the restaurant and the snack bar. Of course, this rule of laches or delay is not a rigid rule which can be cast in a straitjacket formula, for there may be cases where despite delay and creation of third party rights the High Court may still in the exercise of its discretion interfere and grant relief to the petitioner. But such cases where the demand of justice is so compelling that the High Court would be inclined to interfere in spite of delay or creation of third party rights would by their very nature be few and far between. Ultimately it would be a matter within the discretion of the Court; ex hypothesis every discretion must be exercised fairly and justly so as to promote justice and not to defeat it."

38. Reliance is then placed on the decision of the Apex Court in the case of *Bombay Dyeing & Manufacturing Co. Ltd. vs. Bombay Environmental Action Group & Others*[56] in particular at paragraphs 341 and 345 thereof. The same read thus:

> "341. Delay and laches on the part of the writ petitioners indisputably have a role to play in the matter of grant of relief in a writ petition. This Court in a large number of decisions has categorically laid down that where by reason of delay and/or laches on the part of the writ petitioners the parties altered their positions and/or third-party interests have been created, public interest

[56] 2006(III) SCC 434

litigations may be summarily dismissed. Delay although may not be the sole ground for dismissing a public interest litigation in some cases and, thus, each case must be considered having regard to the facts and circumstances obtaining therein, the underlying equitable principles cannot be ignored. As regards applicability of the said principles, public interest litigations are no exceptions. We have here to before noticed the scope and object of public interest litigation. Delay of such a nature in some cases is considered to be of vital importance. (See Chairman & MD, BPL Ltd. V. S.P. Gururaja).

345. However, we do not intend to lay down a law that delay or laches alone should be the sole ground for throwing out a public interest litigation irrespective of the merit of the matter or the stage thereof. Keeping in view the magnitude of public interest, the court may consider the desirability to relax the rigours of the accepted norms. We do not accept the explanation in this regard sought to be offered by the writ petitioners. We have no doubt in our mind that the writ petitioners are guilty of serious delay and laches on their part."

39. Reliance is also placed on the decision in case of *R & M Trust vs. Koramangala Residents Vigilance Group and Others*[57] in particular paragraphs 33 thereof, which read thus:

"33. In the case of *State of Maharashtra vs. Digambar* Their Lordships observed as follows: (SCC p. 684)

"The power of the High Court to be exercised under Article 226 of the Constitution, if is discretionary, its exercise must be judicious and reasonable, admits of no controversy. Persons seeking relief against the State under Article 226 of the Constitution, be they citizens or otherwise, cannot get discretionary relief obtainable thereunder unless they fully satisfy the High Court that the facts and circumstances of the case clearly justified the laches or undue delay on their part in approaching the Court for grant of such discretionary relief. Therefore, where the High Court grants relief to a citizen or any other person under Article 226 of the Constitution against any person including the State without considering his blameworthy conduct, such as laches or undue delay, acquiescence or waiver, the relief so granted becomes unsustainable even if the relief was granted in respect of alleged deprivation of his legal right by the State."

40. We are in agreement with the grievance of respondent No. 7/project proponent-Company that in the fact situation of the present case, the Court should be loath in interfering at the instance of these petitioners.

41. The counsel for the said writ petitioners, however, was at pains to persuade the Court that the petitioner No. 1 in the first petition had participated in the public hearing and also raised objections, that cannot be the basis to non-suit the other petitioners. Even this argument deserves to be stated to be rejected. Inasmuch as, it is not the case of the other petitioners that the activities regarding setting up of the proposed project were not in public domain at all and were done secretively. It is not their case that public hearing was not held at all or for that matter meeting was convened at short notice. The record clearly indicates that sufficient notice was given regarding the public hearing. If the other petitioners failed to attend the meeting, convened to hold public hearing, now, cannot be heard to complain about the same. In any case, the grounds on which the proposed project is sought to be stalled or objected to, as found in the earlier part of this judgment, are completely untenable and figment of imagination of the petitioners. The same have not been substantiated from the record at all. On the other hand, the

[57] 2005 (III) SCC 91

record indicates to the contrary and supports the stand of the respondents. Suffice it to observe that in the writ petitions no explanation whatsoever muchless satisfactory or plausible explanation has been given for filing of the writ petitions belatedly and for waiting till the approvals/permissions were granted of Stage-I and also Stage-II. Both these petitions therefore, deserve to be dismissed because of unexplained delay and laches.

42. The last aspect that needs to be considered is the argument of respondent No. 7/project proponent-Company that in the facts of the present case, it is but appropriate that Court must not only provide for costs to the respondents for having been embroiled in frivolous and vexatious litigation but also exemplary costs, as each of these petitions are motivated. To buttress this argument, learned counsel has invited our attention to the decision of the Apex Court in the case of *Raghbir Singh Sehrawat vs. State of Haryana and Others*[58], in which, the Court directed the opposite party to pay costs to the appellant, quantified of Rs. 2.50 lacks. He submits that similar amount be directed to be paid by each of the petitioners to the respective respondents. We find substance in this argument. We have already noticed that the allegations and/or grounds urged in the respective petitions are not only untenable but irresponsible, frivolous and vexatious. These petitions have been filed with purpose best known to the petitioners therein. The filing of such petitions inevitably causes confusion amongst the stakeholders. Such action must be held to be against the larger public interest; and is not a genuine public interest litigation. The petitions being motivated and being an attempt to stall the project, which is being set up in larger public interest and has been variously supported by the locals in all respects except the petitioners or few other disgruntled persons, acting at the behest of the petitioners herein, coupled with the fact that the Advocate for the petitioners made incoherent submissions for almost one hour on 13th May, 2013 and the Court had no option but to give him some more time for better preparation and articulation of the issues and on 17th May, 2013, the Court had to again spend substantial part of the day in hearing these matters, which as aforesaid raise frivolous and vexatious grounds, we accede to the request of respondent No. 7/project proponent-company that the Court while dismissing these petitions must impose atleast costs to be paid to the contesting respondents, if not exemplary costs.

43. In the circumstances, we are not only inclined to dismiss the first two petitions but also direct the petitioners in each of these petitions to pay costs quantified at Rs. 25,000/-, (Rupees Twenty Five Thousand) each to be made over to the contesting respondents equally. In other words, four petitioners in the first petition shall pay Rs. 25,000/- each i.e. Rs. One lakh and the sole petitioner in the second petition shall also pay Rs. 25,000/-. The aggregate amount of Rs. 1.25 lakhs shall be distributed equally amongst (i) Ministry of Environment and Forest, Government of India, (ii) H.P. State Pollution Control Board, (iii) H.P. State Electricity Board Limited, (iv) H.P. State Forest Department and (v) The Project Proponent, GMR Bajoli-Holi Hydro Power Pvt. Ltd., who are the contesting respondents. In other words, each of the abovenamed parties, will be entitled to costs of Rs. 25,000/- respectively. The amount of costs shall be paid by the petitioners within four weeks from today, failing which the Collector, Chamba is directed to recover the aforesaid amount from the respective petitioners jointly and severally, within eight weeks from today as arrears of land revenue and deposit the same in the Registry of this Court within the same time.

44. That takes us to the third petition filed by the project proponent. That petition was filed because of the obstructionist attitude adopted by the respondent No. 5 to 11 when

[58] 2012(1) SCC 792

the further construction activity of the proposed project was in progress. However, the counsel for the petitioner therein, in all fairness submits that in view of the reply-affidavit filed by the State and more particularly because the situation is now under control after registration of criminal cases against the miscreants, nothing survives for consideration in this petition. As a result, this petition is being disposed of with liberty to the said petitioner (project proponent) to resort to appropriate remedy against the concerned persons, if and when occasion arises and including to pursue the criminal case already registered against the concerned accused and also for claim for damages against them, if so advised. In view of the above, we pass the following order:

i) Writ petition No. 2083 of 2012 and Writ Petition No. 9980 of 2012 are dismissed with costs quantified at Rs. 25,000/- to be paid by each of the petitioners in the respective petitions to the abovenamed contesting respondents, within four weeks from today, failing which, the Collector, Chamba is directed to recover the aggregate amount of Rs. 1.25 lakhs (Rupees One Lack Twenty Five Thousand) jointly and severally from the four petitioners in the first petition and/or sole petitioner in the second petition, within eight weeks from today as arrears of land revenue and deposit that amount in the Registry of this Court to be made over to (i) Ministry of Environment and Forest, Government of India, (ii) H.P. State Pollution Control Board, (iii) H.P. State Electricity Board Limited, (iv) H.P. State Forest Department and (v) the Project Proponent, GMR Bajoli-Holi Hydro Power Pvt. Ltd. equally i.e. Rs. 25,000/- each.

ii) Writ Petition No. 349 of 2013 is disposed of with liberty to the petitioner to pursue remedy against the concerned persons in accordance with law and including without expressing any opinion on the criminal case already registered against them. Withdrawal of writ petition should not be construed as petitioners having diluted or withdrawn the allegations against the concerned accused in the criminal case, in any manner. In other words, the petitioners are free to pursue other remedies as may be permissible in law.

iii) Ordered accordingly.

Sher Singh & Ors. vs. State of Himachal Pradesh & Anr.

RSA NO. 515 OF 2012A
HIGH COURT OF HIMACHAL PRADESH
27.05.2013
CORAM: KULDIP SINGH, J.

SUMMARY

The appellants had filed a civil suit in the Court of the Civil Judge, Solan as far back as 2002, seeking declaration that they have become owners in possession of land at village Sihardi Chamara by efflux of time, and further seeking an injunction against respondent State government from dispossession.

Having lost before both the Courts before, they had filed a second appeal before the High Court, raising an additional ground that they are claimants under Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA).

The appellants argued that they belong to the Scheduled Caste community called Bangala, residing in the village for last sixty years. They also claimed that they belong to a Scheduled Tribe and traditionally dwell in the forest area being dependent on forest and forest land for livelihood. The appellants further argued that they were allowed to occupy the land by the Maharaja of Patiala in 1942. Accordingly, they claimed ownership and title by adverse possession over the land. The appellants also asserted that they have been recognized by the Gram Sabha by providing facilities like roads, street lights and so on.

The respondent State government argued that the suit land was never allotted to the appellants. Further, the appellants are not dependent upon the forest for their livelihood, thus the protection under the FRA is not available to them.

FINDINGS OF THE COURT

The Court held that the appellants have failed to prove that the suit land was allotted to them by the Maharaja of Patiala in 1942, nor demonstrated any revenue record indicating their possession over the land. The Court examined in close detail the evidence of several witnesses as well as the documentary evidence in

this regard, and concluded that the title of the petitioners, whether by grant or by adverse possession, is not proved.

Regarding the claim of protection under the FRA, the Court examined the definition of "forest dwelling Scheduled Tribes" (Sec. 2(c)) and "other traditional forest dwellers" (Sec. 2(o)). The Court held that the appellants are not sure about which community or caste they belong to, and have failed to prove that they primarily reside in forests and are dependent on forests for their livelihood. The Court was of the view that encroachers on government land cannot acquire title with passage of time. Accordingly, the appeal was dismissed.

EDITOR'S NOTE

The present case is a civil suit for declaration filed well before the enactment of the FRA. The effort of the appellants to rely upon the FRA to buttress their failing claim to ownership was, not surprisingly, unsuccessful.

JUDGMENT

1. The appellants are plaintiffs, they have lost in both the Courts below, they have assailed judgment, decree dated 26.3.2012 passed by learned Addl. District Judge, Solan in Civil Appeal No. 12-S/13 of 2011 affirming judgment, decree dated 29.12.2010 passed by learned Civil Judge (Senior Division), Kasauli, District Solan, H.P. in Civil Suit No. 284/1 of 2002. The appellants had filed a suit for declaration and injunction against the respondents that they have become owners in possession of the land at Sihardi Chamara by afflux of time. They have assailed the order passed by the Collector on 11.9.2000 in case State vs. Sheru and others and also the order dated 19.5.2001 passed by the Commissioner (Revenue) in appeal titled Sheru vs. State of H.P. They have sought consequential relief of permanent prohibitory injunction restraining the respondents from interfering in the ownership and possession of the appellants over the suit land.

2. The pleaded case of the appellants is that they are residents of village Sihardi where they are residing for the last more than 60 years. The appellants belong to Bangala caste which is a backward section of the society besides being scheduled caste. It has also been alleged that the appellants being scheduled tribes and traditionally dwell in forest area. The appellants since time immemorial had been roaming in the forests, residing there and were dependent on forest and forest land for their livelihood.

3. The respondents No. 2 issued notice to the appellants of unauthorised possession over the suit land. The Collector-cum-D.F.O., Solan initiated the proceeding, which was contested by the appellants. They pleaded their adverse possession over the suit land. The ownership of the appellants was recognized by the State of Himachal Pradesh as it had been providing various subsidies and grants to the appellants for the purpose of construction of houses etc. The respondents at no point of time raised any objection to the possession of the appellants.

4. In the year 1974 Baldev Singh, D.F.O. visited the spot and asked the appellants to remove their constructions from the suit land. The appellants asserted that they had been allowed to occupy the land by the Rulers and had been given ownership of the same. The appellants asserted their hostile possession and claimed title by way of adverse

possession over the suit land.

5. The respondent No. 2 has no jurisdiction to issue notice under Section 4 of the Himachal Pradesh Public Premises and Land (Eviction and Rent Recovery) Act, 1971 (for short 'Act'). In the proceedings under the Act, the appellants raised question of title which could not be decided in summary manner by the Collector. The order dated 11.9.2000 passed by the Collector is wrong and illegal. Similarly, the order dated 19.5.2001 of the Commissioner (Revenue) is also wrong and illegal.

6. It has been alleged that Gram Sabha, Dharampur under whose jurisdiction the suit land falls has recognized rights of the plaintiffs/appellants over the suit land by providing facilities of roads, street lights etc. The rights of the plaintiffs have been recognized under the Scheduled Tribes and other Traditional Forest Dweller's (Recognition of Forest Rights) Act, 2006 (for short '2006 Act') which provides protection to the appellants from their eviction.

7. The suit was contested by the respondents by filing written statement. They have taken preliminary objections of jurisdiction, maintainability, valuation. On merits, it has been denied that the appellants are residents of village Sihardi Chamara for the last more than 60 years. They have defended the orders passed by the Collector as well as Commissioner (Revenue). The subsidies were given by the Government to the appellants for their welfare and not for encroaching the forest land. The suit land was never allotted to the appellants, they are encroachers. It has been denied that the appellants have become owners of the suit land by way of adverse possession. It has been denied that the appellants are dependent upon the forest for their livelihood. The protection of 2006 Act is not available to the appellants. The appellants are not doing agricultural activities on the forest land nor they are selling wood or other produce of the forest in the market for their livelihood. They are also not earning their livelihood by hunting. The remaining claim of the appellants was denied.

8. The appellants filed replication. On the pleadings of the parties, the following issues were framed:

    1. Whether the order passed by the defendant No. 2 in case State of H.P. vs. Sheru and others on 11.9.2000 and the order dated 19.5.2001 passed by Commissioner Revenue in appeal No. 71/2000 titled as Sheru vs. State of H.P. are wrong, illegal, null and void, as alleged? OPP

    2. Whether the plaintiffs have perfected their title qua the suit land by way of adverse possession, as alleged? OPP

    2(a) Whether the plaintiffs are protected from their eviction in view of the provisions of the Scheduled Tribes and other Traditional Forest Dweller's (Recognition of Forest Rights) Act, 2006, as alleged? OPP

    3. Whether the jurisdiction of this Court to try and decide the matter is barred under H.P. Public Premises and Land (Eviction and Rent Recovery) Act, 1971, as alleged? OPD

    4. Whether the suit is not maintainable in the present form in the eyes of law? OPD

    5. Whether the plaint does not disclose any cause of action, as alleged? OPD

    6. Whether the suit has not been properly valued for the purpose of court fee and jurisdiction? OPD

7. Relief.

The issues No. 1, 2, 2(a), 4 and 6 were answered in negative, issue No. 3 in affirmative and issue No. 5 was not pressed. The suit of the appellant was dismissed by the learned trial Court on 29.12.2010. The first appeal filed by the appellant was dismissed on 26.3.2012, hence second appeal.

9. I have heard Mr. Dinesh Kumar, learned counsel for the appellants and Mr. M.L. Chauhan, Additional Advocate General for the respondents and have also gone through the records. On behalf of the appellants, it has been submitted that the learned Courts below have erred in holding that the jurisdiction of the Civil Court to try the suit is barred. The Courts below have wrongly held against the appellants regarding their plea of adverse possession. The appellants are otherwise protected under the 2006 Act. The evidence has been misconstrued. Chamaru Ram vs. The Additional Commissioner (Appeals) and others 2002 (1) Cur. L.J.(H.P.) 440 and Ravinder Singh and others vs. State of H.P. and others 2004 (3) Cur. L.J.(H.P.) 560 have been relied by learned counsel for the appellants. The learned Additional Advocate General has supported the impugned judgment, decree and has submitted that the two Courts below after proper appreciation of the evidence have categorically recorded findings of facts against the appellants. No substantial question of law is involved in the appeal. In the second appeal, re-appreciation of evidence is not permissible.

10. The suit was initially dismissed on 11.6.2009. In appeal, learned District Judge allowed the amendment application of the appellants. The appeal was accepted on 20.7.2010 and the suit was remanded with a direction to the trial Court to give opportunity to the respondents to file written statement to the amended plaint. The parties were given opportunity to lead evidence on new issues, if any. The trial Court thereafter dismissed the suit on 29.12.2010 and learned Additional District Judge on 29.12.2010 affirmed the judgment, decree dated 26.3.2010 of the learned trial Court.

11. The appellants have assailed the orders dated 11.9.2000 and 19.5.2001. They have sought declaration that they are owners of the land and structures mentioned in the order dated 11.9.2000. They have acquired their title on the basis of adverse possession of over 30 years. In alternative, they have right to hold and possess the land under 2006 Act. They have prayed injunction against the respondents from interference over the suit land. The appellants have pleaded that respondent No. 2 had issued notices to appellants identifying their possession over different parts of khasra No. 1 from 2 to 6 biswas on forest land situate in Sihardi.

12. The appellants have pleaded that they have been residing in a village Sihardi Chamara for the last more than 60-70 years and they are scheduled caste. They are dependent upon forest land for bonafide livelihood. They are scheduled tribes and traditionally dwell in forest area. The respondent No. 2 has no jurisdiction under the Act to proceed against the appellants, who are otherwise protected under the 2006 Act.

13. The appellants have not placed on record the revenue record indicating their possession over the suit land. They have produced applications and electricity connection orders Ex. PW-6/B to Ex. PW-6/F. Ex. PW-6/F is the application dated 17.7.1964 and Ex. PW-6/E is the connection order in favour of Bhondoo Ram. Ex. PW-6/D is the application dated 27.8.1978 and Ex. PW-6/C is the connection order dated 27.9.1978 in favour of Sukh Ram. Ex. PW-6/B is the application of Sadh Ram presented on 16.6.1992.

14. PW-1 Sadh Ram has tendered in evidence his affidavit Ex. PW-1/A, the copy of order dated 11.9.2000 Ex. PW-1/B and copy of grounds of appeal Ex. PW-1/C and copy of order

of Commissioner mark 'A'. In affidavit Ex. PW-1/A he has stated that in or around the year 1942 Shiradi Chamara area was in Patiala State. Maharaja of Patiala was pleased with the services rendered by their community and granted/gifted the suit land to their ancestors and since then they are residing over the suit land. He further deposed that his ancestors discontinued moving from place to place, developed the land and settled there by raising permanent structures. The houses were constructed in the year 1944-45. The ancestors became owners of the suit land on the basis of the gift. The State of H.P. also treated them as owners and granted financial help for improvement of their houses. The defendants have no jurisdiction to adjudicate the complicated questions of gift. He has stated that in alternative, the plaintiffs have become owners of the suit land on the basis of hostile possession. Baldev Singh, D.F.O. visited the spot in the year 1975. He was told that the suit land was allotted to the plaintiffs by Maharaja Patiala in the year 1942. Baldev Singh told the plaintiffs that they were in illegal possession. They asserted their ownership on the suit land. The plaintiffs belong to Scheduled Caste. In cross-examination, he has stated that his house was constructed 30-35 years ago, his statement was recorded on 18.3.2006. They never got their possession recorded with the Patwari. He has no proof of allotment of land by way of gift. He denied that houses were constructed by them recently.

15. PW-2 Rajesh Kumar tendered in evidence his affidavit Ex. PW-2/A which is more or less on the same lines as affidavit Ex. PW-1/A. In cross-examination, he has stated that he is working in Hot-Millions. He constructed his house in the year 1969. PW-3 Ashok Gupta has tendered in evidence his affidavit Ex. PW-3/A. He has stated that he remained Vice-Pradhan of Gram Panchayat, Dharampur. The village Sihardi Chamara is part of Gram Panchayat, Dharampur. He has stated that in the year 1942 fire broke out in Sihardi Chamara. The ancestors of the plaintiffs helped the officials of Maharaja Patiala in extinguishing the fire. Maharaja Patiala gifted the suit land to the ancestors of the plaintiffs. All houses of the plaintiffs were constructed before independence in the year 1944-45. Maharaja Patiala was the owner of the suit land, thereafter the land vested in the State of Himachal Pradesh but possession remained with predecessors-in-interest of the plaintiffs. Baldev Singh, D.F.O. visited the area in the year 1974. He asked the plaintiffs or their ancestors to vacate the forest land. He was informed that the suit land had been allotted to the plaintiffs or their predecessors by Maharaja Patiala. In cross-examination, he has stated that he heard of fire but did not see himself. He has given his date of birth 16.8.1953. He is the President of Gram Panchayat, Dharampur. He never enquired that colony of the plaintiffs is illegal and, therefore, panchayat funds should not be spent in such colony.

16. PW-4 Gurdev Singh in examination in chief has tendered his affidavit Ex. PW-4/A which is more or less on the same lines as Ex. PW-1/A. In cross-examination, he has stated that he is living in Dharampur since 1953. Maharaja Patiala had given the land in dispute. The colony is in forest land. He remained member Gram Panchayat, Dharampur twice. The forest land cannot be allotted by the Government. The Government does not provide any aid to unauthorised colony. PW-5 Nanak Singh in examination in chief has tendered his affidavit Ex. PW-5/A in which he has deposed like the affidavits of other witnesses. In cross-examination, he has stated that he had heard that in Chamara forest there was an incident of fire. Maharaja Patiala orally rehabilitated the plaintiffs. He remained member and Vice President of the Panchayat from 1975 to 2005. He never enquired that colony is authorized or unauthorised. PW-6 Jai Krishan, Meter Reader, Electrical Sub Division, Dharampur has proved applications and connection orders Ex. PW-6/A to Ex. PW-6/F.

17. PW-7 Baldev Singh has tendered in evidence his affidavit Ex. PW-7/A in which he has stated that in 1974 he was posted as D.F.O., Solan. In 1975 he found various houses on

the forest land. He was told that the land was given to the Bangala community people by Maharaja Patiala in gift. It was found that those persons were in possession of the land since 1942. In cross-examination, he has stated that Bangala community people are engaged in small trades. In 1975 he found about 35 houses on the land, some were katcha and some were pucca. PW-8 Beer Singh, office Superintendent, Gram Panchayat, Dharampur has proved panchayat resolutions Ex. PW-8/A to Ex. PW-8/H and Ex. PW-8/J to Ex. PW-8/L.

18. After remand of the case, PW-1 Sadh Ram tendered his affidavit Ex. PW-1/A-1 in examination in chief and stated that their main source of livelihood has been to collect forest produce, catch snakes etc. in the jungle. They are Bangala by caste. They had been collecting dry wood from jungle, selling it to meet their basic needs. In cross-examination, he has stated that they are not hunting, they collect waste material, many of them are employed in different jobs. PW-2 Rajesh Kumar has tendered in evidence his affidavit Ex. PW-2/A-1. He has deposed like PW-1. In fact on material particulars Ex. PW-2/A-1 and Ex. PW-1/A-1 are identical. In cross-examination, PW-2 has stated that Bangala community people roam here and there. He stated that he is employed in a hotel. PW-3 Ashok Kumar Gupta, President, Gram Panchayat, Dharampur has tendered in evidence his affidavit Ex. PW-3/A-1 which on material particulars is identical to Ex. PW-1/A-1. In cross-examination, he has denied that the suit land is forest land. The forest land cannot be allotted to anyone. He has stated that Bangala community people do not stay at one place, they roam about. PW-4 Gurdev Singh has tendered in evidence his affidavit Ex. PW-4/A-1 which on material particulars is identical to the examination in chief of PW-1 to PW-3. In cross-examination, he has stated that in Sihardi Chamara forest Bangala community people are residing.

19. DW-1 Hitender Sharma, R.O. Subathu Range has tendered in evidence his affidavit Ex. DW-1/A and has stated that the plaintiffs had been occupying forest land illegally, notice was issued under the Act. The suit land was never allotted to the plaintiffs by Maharaja Patiala. The suit land came in possession of Forest Department in 1937 settlement and is continuing. The possession of the plaintiffs was detected during 1990-91 forest settlement. Baldev Singh, Retd. D.F.O. did not visit the suit land in 1975. The forest land cannot be allotted. In cross-examination, he admitted that Ex. P-1, Ex. P-2 and Ex. P-3 are of the suit land. He denied that Ex. PW-8/A to Ex. PW-8/L are the details of works done on the spot.

20. DW-2 Kaka Ram, Forest Kanungo has tendered in evidence his affidavit Ex. DW-2/A, in which he has stated that ownership of the State and possession of Forest Department has been correctly recorded in the revenue record. He was posted as Patwari in Solan Forest Division during 1977-99. In 1991-92 encroachments of plaintiffs were detected during forest settlement. In cross-examination, he has stated that photographs Ex. P-1 to Ex. P-19 are of the spot. He has no knowledge of the spot situation before forest settlement. The respondents did not lead evidence after remand.

21. The case of the appellants in brief is that Maharaja Patiala gifted the suit land to the predecessors of the appellants around the year 1942, they constructed their houses immediately thereafter and since then they are residing in the houses constructed over the suit land. In alternative, the appellants have projected their case of adverse possession. They have also sought protection under the 2006 Act. The construction of houses over the suit land some katcha and some pucca has been established but it is the case of the respondents that encroachments of the appellants over the suit land were detected in the year 1990-92 during forest settlement, thereafter, steps were taken for evicting the appellants from the suit land. The Collector found the appellants and others encroachers over the suit land, they were ordered to be ejected vide order

dated 11.9.2000 Ex. PW-1/B which was upheld by the Commissioner on 19.5.2001.

22. The appellants have miserably failed to prove that the suit land was allotted to them by Maharaja Patiala around the year 1942. The appellants have not produced any written order or oral order of Maharaja given effect in the revenue record to show that the suit land in fact was allotted to the appellants by Maharaja Patiala in the year 1942. The appellants have alleged that even respondent No. 1 while acknowledging the ownership of appellants in the past had provided several common facilities to the appellants. It has been proved on record that the suit land is part of forest land. The witnesses of the appellants have stated that the forest land cannot be allotted and for illegal colonies, no facilities can be provided by the Panchayat. But it appears that Panchayat representatives in order to woo the voters of the unauthorised colony of the appellants, provided them some common facilities, but that will not legalize the unauthorised colony of appellants and others over forest land. The simple possession of the appellants over the suit land will not transform into legal title.

23. The appellants have taken contradictory plea of ownership by way of gift over the suit land and title over the suit property by way of adverse possession. The possession howsoever long is not enough to record a finding of adverse possession unless it starts with hostile animus and continue as such over statutory period so as to claim adverse possession. The State was also not aware till forest settlement in 1990-92 that appellants are in unauthorised possession over the suit land. The State during forest settlement only in 1990-92 came to know unauthorised possession of appellants over the suit land.

24. The statement of PW-7 Baldev Singh that he as D.F.O. forest in the year 1975 came to know the unauthorised possession of the appellants over the suit land is not believable. There is no explanation why PW-7 after having come to know unauthorised possession of appellants over the suit land did not take any action for evicting the appellants from the suit land or to bring to the notice of the higher authorities the unauthorised possession of the appellants over the suit land. Thus, taken from any angle, the appellants have failed to prove their adverse possession over the suit land.

25. The learned counsel for the appellants has submitted that the two Courts below have erred in holding that the Civil Court has no jurisdiction to go into the question of title of appellants in view of the findings recorded by the Collector in the order dated 11.9.2000 and by the Commissioner in the order dated 19.5.2001 under the Act. In view of Chamaru Ram (supra), there is substance in this submission of learned counsel for the appellants. In Chamaru Ram, it has been held that bar imposed by Section 15 of the Act cannot deprive the plaintiffs of their right to claim title by filing civil suit. However, the appellants have independently failed to prove their title over the suit land. It has also been submitted on behalf of the appellants that the Collector and the Commissioner erred in proceeding against the appellants collectively, the submission is that individual appellant is in possession of certain portion of the land in dispute, therefore, all the appellants could not have been proceeded by the Collector and the Commissioner in one proceeding. In support of this submission, help has been taken from Ravinder Singh (supra). The appellants have not shown any prejudice for proceeding against them jointly in one proceeding. Therefore, the appellants cannot take advantage of Ravinder Singh (supra).

26. It has been lastly contended that the appellants are protected under the 2006 Act. The appellants have taken different stands in the plaint. They have pleaded they belong to Scheduled Caste. They have also pleaded that they are Scheduled Tribe. Their case is also that they belong to Bangala community. The Clause (c) of Section 2 of 2006 Act defines

"forest dwelling Scheduled Tribes" means the members or community of the Scheduled Tribes who primarily reside in and who depend on the forests or forest lands for bona fide livelihood needs and includes the Scheduled Tribe pastoralist communities. The Clause(o) of Section 2 defines "other traditional forest dweller" means any member or community who has for at least three generations prior to the 13th day of December, 2005 primarily resided in and who depend on the forest or forests land for bona fide livelihood needs. The explanation to Clause (o) provides "generation" means a period comprising of twenty-five years. The Section 3 of 2006 Act identifies forest rights of Forest dwelling Scheduled Tribes and other traditional forest dwellers.

27. The appellants in the plaint have pleaded that they belong to Bangala caste and are Scheduled Caste. They have also pleaded that they are Scheduled Tribe and traditionally dwell in the forest area. They are not sure to which community or caste they belong. The appellants have not proved that their community primarily resided in forests and depend on forests or forest land for bona fide livelihood needs. On the contrary, it has come in evidence that some of the appellants are employed at different places. The suit was filed in the year 2002. The appellants have pleaded that they are residing in village Sihardi for the last more than 60 years. Therefore, as per appellants they are occupying the suit land since or around 1942. The 2006 Act recognizes other traditional forest dwellers occupying such land for the last three generations, prior to 13.12.2005 with each generation of 25 years. In other words, the 2006 Act recognizes other traditional forest dwellers if they are occupying the forest land since 13.12.1930. The appellants are thus not other traditional forest dwellers under the Act even as per their pleaded case.

28. The appellants simply on the basis of their possession over the suit land which is part of forest land cannot claim protection under the 2006 Act. It is common knowledge that people individually or in group encroach upon the Government land, they manage their stay over encroached land by pulling strings here and there together with intentional or unintentional inaction of authorities for evicting them from the encroached land but that does not mean that such encroachers with the passage of time only acquire title over the Government land. The appellants have miserably failed to prove their title over the suit land. The two Courts below have concurrently held against the appellants. There is no substantial question of involved in the appeal. The appeal is devoid of any merit. In view of above, the appeal fails and is accordingly dismissed.

Court on its Own Motion and Dungar Singh vs. State of Himachal Pradesh & Ors.

CWP (PIL) NO. 15 OF 2010
HIGH COURT OF HIMACHAL PRADESH, SHIMLA BENCH
02.07.2013
CORAM: A.M. KHANWILKAR, C.J. AND R.B. MISRA, J.

SUMMARY

The Division Bench of the High Court had, earlier the same year, issued directions for removal of all unauthorised dhabas, hotels etc. between Kothi and Rohtang Pass on government forest land. Pursuant thereto, an order was passed by the District Forest Officer (DFO) evicting the applicant, among others.

The applicant argued that he belonged to a Scheduled Tribe community and the dhabas were constructed many years ago as a stoppage between transits from one place to another, since the time of his forefathers. He also argued that their livelihood is based on collection of herbs and other minor forest produce, and selling these in the dhabas. The license given by the concerned authority was also produced in support of this argument. The applicant asserted that he cannot be evicted from the place as he is a forest dwelling Scheduled Tribe in terms of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) and under Sec. 4 (5) he cannot be dispossessed till the recognition and verification procedure is complete.

The Court noticed that a previous case of eviction against the applicant is pending in the Court of the Divisional Commissioner, Mandi, initiated by the Forest Range Officer under the Himachal Pradesh Public Premises and Land (Eviction and Rent Recovery) Act, 1971.

Relying on the report by the Forest Range Officer and the order of the District Collector, the Court held that the applicant is not entitled to the protection of the FRA. The Court held that merely being a Scheduled Tribe does not fulfill the qualification of a forest dwelling Scheduled Tribe, for the reason that the claimant must not only be residing in the forest but also be dependent on forest for livelihood.

The Court was of the view that the "forest rights" under Section 3(1) of FRA do not include construction of a structure for running a dhaba on forest land. The Court thus held that the applicant does not fulfill the definition of forest dwelling Scheduled Tribe, and held that the applicant is an unauthorised occupant. The order of eviction was, accordingly, upheld and the application was dismissed.

EDITOR'S NOTE

This is a very peculiar order, where, in exercise of its powers under Article 226 of the Constitution, the High Court has entered into deciding a question of fact in a decisive manner. It is even more incomprehensible that the question of fact was decided by the High Court even while the same issue was pending adjudication before the Divisional Commissioner, Mandi. The precedent value of this judgment is, on the face of it, questionable.

JUDGMENT

1. This application has been filed by third party in the pending public interest litigation. On 3rd May, 2013, the Division Bench of this Court issued certain directions to the State Authorities, inter alia, to forthwith remove all the unauthorised dhabas/hotels/catering/food stalls in segment Nos. 4 and 5 between Kothi to Rohtang Pass. As a consequence of that order, the Divisional Forest Officer, Kullu Forest Division issued notice for eviction-cum-removal of encroachment upon the Government forest land, to the applicant, dated 9th May, 2013. The said communication reads thus:

> IN THE OFFICE OF DIVISIONAL FOREST OFFICER, KULLU HP
> No. 973
>
> Dated: Kullu, 9.5.2013.
>
> To
>
> Sh. Dhunger Singh S/o. Sh. Udhey Singh R/o Gompa Road, Manali Tehsil Manali & District Kullu HP.
>
> Subject: Notice for removal of encroachment upon the Government Forest land.
>
> Whereas, the Collector-Cum-DFO (Encroachment), Kullu passed an order to vacate the unauthorised/unlawful possession of Public premises i.e. Government Forest Land comprising Khasra No. Nil, Manali-III, Marhi UPF measuring area 0.0573 hac in Tukta No. I and II situated in Phati Palchan, Tehsil Manali District Kullu, HP under Section (1) of 5 of the Himachal Pradesh Public Premises & Land (Eviction & Rent Recovery) Act, 1971 vide order dated 24.5.2011 which is now pending adjudication before the Court of Divisional Commissioner Mandi, H.P.
>
> And whereas the Hon'ble High Court, Court on its own motion v. State of H.P. and others, CWPIL No. 15/2010 dated 3.5.2013 has held that:-
>
> > Since the entire issue concerning the stretch of Kothi to Rohtang Pass is pending before this Court, every action, including the proposed action of removal of unauthorised dhabas/hotels/caterings/food stalls in segment No. IV and V

will be made subject matter of challenge only before this Court in the present proceedings. No other forum in the State be it of Commissioner or the Civil Court, should entertain the same. The appeals, if any, shall stand transferred to the Court forthwith.

The Hon'ble High Court has further directed to state authorities to forthwith remove all the unauthorised dhabas/hotels/caterings/food stalls in segment Nos. IV and V between Kothi to Rohtang Pass and report compliance or before 10th June, 2013.

Now, therefore, in compliance of the Hon'ble High Court order dated 3.5.2013 and Pr. Secretary Forests to the Government of Himachal Pradesh vide letter No. FFE-B-F(6)3/2009 dated 7.5.2013, I hereby serve upon you notice to you and all concern to vacate the Khokha and store (for running shop/dhaba) by demolishing the structure on or before 16.5.2013, failing which the unauthorised/unlawful structure possession of the land in question shall be taken by the Forest department by removal of the said structure at your expenses forcefully with the help of Police and District Administration.

Dated 9.5.2013
Place Kullu

Sd/-

Divisional Forest Officer,
Kullu Forest Division, Kullu.

This eviction notice has been issued notwithstanding the pendency of proceedings before the Divisional Commissioner, Mandi against the order of eviction passed against the applicant on the ground of unauthorised and unlawful possession of public premises i.e. Government forest land comprising Khasra No. nil, Manali-III, Marhi UPF measuring area 0.0573 hac in Tukta No. I and II situated in Phati Palchan, Tehsil Manali, District Kullu, H.P. This has been done presumably on the basis of the observations in the order passed by this Court, dated 3rd May, 2013, that the action of removal of unauthorised structures in the specified segment will be made subject matter of challenge only before this Court in the pending writ petition and no other forum in the State should entertain the same.

2. In the present application, the applicant has relied on several documents indicative of applicant's possession of the disputed land and including that he belongs to Scheduled Tribe community. It is the applicant's case that his forefathers were engaged in the trade of cattle, clothing, food supplies etc. They used to travel from Mandi to Lahaul and Spiti, Leh, Ladakh and Pangi. During their transit, they used to take a break at Marhi It is stated in the application that in due course, they constructed katcha dhara at Marhi for the residential purpose of the family. That was later on converted into a dhaba, which was run in the name and style of Mansarovar Dhaba. Even other tribals engaged in similar trade had constructed such dharas. The said dharas were constructed to accommodate the ladies along with children and other persons, who visited with the male members to Marhi. The male members of the family used to accompany the mules in connection with their trade in different parts of the State and would return to Marhi in the month of March. It is also asserted that the primary source of earning livelihood of the father of the applicant and the applicant was dhaba, collection of herbs such as Karu, Patish, Dhoop, Pharna, Chura, Panja Chuji etc. These herbs were put up for sale in the dhaba at Marhi, which practice is still continuing. The applicant admits that he did not mention about this fact in the earlier proceeding/application filed by him due to inadvertence.

The applicant has also relied on license given by the concerned authority for running of the dhaba and including electricity supply provided to the dhaba. In this backdrop, the applicant has asserted that he cannot be evicted from the disputed land, much less the dhaba cannot be removed by virtue of the provisions contained in the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

3. It is, however, noticed from the record that the Range Forest Officer, Manali on the basis of spot report dated 20.9.2001, had initiated proceedings against the applicant by issuing show cause notice under Section 4(1) of Himachal Pradesh Public Premises and Land (Eviction and Rent Recovery) Act, 1971, which was registered as case No. 15/2004-05 in the Court of Collector-cum-DFO (Encroachment), Kullu. In the said case, two issues were considered firstly, whether the applicant had encroached upon the land in dispute or not and; secondly, whether the eviction order was required to be issued under Section 5 of the Act of 1971. The Collector, after considering relevant material on record, concluded that the applicant has encroached upon the forest land and, therefore, ordered eviction, vide order dated 24th May, 2011. The relevant extract of the said order reads, thus:

> Final Order
>
> For the reason recorded here in after the finding on the above paras are as under:
> Point No. 1 Yes.
>
> Point No. 2 Application allowed.
>
> I have perused the record to the case the reason for final order is as under. The applicant has allege in his plaint that respondent is in unauthorised occupation of forest land by encroaching upon forest land in Manali III measuring 0-573 ha by Constructing a stone walled and tin roofed khokha over land measuring 0.007 in tukra No. 1 and using as store and also erected a store with stone wall and tin roofed measuring 0.0116 ha in tukra No. II and measuring 0.0387 in Tukra No. III running cold drink shop and dhaba therein.
>
> The prosecution witnesses PW-1 and PW-2 and PW3 examined and confirmed in their statements that the respondent without authority has encroached upon forest land in Manali III at Marhi measuring 0-0573 ha by Constructing a stone walled and tin roofed khokha over land measuring 0.007 in tukra No. I and using as store and also erected a store with stone wall and tin roofed measuring 0.0116 ha in tukra No. II and measuring 0.0387 in Tukra No. III running cold drink shop and dhaba therein.
>
> The PWs also confirmed in the statement that the suit 'land is a forest land the record prepared by the halqau patwari and same is verified by the field kanungo of the concerned area also the tatima and report is countersigned by the tehsildar Manali. Which is also confirmed by the revenue record entry where the suit land is entered as bila paimud and as per Notification No. 282 dated 1st June 1896 the suit land is owned and possessed by the forest department. The respondent is well aware of the fact that he is in unauthorised occupation of forest land. The respondent produce three witness in his favour both could not prove to the satisfaction of the Court as alleged by respondent. The petitioner has also made references of honorable supreme Court order in C.W.P. No. 202 dated 12.12.96, the S.C. order is produced verbatim is as under:
>
> > The word "forest" must be understood according to its dictionary meaning this description cover all statutorily recognized forest, whether designated reserved or protected or otherwise for the purpose of Section 2(i) of the FCA, 1980. The term "forest land" occurring in Section 2, will not only include "forest" as understood in the dictionary sense, but also any area recorded as forest in government record

irrespective of the ownership.

Therefore I hold the applicant has proved that the respondent has encroach upon forest Land in Manali III measuring 0-0573 ha by Constructing a stone walled and tin roofed khokha over land measuring 0.007 in tukra No. I and using as store and also erected a store with stone wall and tin roofed measuring 0.0116 ha in tukra No. II and measuring 0.0387 in Tukra No. III running cold during shop and dhaba therein which is located in the heart of forest land. There is no private land adjoining to the suit land. In view of findings the point No. 1 is proved to the satisfaction of the Court. The application is allowed and eviction order passed. The case file is consigned to the record room of DFO Kullu after completion.

Announced in Open Court.

(emphasis supplied)

4. On the basis of the above said order, the Collector issued eviction order in Form "B" on 24th May, 2011, which reads, thus:

The Himachal Pradesh Public Premises and Land (Eviction and Rent Recovery) Rules, 1971

FORM "B"

Order under sub-section (1) of Section 5 of the Himachal Pradesh Public Premises -and Land (Eviction and Rent Recovery) Act, 1971.

Whereas, I V.P. Pathania D.F.O. encroachment-cum-collector Kullu is satisfied for the reason recorded below that that Sh. Dhunger Singh S/o. Sh. Udhey Singh R/o Gompa Road Manali, Tehsil Manali, Distt. Kullu, H.P. is in the unauthorised occupation of Public Premises specified in the scheduled below. Reason: Detail order of the case No. 14/04-05 decided on 24.05.2011, is attached herewith.

Now, therefore, in exercise of the powers conferred on me by sub Section 1 of Section 5 of the Himachal Pradesh Public Premises and Land (Eviction and Rent Recovery) Rules, 1971. I hereby order the said that Sh. Dhunger Singh S/o. Sh. Udhey Singh, R/o Gompa Road Manali, Tehsil Manali, Distt. Kullu, H.P. and all persons who may be in occupation of the said premises or any part thereof to vacate the said premises within 15 days of the publication of this order. It is further ordered that applicant (R.O. Manali) will take over the possession of suit land within 15 days of publication of the order. In the event of refusal or failure to comply with this order with in the period specified above, the said that Sh. Dhunger Singh S/o. Sh Udhey Singh R/o Gompa Road, Manali, Tehsil Manali, Distt. Kullu, H.P. and all other persons concerned are liable to be evicted from the said premises, if need be by the use of such force as may be necessary.

SCHEDULE

The applicant has proved to the satisfaction of the Court that that Sh. Dhunger Singh S/o. Sh Udhey Singh R/o Gompa Road, Manali, Tehsil Manali, Distt. Kullu, H.P. is in unauthorised occupation of forest land by encroaching upon forest land in Manali measuring 0-0573 ha by Constructing a stone walled and tin roofed khokha over land measuring 0.007 in tukra No. I and using as store and also erected a store with stone wall and tin roofed measuring 0.0116 ha in tukra No. II and measuring 0.0387 in tukra No. III running cold drink shop and dhaba therein.

It is proved to the satisfaction of the Court. The eviction order passed. Date: 24.05.2011

sd/-

Signature and seal of the Collector.

5. Against this decision, the applicant has preferred appeal before the Divisional Commissioner, Mandi, which was stated to be pending when the impugned eviction notice, dated 9th May, 2013 came to be passed, pursuant to the order of this Court, dated 3rd May, 2013. From the order passed by the Collector, dated 24th May, 2011, it can be discerned that the applicant claims to have erected structure on land, which is, admittedly, a forest land. No valid and subsisting license has been produced by the applicant to dispel the factual position noted in the show cause notice about unauthorised occupation of forest land by the applicant. The revenue record confirms the position that the suit land is owned and possessed by the Forest Department. The applicant was fully aware of that fact. The applicant had produced three witnesses in the proceedings before the Collector, but they could not prove the fact that the applicant was in authorized possession of the land in question. As a result, order of eviction has been passed.

6. Even before this Court, the position is no different except that the applicant has now produced documents, at best, indicative of occupation of the applicant of three khokhas in Class-III forest area, Marhi. The damage report issued in this respect by the Range Forest Officer, Manali, dated 24th July, 1996, at page 987, testifies that the applicant is in unauthorised occupation of those three khokhas in forest area. To get over this position, the applicant has now rested his argument on the "forest rights" recognized by the Act of 2006 and which, according to him, has vested in him guaranteeing protection of his possession in respect of said disputed structure. The fact that the structures in question are in existence for quite some time will be of no avail. That cannot bestow any right on the applicant, much less guaranteed by the Act of 2006.

7. We may straightway turn to the provisions of the Act of 2006. The preamble of the Act makes it amply clear that it is an Act to recognize and vest the "forest rights" and "occupation in forest land" in "forest dwelling scheduled tribes and other traditional forest dwellers". In the present case, we are concerned with the applicant, who claims to be scheduled tribe. However, to fulfil the qualification of forest dwelling scheduled tribe, the person must establish the fact that he was primarily residing in forest or the forest land and further that he depends on the forests or forest lands for his bonafide livelihood needs. Thus, merely being a Scheduled Tribe is not enough. This position is reinforced from the definition of expression 'forest dwelling scheduled tribes', as defined in Section 2(c) of the Act, which reads, thus:

   (c) "forest dwelling Scheduled Tribes" means the members or community of the Scheduled Tribes who primarily reside in and who depend on the forest or forest lands for bonafide livelihood needs and includes the Scheduled Tribe pastoralist communities;

8. It may be useful to advert to the definition of forest land and forest rights as contained in Sections 2(d) and 2(e) of the Act, respectively, which read, thus:

   (d) "forest land" means land of any description falling within any forest area and includes unclassified forest, undemarcated forests, existing or deemed forest, protected forests, reserved forests, Sanctuaries and National Parks;

   (e) "forest rights" means the forest rights referred to in Section 3;

9. Section 3 of the Act of 2006 spells out the rights of persons covered under the Act in clauses (a) to (m) of sub-section (1) thereof. The applicant has pressed into service clauses (a) and (c) thereof.

10. On a bare reading of clause (a), it is obvious that the person must be primarily residing in the forest land. Further, he would get right to hold that land and live in the forest land for the activities specified in clause (a) for habitation or for self cultivation for livelihood. Constructing a structure for running of a dhaba on a forest land is not covered by this clause at all. It is not the case of the applicant that all three khokhas unauthorisedly constructed on the forest land were for habitation. On the other hand, it is the positive case of the applicant that he was running dhaba from the said premises.

11. Assuming that the applicant has been able to establish the fact that he was primarily residing in the forest or forest land, the only right protected is for his individual occupation for habitation. On the basis of the averments made in the application, which is the case made out for the first time, the applicant has also relied on clause (c) of Section 3(1). That speaks about the right of ownership access to collect, use, and dispose of minor forest produce, which has been traditionally collected within or outside village boundaries. By removing the three unauthorised structures, none of these rights of the applicant, assuming that he has those rights, would be affected. For, his right of access to forests or forest land to collect, use, and dispose of minor forest produce, which has been traditionally collected, will not be affected. This, once again, is on the assumption that the applicant has been able to establish the fact that he is forest dwelling scheduled tribe.

12. As noted earlier, there is hardly any material on record to suggest that the applicant fulfils the definition of forest dwelling Scheduled Tribe. That claim is obviously an argument of desperation. In the present case, the action for unauthorised occupation of the structures was commenced against the applicant on the basis of damage report of the Range Forest Officer, Manali, dated 24th July, 1996 and 20th September, 2001, and the eviction order has been passed under the Act of 1971 by the Collector on 24th May, 2011, on the finding that the applicant was unauthorised occupant in the stated premises.

13. Counsel for the applicant would then rely on sub-section (5) of Section 4 of the Act to contend that the applicant cannot be evicted or removed from forest land in his possession till the recognition and verification procedure is complete. The said provision cannot be read in isolation. The recognition and verification procedure is in respect of vesting of forest rights in the person. We have already noticed that construction of structure on the forest land for running a dhaba, per se, does not create any forest rights. The forest rights are specified in Section 3(1) of the Act. The recognition and verification procedure is only in relation to those rights and not in respect of unauthorised structures having no causal connection with the rights specified in Section 3(1) of the Act of 2006. For the same reason, reliance placed by the applicant on Section 6 of the Act as to the authority competent to vest forest rights in forest dwelling Scheduled Tribe will be of no avail to the applicant.

14. Considering the fact that the applicant has failed to produce any tangible material or license/lease granted to the applicant to occupy the forest land in question or to put up the subject structures thereon, given by the competent authority; and that the said license/lease is a subsisting one, it would necessarily follow that the applicant is unauthorised occupant on the forest land. On this finding, no fault can be found with the order of eviction passed by the Collector which is subject matter of the present application. Accordingly, the said order is upheld, as a result of which the Collector,

Kullu and/or Divisional Forest Officer, Kullu Forest Division, Kullu are free to proceed in the matter on the basis of eviction notice, dated 24th May, 2011 or 9th May, 2013, respectively, and take the same to its logical end within four weeks from today. This application is dismissed.

KARNATAKA HIGH COURT

TABLE OF JUDGMENTS AND ORDERS

Lakshmirao Manikrao Shinde vs. State of Karnataka & Ors.

WP 100390 OF 2014
KARNATAKA HIGH COURT
04.03.2014
CORAM: ARVIND KUMAR, J.

SUMMARY

The petitioner has sought a mandamus directing the respondents to regularise occupation of the land in question (measuring 4 acres) in him as per the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) and Rules. He is aggrieved due to non-consideration of various applications and by threat of coercive steps to be taken against him.

Without expressing any opinion on deciding the merits of the case, the Court directed that the Forest Rights Committee consider the application of the Petitioner expeditiously (within 6 months), and further directed that the petitioner not be dispossessed of the land till the disposal of the application.

ORDER

1. Heard Sri H.M. Dharigond, learned counsel appearing for the petitioner and Smt. K.Vidyavathi, learned Additional Government Advocate appearing for respondents. Perused the case papers and annexures filed thereto as also the statement of objections.

2. Though petition is listed for preliminary hearing, by consent, it is taken up for final disposal.

3. Petitioner is seeking for a mandamus to direct the respondents to regularise occupation of land bearing Sy.No.37/1A measuring 4 acres situated at Gonagnur village, Ramdurgtaluk, Belgaum district, in favour of the petitioner as per the provisions of Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and the Rules made thereunder. Petitioner claims to be In possession of 4 acres of reserved forest land situated in Sy.No.37/1A and he claims to have filed an application on 14.05.2005 Annexure-C seeking regularisation of his occupation and on account of

non-consideration of said application., one more application was tiled by the petitioner on 13.05.2009 Annexure-D. Photographs produced at Annexure-E would indicate there are standing crops in the lands in question. On account of non-consideration of his application and on the threat of coercive steps proposed to be taken against the petitioner by respondents, petitioner has sought for the relief of regularisation of his occupation of the said land. Statement of objections have been filed by respondents contending that petitioner is not a forest dweller and a such, he is not entitled for being regularised.

4. Undisputedly, application filed by the petitioner before the respondents are still pending. It is not yet disposed of. It is for the authorities to take a decision as to whether the said application merits acceptance or rejection. If petitioner's claim is outside the purview of the Act and the Rules framed thereunder, respondents would be at liberty to reject his application or they are at liberty to regularise his possession, if, the petitioner is entitled under law. Hence, without expressing any opinion on the merit of the claim made by the petitioner, a direction is issued to Forest Rights Committee i.e., the 4th respondent to consider the applications of petitioner submitted on 14.05.2005 and 13.05.2009 Annexure 'C' and 'D' respectively, expeditiously at any rate within an outer limit of six months from today.

5. It is needless to state that till the disposal of the application, respondents shall not dispossess the petitioner from the land in question.

KERALA HIGH COURT

TABLE OF JUDGMENTS AND ORDERS

Janaki & Ors. vs. State of Kerala & Ors.

RP NO. 317 OF 2008
KERALA HIGH COURT
25.03.2008
CORAM: M. SASIDHARAN NAMBIAR, J.

SUMMARY

This judgment was passed in a review petition. Originally, the petitioners had filed a suit for permanent prohibitory injunction under Order XLVII Rule 1 of the Civil Procedure Code (CPC) against the respondent State government in 2004. The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) was not enacted at the time, and no pleading or prayer was made in that regard. At the time of the hearing and disposal of the second appeal by the High Court in 2007, the FRA was enacted but not yet in force. The present review petition was filed seeking reconsideration of the judgment, on the ground that when the second appeal was heard and disposed of, the rights of the petitioners under FRA were not brought to the notice of the Court and therefore were not considered.

The Court rejected this argument, on the ground that in a suit for injunction, the question of entitlement under the Central Act could not be considered at the stage of appeal, and in any event this would not be a ground for review.

While dismissing the review petition for the above mentioned reason, the Court did grant some relief to the petitioners by directing as follows:

> **"It is made clear that dismissal of the appeal will not disentitle appellants from claiming the benefit, if any, available to them under Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006."**

ORDER

1. This petition is filed under Order XLVII Rule 1 of Code of Civil Procedure by the appellants to review the judgment in RSA 377/2007 dated 20.11.2007. Case of the appellants in the second appeal is that when the second appeal was heard and disposed of, rights available to the petitioners under Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006(Act 2 of 2007) was not brought to the notice of

the Court and under the said Act appellants are entitled to the protection and therefore judgment is to be reviewed.

2. The second appeal was filed against the dismissal of the suit for permanent prohibitory injunction instituted by the appellants before Munsiff Court, Thodupuzha. It was confirmed by the First Appellate Court inA.S.46/2004. Appellants did not claim any right under the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. R.P.317/2008 2 Evidently the `Act' was not in force at that time. Being a suit for injunction, question of entitlement of the appellants to the benefit of Central Act 2 of2007 is not to be considered in the appeal. In any event, it is not a ground to order review of the judgment in this appeal.

3. Review Petition is dismissed. It is made clear that dismissal of the appeal will not disentitle appellants from claiming the benefit, if any, available to them under Scheduled Tribes and other Traditional Forest Dwellers(Recognition of Forest Rights) Act, 2006.

Kuttan & Ors. vs. State of Kerala & Ors.

WP (C) 6824/2010
KERALA HIGH COURT
20.6.2014
CORAM: A.V. RAMAKRISHNA PILLAI, J.

SUMMARY

The petitioner is the convener of "Adivasi Punaradhivasa Samithy", an association of the residents of Warriam Colony, who are traditional forest dwellers, and were living in Warriam located in the dense Pooyamkutty Reserve Forest for the past 300 years. The settlers lived in the forest areas by collecting honey, bamboo, and other wild items from there; subsequently they shifted to agricultural operations by cultivating various crops overtime they shifted to settled cultivation. However due to various problems, including attacks by wild animals, they had to be shifted to a settlement colony at the periphery of the Reserve Forest. There are no infrastructural facilities in the settlement area, and now the Forest Department is demanding payment of net present value (NPV).

ARGUMENTS ADVANCED

It was contended that due to lack of developmental activities in the area the State government must allot another property to the settlers. The petitioners allege that under the Scheduled Tribes and Other Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) the settlers had every right to be allotted another property, and accordingly, the Tribal Department decided to prepare a detailed scheme for rehabilitation, incorporating their present rights and privileges, and also reallocating alternate sites.

The Forest Department demanded that NPV/compensatory afforestation be paid. Thereafter, the State Cabinet resolved to approach the Central Government for an exemption.

However, counsel for the respondent State Legal Services Authority[59] (KELSA) submitted that it was not a case where any such proposal needed to be forwarded to the Centre (MoEF) for exemption from NPV as it was a case of rehabilitating the tribals, and not a case of diversion of forest land.

An interim order had been passed directing the State government to file an affidavit, giving the status of rehabilitation, which it did not do. Rather, it was the KELSA counsel who produced documentation to show that the area, amounting to 523 acres and falling in various plantations, had been earmarked for rehabilitation of the tribals for vacating almost twice that area (939 acres) in the interior forest areas. The plantation journals available at the range office showed that these plantations have been formed after clearing forests, and was being maintained as such for a long period as per the working plan already approved by the Central Government.

FINDINGS OF THE COURT

Under the FRA, forest rights are to be conferred free of the requirement of paying of NPV and cost of compensatory afforestation. Under the working plans, rehabilitation of tribals is also part of forest management. The court declared that "this is not a case where there is any question of NPV or cost of compensatory afforestation is involved". It directed the Ministry of Tribal Affairs "to render all assistance to 1st respondent to rehabilitate the tribal, by including them in the next working plan of the area", and that "earnest efforts shall be made by both governments". It expressed its appreciation towards the counsel for State Legal Services Authority for the "able and valuable assistance rendered by her in the case".

JUDGMENT

1. The petitioners, who are traditional forest dwellers at Warriam near Pooyamkutty, have approached this Court seeking a direction to allot forest land to Warriam settlers at Kandanpara for their settlement and also for a direction to respondents 1 to 4 to take immediate steps for allotting alternate land for Warriam Adivasy Colony settlers on the basis of Ext.P7, considering the fact that they have already surrendered 600 acres of forest land to the Government.

2. The petitioners allege that they belong to the traditional forest dwellers at Warriam settlement and their ancestors were living in Warriam settlement area since 300 years. The forest department, in the year 1984, surveyed and demarcated the settlement area and erected juntas. Formerly, the settlers lived in the forest by collecting honey, bamboo and other wild items from there. However, after the allotment of land by the Government the settlers moved to agricultural operations by cultivating crops like cardamom, pepper wines, coconut trees and other seasonal improvements. They

[59] It is worth noting that the Court had early in the proceedings directed impleadment of the State Legal Services Authority as a respondent which greatly assisted in presenting the correct legal position. For instance, the list of documents submitted by her before the Court is as under:
1. Copy of Letter Dated 1.2.2013 of the Chairman, Taluk Legal Service Committee, Kothamangalam addressed to the Member Secretary, Kelsa (Kerala State Legal Services Authority).
2. Copy of Letter Dated 28.01.2013 of the Tribal Development Officer, Muvattupuzha (4th Respondent) addressed to the Divisional Forest Officer, Malayattoor.
3. Copy of the Minutes of the Meeting Held on 17.12.2012 in the Chief Minister's Chamber.
4. Copy of Order Dated 3.8.2009 of the Ministry of Environment and Forests, Government Of India
5. True Copy of the Letter Dated 12.2.2013 sent by the D.F. Omalayattoor to the Forest Conservator, Thrissur.
6. True Copy of the Entries in the Plantation Journal with regard to the 1977 TP (Bit-1) Plantation.
7. True Copy of the Plantation Journal with regard to the 1977 TP (Bit-II) Plantation.
8. True Copy of the Plantation Journal with regard to the 1978 TP Plantation.
9. True Copy of Plantation Journal with regard to 1981 TP Plantation.

further allege that Pooyamkutty is a dense reserved forest and as per present census of the forest department, majority of elephants are in the said forest area. Due to the attack of wild animals the cultivations in the settlement area are destroyed and there are no schools, hospitals or any other infrastructural facilities to live in; it is alleged.

3. It is further alleged that as per Ext.P2, the Government admitted that since developmental activities are not going on in the area, they have decided to allot another property to the settlers. On the basis of Ext.P2 and also at the request of the Government, the petitioners' settlement colony have decided to surrender their property to the Government on the promise made by the authorities. About 600 acres of land was surrendered by the Warriam settlers to the Government and the Government informed the settlers that they would take immediate steps to rehabilitate them near Pooyamkutty at Kandanpara.

4. The petitioners allege that as per the Schedule Tribe and other Forest Dwellers (Recognition of Forest Rights) Act, 2006, the settlers have every right to get allotment of another property. Ext.P7 Government Order affirmed the said fact and as per Ext. P7 decision, the tribal department was directed to prepare a detailed scheme for rehabilitation incorporating their present rights and privileges and also to reallocate alternate sites. The petitioners further allege that believing the words of the Government authorities they thought that alternate land would be allotted to them immediately. That was not done. Due to the heavy attack of the wild animals and other deceases, all the improvements in the settlement area were ruined and the petitioners were not in a position to live at Warriam; it is alleged.

5. The petitioners further allege that the Government have promised that forest property at Kandanpara would be allotted to them and hence on 25.2.2009, 61 families having 300 members shifted their residence from Warriam to Kandanpara. The said area is a plain rocky land which is on the bank of Pooyamkutty river. Small thatched sheds were erected there and about four families are residing in a single shed. During rainy season, heavy flood is likely to come and all the settlers would be washed away; it is alleged. Therefore, they say that as per law they are entitled to get alternate land and the Government have the duty to rehabilitate the settlers in a suitable place at Kandanpara near Pooyamkutty.

6. The first respondent on 1.1.2012 filed a statement as directed by this Court regarding the steps taken by the departments for the rehabilitation of 218 families at Warriam Uriyampetty settlement. It is submitted that another affidavit was also filed on 13.6.2013 on behalf of the respondents stating the steps taken for the rehabilitation of tribals. Later in the statement by the Special Government Pleader on 23.1.2014, it was averred that in continuation of the steps taken by the department, a meeting was again convened on 7.11.2013 by the Chief Minister and the Minister for Scheduled Tribe Development Department, the Member of Parliament and other officers concerned. In the meeting discussions were made for taking effective steps for rehabilitation. The copy of the minutes is produced as Annexure- R1(a) along with the statement.

7. As directed by this Court, the Kerala State Legal Services Authority was impleaded in this case as additional 6threspondent. The 6th respondent was represented by Adv. Pinku H. Thaliath.

8. I have heard the learned counsel for the petitioners, the learned Special Government Pleader (Forests) as well as the learned counsel appearing for the Kerala Legal Services Authority.

9. Though it is submitted by the Government that effective steps are being taken, the

grievance of the petitioners have not been redressed so far. It was pointed out by the learned counsel appearing for the 6th respondent thetas per G.O(MS) No.06/14/F&WLD. dated 1.2.2014 which is produced as Annexure R1(b), the State Cabinet is seen to have given permission to approach the Central Government for exemption from Net Present Value (NPV) and cost of compensatory afforestation, in order to rehabilitate the tribal from Warriam colony in Kuttampuzha to the Urulanthanny teak plantation. The State Government seems to have been advised that there is an issue of payment of NPV and cost of compensatory afforestation in the matter at hand, as according to the Principal Chief Conservator of forests, the rehabilitation constitutes a diversion of forest land.

10. However, the learned counsel for the 6th respondent submitted that it is not a case where any such proposal need be forwarded to the Central Government (Minister of Environment and Forests) for exemption from NPV and cost of compensatory afforestation. In support of her argument, it was pointed out that this is a case of rehabilitating the tribals and not a case of diversion of forest land. The tribals are entitled to forest rights and by shifting them from their original place from the thick forest areas, the State Government is merely modifying their forest rights and resettling them; so submitted the learned counsel for the petitioners. I see force in the said submission. It is not a case of diversion of forest land, but it is a case of modification of forest rights.

11. As per the provisions of the Scheduled Tribes and other Traditional Forest Dwellers Recognition of Forest Rights) Act forest rights were to be conferred free of the requirement of paying of NPV and cost of compensatory afforestation. It is submitted that the present area in which the tribals are to be rehabilitated is a teak-elavu plantation. As these are being maintained as plantations since long ago, they cannot be treated as pukka forest land. Moreover, there is no loss of forest land as the tribals are surrendering close to double the extent of thick forest land i.e. 939 acres. As admitted even by the Chief Conservator of Forests, there is no need for afforestation, as the area given by the tribals is highly thick forest area.

12. This Court on 28.11.2013 had directed the Government to file a statement incorporating the status of the land to which the tribals are to be relocated, which was not complied with. Enquiries made by the 6th respondent would reveal that the Urulanthanny plantations to where the tribals are to be rehabilitated comprise an area of 523 acres falling in1977 TP (Bit I) plantation, 1977 TP (Bit II) Plantation, 1978 TP Plantation and 1981 TP Plantation. The plantation journals being kept with regard to the above plantations in the Kuttampuzha range office, which is produced by the 6th respondent would show that these plantations have been formed after clearing forest in 1977, 1978 and 1981respectively and is being maintained as such since long back as per a working plan already approved by the Central Government. Usually working plans are revised once in 10years, according to the procedure laid down in the National Working Plan Code, 2004. Two years time was usually granted to the State Government to incorporate changes in the present working plan for each area, and to submit it to the Central Government for approval. The present working plan for 'Malayattoor forest division' in which the Urulanthanny plantations are situated is due to be submitted for revision and approval, for the next 10 years. Therefore, the proposed rehabilitation package for these tribals has to be included in the working plan of this area i.e. the Malayattoor forest division, before submitting it for approval of the Central Government, as 'rehabilitating tribals' is also a part of 'forest management'.

13. On examining the rehabilitation package, it is seen that other than the 2 acres of land allocated to each tribal family in recognition of their forest rights, 87 acres of land has been set apart for infrastructure development. As per section 3(2) of the Scheduled

Tribes and other traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 even in case of forest land, it is possible to divert an extent of less than 1 hectare each, for each developmental initiative of the Government, subject to certain conditions, and in such cases, the Central Government is bound to allow diversion. Here, in the case of Urulanthanny plantation, the situation is even more favourable, as the area is not a pukka forest, but a teak elavu plantation existing since long back, that too as per a working plan approved by the Central Government. If the matter is handled by the State Government in the above manner, the tribals can be rehabilitated speedily.

14. In order to facilitate the speedy and compulsory rehabilitation of the tribals, the Writ Petition is disposed of asunder:

(a) It is hereby declared that this is not a case where there is any question of NPV or cost of compensatory afforestation is involved.

(b) The 3rd respondent is directed to render all assistance to the 1st respondent to rehabilitate the tribals, to which the petitioners belong, if necessary, by including them in the next working plan of the area, in furtherance of modification of their forest rights.

(c) As the working plan of the area (Malayattoor forest division) in which the Urulanthanny teak plantation is situated is being revised, earnest efforts shall be made by both Governments to see that the grievance of the petitioners are redressed during the next plan itself by complying with the aforesaid direction.

Before parting with this judgment, I would like to place on record the appreciation towards the learned counsel for the sixth respondent for the able and valuable assistance rendered by her in this case.

One Earth One Life vs. State of Kerala & Ors.

W.P. (C) NO. 35501 OF 2009
HIGH COURT OF KERALA
14.07.2015
CORAM: ASHOK BHUSHAN, C.J. AND A.M. SHAFFIQUE, J.
CITATION: 2015 SCC ONLINE KER 20696

SUMMARY

The petition was filed as a public interest litigation seeking directions against the respondent State government to stop illegal assignment of forest land under the guise of implementation of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) and FR Rules.

The petitioner submitted that large scale encroachments in forest lands have been made in the forests of Palakkad and Mannarkad forest divisions. Although a joint verification was conducted by the Revenue and Forest Departments in the said area in 2006, when the claims were submitted, those claims by tribals below 1 acre were returned with instructions to claim a minimum of 1 acre of land each. The petitioner argued that this decision is in violation of the FRA which under Section 4(3) only permits recognition of land in possession on 13.12.2005.

Contesting the claims made by the petitioner, the respondent State declared that although a decision to this effect had been taken at the ministerial level, no such Government order was issued nor was it ever implemented. Substantiating the contention, the respondents claimed that the necessary GPS survey of tribal settlements has been completed as per the instruction of the Chief Conservator of Forest (Protection) in the whole State, on the basis of which maps have been prepared. In areas where encroachment has taken place, no title has been issued under FRA.

The Court held that forest dwellers are entitled to assignment of land only in accordance with the provisions of the FRA, in particular Section 4(3) which requires they should have occupied the forest land before 13.12.2005. The Court stated that there can be no doubt that the forest right will be assigned only with reference to the property in possession of the forest dweller or the tribal, and it cannot be extended to any other area.

Disposing of the writ petition, the Court made it clear that the ministerial decision regarding assignment of a minimum of one acre of land to each claimant shall not operate, and the recognition of rights shall be strictly in accordance with law.

EDITOR'S NOTE

Although this judgment is recent, the ministerial decision is an old one from 2009, which had been revoked soon thereafter. After an early course correction, the State of Kerala has demonstrated exemplary advances in the implementation of the FRA, both with regard to individual as well as community and community forest resource rights.

JUDGMENT

(the Judgment of the Court was delivered by A.M. Shaffique, J.)

1. This writ petition is filed in the form of a Public Interest Litigation inter alia seeking for the following reliefs;

    (i) Issue a writ of mandamus directing respondents 1 to 5 not to assign Forest lands to the Scheduled Tribes and Other Traditional Forest Dwellers which is not in their actual possession as on 13.12.2005 and not more than the actual extent possessed by them.

    (ii) Issue a writ of certiorari, calling for the records relating to Exhibit P4 and quash the portion of Exhibit-P4 by which it was decided to return the application for claims of right by the Scheduled Tribes and Other Traditional Forest Dwellers, if the area claimed is below one acre and to get revised claims from such applicants so that at least one acre can be assigned to each claimant.

    (iii) Issue a writ of mandamus directing respondents No. 8 to cancel all the pattas issued on 7.12.2009 to the Scheduled Tribes and Other Traditional Forest Dwellers in respect of unoccupied forest lands coming under Mannarkkad and Palakkad Forest Divisions, Immediately.

    (iv) Issue a writ of mandamus directing respondents 1 to 5 to issue record of rights to the Scheduled Tribes and Other Traditional Forest Dwellers only after a joint verification by the Forest and Revenue Departments in respect of the claims.

    (v) Issue a writ of mandamus directing respondents 2 and 4 to fix the boundaries by putting jundas between the lands for which records of rights are issued to the Scheduled Tribes and Other Traditional Forest Dwellers and the adjacent forest lands and to protect the neighboring forest lands from being further encroached".

2. The facts involved in the writ petition disclose that the petitioner, being a voluntary organization, on being aggrieved by the destruction of various forest land by Revenue and Tribal departments, has approached this Court contending that the forest lands are being assigned illegally under the guise of implementation of Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2005 (hereinafter referred to as 'the Act') and the Rules framed thereunder.

3. It is stated that in respect of lands coming within the forest range of Mannarkkad forest division of Palakkad, large scale encroachments have been made with respect of 82 acres of virgin forest land thereby destroying the undergrowth. Such an incident has been reported in newspapers as evidenced from Ext.P1 dated 30/9/2009. It is submitted by the petitioner that in implementation of the provisions of the Act, a joint verification was conducted by the Revenue and Forest Department in Mannarkkad Taluk in 2006. All lands under the possession and cultivation of the dwellers have been surveyed, demarcated and the joint verification list has been prepared in respect of Vettilachola colony, which is produced as Ext.P2. GPS survey was also conducted in the forest areas and all the tribal settlements have been marked by the forest department. However, in a joint meeting of the Ministers for Forest, Tribunal Welfare and Revenue, a decision was taken to take back the application for claims of the rights claimed by tribals below 1 acre and they were asked to submit revised claims so that at least one acre land can be assigned to them. Ext.P4 is the said minutes.

4. Petitioner points out that the aforesaid decision in the minutes is in total violation of the statutory provisions under the Act. Further, it is pointed out that the authorities proceeded to assign lands to ineligible persons and larger extent of forest land is proposed to be assigned in violation of the provisions of the Act and the Rules, which according to the petitioner, will denude the forest and hence the writ petition is filed seeking the reliefs aforesaid.

5. Counter affidavit has been filed by the 4th respondent virtually admitting the factual statements in the writ petition and stating that though a decision had been taken by virtue of Ext.P4 minutes, the intention to provide one acre of land to tribals, no such Government Order had been issued in that regard. Further, a perusal of the counter affidavit clearly indicates that necessary GPS survey of tribal settlements based on the decision in The State Level Monitoring Committee and as per the instructions of the Chief Conservator of Forests (Protection) had been completed in all the forest settlements in the State and maps have been prepared.

6. It is also admitted that there had been encroachment over 82 acres of virgin forest land in Vettilachola Tribal Settlement, which took place in 2007-2008 and 2009. However, it is stated that no title have been issued in Vettilachola Tribal Settlements under the provisions of the Act since the correct legal position was brought to the notice of the Sub Divisional Level Committee and District Level Committee by the forest officials. However, in para 33, it is stated as under:

   "33. The allegation raised in Ground (D) it is submitted that the forest officials have not been duly intimated about the survey of land for which claims have been preferred and received by the Grama Sabha which would lead to assignment of virgin forest land in contravention of the provisions of the Forest Rights Act. This would also lead to recognizing fake claims on forest lands. In this connection it has been reported by the Divisional Forest Officer, Mannarkkad that as on 25/02/2010, 93 out of 268 records of rights issued are for land under forest vegetation. These 93 records of rights include 3 records of rights in Pazhayur settlement of Attappadi Range, 10 records of rights in Vakkodan Settlement of Mannarkkad Range and 80 records of rights in Agaly Range. The 80 records of rights given in Agaly range are to tribals residing outside forest".

7. Having regard to the above factual situation, there is no dispute about the fact that the tribals are entitled for assignment of land only under the provisions of Act. Section 4(3) of the Act is relevant, which reads as under;

   "4(3) The recognition and vesting of forest rights under this Act to the forest dwelling Scheduled Tribes and to other traditional forest dwellers in relation to any

State or Union territory in respect of forest land and their habitat shall be subject to the condition that such Scheduled Tribes or tribal communities or other traditional forest dwellers had occupied forest land before the 13th day of December, 2005".

8. There cannot by any dispute regarding the fact that the recognition and vesting of forest rights under the Act to the forest dwelling Scheduled Tribes and Other Traditional Forest Dwellers can only be in respect of forest land. The very concept of the aforesaid statutory provision indicates that forest land can be assigned only with reference to the property in possession of the forest dweller or the tribal, as the case may be. It cannot be extended to any other area of forest. In other words, it is not open for the Government to assign any extent of land to the forest dwellers other than the land in their actual possession. When this legal position is clear, we do not think that the Government will have any right to issue any assignment orders or issue pattas based on the minutes of discussion as stated in Ext.P4.

9. It is for the Government and its authorities especially the Forest Department to ensure that the forest land is not misutilized by issuing assignment orders/pattas to persons who are not eligible for the same. If there is any encroachment on the forest land, it is for the concerned officers to ensure that encroachment is removed at the earliest.

10. Therefore, having regard to the limited scope of the above writ petition, we direct the respondent authorities to ensure that no land shall be assigned other than in accordance with the provisions of the Act and the Rules framed thereunder. It is made clear that para 5 of the minutes of the meeting (Ext.P4) shall not enable any person to claim 1 acre of land from the forest area, other than the land in their possession. The forest department shall also verify whether appropriate demarcation can be made to the aforesaid habitats depending upon the ground reality involved in the matter.

11. Writ petition is closed as above.

MADHYA PRADESH HIGH COURT

TABLE OF JUDGMENTS AND ORDERS

Ravindra Masane & Anr. vs. State of Madhya Pradesh & Ors.

WP NO. 7727 OF 2008 (PIL)
HIGH COURT OF MADHYA PRADESH, JABALPUR BENCH
16.07.2008 (INTERIM ORDER)
CORAM: A.K. PATNAIK, C.J. AND SANJAY YADAV, J.

SUMMARY

The petitioners, both of whom are part of the tribal rights movements, filed the present writ petition as a public interest litigation, in order to protect the forest dwellers of the districts in which they are working, from forcible dispossession from the forest lands in light of the (then) recently enacted Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA).

Taking note of the substantive provisions of the law under Section 3(1) and Section 4, and in particular the statutory injunction from dispossession from lands while rights recognition process is underway, the Court passed the following interim order as under:

> **"as an interim measure, that no member of forest dwelling Scheduled Tribe or no other traditional forest dweller of Gram Panchayat Garhtaal, Tahsil and District Burhanpur shall be evicted from forest land under the occupation or will be prevented from cultivating or dwelling on such forest land until further orders."**

EDITOR'S NOTE

One of the earliest orders passed by a constitutional court under the FRA, these protective directions remained in force until the writ petition was finally disposed of vide order dated 8.1.2014 (extracted elsewhere in this compendium), albeit by a different bench.

ORDER

1. Particulars of the Petitioner:

(a) The petitioner No.1 is a public - spirited person, a public figure and has been associated with Mass tribal movements in the District of Burhanpur. He was elected as ward member of Ward No.1 of BurhanpurNagarpalika during 1999-2004. He has been associated with the residents of the affected villages described in this petition and has been their friend and guide in their struggle for survival.

(b) The petitioner No. 2 is a community leader of the Bhil & Bhilala tribesmen, traditionally known as Patel's, of one of the affected Villages Junibadi, District - Burhanpur. He enjoys the confidence of his tribesmen and has been mandated by his people to bring litigations, if any, for securing their rights and protecting their interests.

2. Heard Mr. Raghvendra Kumar, learned counsel for the petitioner and Mr. V.K. Shukla, learned Deputy Advocate General for the State.

3. This matter has come up today for considering the interim prayer interim prayer made in the writ petition is the no villager of Gram Panchayat Garhtaal should be evicted from the land or prohibited from cultivating and dwelling on their land till the procedure for recognition and verification of their rights is complete as per the mandate of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (for short 'the Act of 2006').

4. We find that under Section 3(1)(a) of the Act of 2006 forest dwelling Scheduled Tribes and other traditional forest dwellers would now have the right to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation. Section 4(1) of the Act of 2006 further states that notwithstanding anything contained in any other law for the time being in force, and subject to the provisions of the Act, the Central Government recognizes and vests forest rights in the forest dwelling Scheduled Tribes and other traditional forest dwellers in respect of all forest rights mentioned in Section 3, Section 4(5) of the Act of 2006 further says that save as otherwise provided, no member of a forest dwelling Scheduled Tribe or other traditional forest dweller shall be evicted or removed from forest land under his occupation till the recognition and verification procedure is complete.

5. Considering the aforesaid provisions in the Act of 2006, which have come into force with effect from 31st December 2007 by notification dated 31st December, 2007, we direct, as an interim measure, that no member of forest dwelling Scheduled Tribe or no other traditional forest dweller of Gram Panchayat Garhtaal, Tahsil and District Burhanpur shall be evicted from forest land under the occupation or will be prevented from cultivating or dwelling on such forest land until further orders.

C.C. as per rules, by tomorrow.

Ms. Shamim Modi vs. Ms. Sudha Chowdhary, District Collector & Ors.

WP 4644/2004; 2008 (5) MPHT 13
MADHYA PRADESH HIGH COURT
17.07.2008
CORAM: A.K. PATNAIK, C.J. AND PRAKASH SHRIVASTAVE, J.
CITATION: 2008 (5) MPHT 13

SUMMARY

BRIEF FACTS

The petitioner, a founding member of *Shramik Adivasi Sanghatan* which is an organization for betterment of the conditions of tribals, filed a PIL to protect the rights of tribals residing in the tribal village of Ghorpodmal in Bhaisdehi Tehsil, West Betul, Madhya Pradesh. The petitioner had alleged that the forest officers of the Forest Department of the Government of Madhya Pradesh had threatened the tribal people if they didn't refrain from participating in the activities of the Sangathan, that they would be dispossessed from their right to continue cultivating their ancestral lands in the forest.

The petitioner further alleged that 50 armed policemen and forest department personnel had forcibly entered the house of a member of the community when he was not present, and then molested and beaten up two women in the household. They also assaulted various individuals who in self-defense pelted stones at them, subsequent to which the officials left. Later police personnel registered a false case of dacoity and attempt to murder against 13 persons. Moreover, the complaints made by the petitioner were not being investigated, and the members of the community were being forced by the police to withdraw their complaints even as they registered false criminal cases against the tribals and the petitioner herself. The tribals were being kept in judicial custody and were being produced in handcuffs before the Courts.

During the pendency of the writ proceedings, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) was enacted and the Petitioner further sought to rely upon the said Act to substantiate the claims of the tribals.

The respondent State government claimed that the petitioner and her husband had instigated members of the tribal community to commit forest offences regularly. The forest department had been taking suitable action by registering cases of forest offences, encroachments, etc. against these offenders. Further, the respondents argued the tribals were encroachers and indulging in criminal activities, including illegally ploughing the fields. Efforts to stop them resulted in the tribals attacking the state personnel with lathis.

FINDINGS

Since a number of different issues were raised, the Court dealt with them one by one as under-

1. **The argument of the petitioner that judicial detention of tribals charged under the various offences was a violation of Article 21 of the Constitution, was rejected. Monetary compensation, therefore, cannot be claimed for such detention.**

2. **The argument of the petitioner that the actions of the police and forest officers amount to various offences under the Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989 and prosecutions be initiated, was rejected. The Court was of the view it does not have the jurisdiction to direct registration of FIRs, and the avenues under the Criminal Procedure Code (CrPC) should be adopted by the petitioner.**

3. **The production of three tribal accused in handcuffs before the Court of the SDM was found to be contrary to the law and to the judgment of the Supreme Court in *Sunil Gupta vs. State of Madhya Pradesh*[60]. Accordingly, the State was directed to pay compensation of Rs. 10,000 to each of them.**

4. **Regarding illegal mining and excavation of sand from the forest area by the forest officials, the Court passed directions that this must be stopped immediately in terms of Section 2 of the Forest Conservation Act, 1980 (or FCA) and various orders of the Supreme Court. The respondents were directed to ensure that no excavations in land recorded in government records as forests takes place, either by the State or other authorities or private persons, including contractors, without prior approval of the Central government. In case such excavations are conducted, steps will be taken for prosecution for offences under S.3-A & 3-B of the FCA[61].**

5. **The petitioner also placed on record the Government Order dated 12.05.2005 of the Government of India directing that forest dwellers including tribals who are in continuous possession of forest land at least from prior to 25.10.1980 i.e. the date of enactment of the FCA shall be eligible to be considered for settlement of land rights including regularization of encroachment of forest land. It may be noted that in terms of the said Government Order, the Court had passed an interim order on 18.10.2005 directing that no steps shall be taken**

[60] (1990) 2 SCR 871

[61] Section 3A FCA: "Penalty for contravention of the provisions of the Act. — Whoever contravenes or abets the contravention of any of the provisions of section 2, shall be punishable with simple imprisonment for a period which may extend to fifteen days."

Section 3B FCA deals with offences by the authorities and Government Departments.

by the State Government to evict any forest dwellers who are in continuous possession as stated.

6. **The arguments of the Petitioner with regard to the FRA were accepted by the Court. At the time of filing of the writ petition, the Act had not come into force, but the petitioner placed on record the Draft Bill of 2005 which was under consideration in Parliament.**

Now that the FRA has come into force, the Court observed, Section 4(5) of the said Act prevents eviction of forest dwellers until recognition of rights is complete. Accordingly, the Court directed that "the claims of the members of the Scheduled Tribes and other traditional forest dwellers of Village Ghorpodmal, District Betul will be decided in accordance with the provisions of the 2006 Act and the authorities will not evict a member of a forest dwelling Scheduled Tribe or any other traditional forest dweller from the forest land under his occupation till the recognition and verification procedure is complete."

With these directions, the writ petition was disposed of.

JUDGMENT

(the judgment of the Court was pronounced by AK Patnaik, C.J)

1. The petitioner has filed this Public Interest Litigation to protect the rights of tribals residing in the Tribal Village Ghorpodmal in Bhaisdehi Tehsil in the Mohada forest range in the West Betul Forest Division in the State of Madhya Pradesh.

2. The petitioner is a Psychology graduate from Jesus and Mary College, Delhi and holds a Master's Degree in Psychology from Lady Ram College, Delhi. She did her M.Phil in Social Science from the Tata Institute of Social Science, Mumbai and graduation in Law from the Barkatullah University, Bhopal and thereafter became a Project Officer of OXFAM (India) Trust, a British Funding Agency in 1991-92. She has stated in the writ petition that while working as Project Officer of OXFAM (India) Trust, she got an opportunity to serve in the tribal areas of Madhya Pradesh and she was shocked to find the pathetic conditions in which the tribals are living and she has therefore formed an organisation of the tribals called the Shramik Adivasi Sangathan (for short 'the Sangathan') for the welfare of the tribals.

3. The petitioner has alleged in the writ petition that the Beat Guard, Deputy Ranger and the Ranger of the Forest Department of the Government of Madhya Pradesh have been threatening the tribals of Ghorpodmal village of dire consequences if they do not restrain from participating in the activities of the Sangathan. She has alleged that on 17th July, 2004 at about 11.00 p.m., fifty armed personnel of the Police and the Forest Departments marched through Village Ghorpodmal and created havoc. She has alleged that these personnel of the Police and the Forest Departments were armed with rifles and most of them were drunk and they came in 6 to 7 jeeps, 7 to 8 motorcycles and abused the tribals in foul language. The petitioner has further alleged that these armed personnel of the Police and the Forest Departments entered Soma Korku's hutment and on being told by his wife Sukhiyabai that Soma was not present, the drunk intruders started molesting two tribal women, Sukhiya Bai and Mundli, and when the women protested vehemently, they were beaten up with the butts of rifles. She has further alleged that these assaulters went on rampage and started assaulting anyone and everyone in the

night and in these circumstances, the villagers got panicky and in self defence started pelting stones at the assaulters and they left the place. The petitioner has also alleged that the Police personnel then registered a false case of dacoity and attempt to murder against 13 tribals. To avoid arrest and fearing further assault, the 13 tribals had to run from pillar to post and could not harvest their crop or do any other labour and also could not handle their responsibilities towards their family members.

4. The petitioner has stated in the writ petition that although complaints of the incidents of 17th July, 2004 were filed before different authorities, no investigation was initiated by any Competent Authority, and on the other hand, Munji Yadav and two other tribal activists namely, Balaram and Bhoota were asked by Thanedar Tripathi on 29th September, 2004 to withdraw the complaints against the Police personnel. The petitioner has also stated that on 21st August, 2004, the Forest personnel went to Chamil Jungle near Kabra village, which is in vicinity of Ghorpodmal village, and arrested 8-10 tribals who were mercilessly beaten up and taken to Mohada Police Station. Of these tribals, Hannu and Shyamlal were beaten the most and were implicated in the offence of dacoity alongwith other tribals of Village Ghorpodmal. The petitioner has further stated that Hannu and Shyamlal were arrested on 21st August, 2004 and were kept in custody till 23rd August, 2004 at the Mohada Police Station and produced before the Magistrate on 24th August, 2004 and were remanded to judicial custody, and were denied bail and they languished in Betul Jail for atleast four and half months. The petitioner has, inter alia, prayed that an enquiry be conducted into the incidents of 17th July, 2004 in the Ghorpodmal village by an independent agency and that the arrest of tribals of Ghorpodmal be stopped immediately.

5. In the preliminary submissions, the respondent Nos. 4(a), (b) and (c) have stated that approximately 200 families of local tribes live in Villages Kabra and Ghorpodmal within the forest ranges of Mohada and Tawdi under West Betul (G) Forest Division and taking advantage of the proximity to forest, some of them on the instigation of the petitioner and her husband are involved in various types of forest offences on regular basis in the nearby compartment Nos. 1293, 1304, 1273 and 1283 of West Forest Division, Betul. They have also stated that the Department of Forest has been taking suitable action by registering cases of forest offences, encroachments etc. against the offenders.

6. Regarding the incidents which took place on 17th July, 2004 in Village Ghorpodmal, respondent Nos. 4(a), (b) and (c) have alleged that Soma and Mer Singh including Hannua and Shyamlal encroached upon the forest land of compartment No. 1293. These respondents have further stated that a Task Force consisting of officials of Forest, Revenue and Police Departments reached the spot where the encroachment was being made at about 2.30 p.m. on 17th July, 2004 and on seeing the Task Force, the encroachers fled from the spot and were chased by the Task Force to the Ghorpodmal Village. They have also alleged that on 17th of July, 2004 at 5.30 p.m., when the members of the Task Force reached Soma's house and directed him to come out so that further legal action could be taken against him, supporters of the petitioner and members of the organisation from surrounding Villages Kabra, Keli-Rawang, Malegaon, Batki, Kayada etc. including Soma, Hannu and Shyamlal, who could be 100 to 125 in number, started shouting slogans and attacking and assaulting the members of the Task Force by deadly weapons like lathi, axe, farsa and stones and as a result, the employees of the Forest Department sustained grievous injuries. They have also stated that these tribals damaged police vehicle No. MP-03/3627 and also took away a wireless set. They have further stated that the Task Force showed tremendous restraint in not taking any coercive action though they were fully equipped and to save their lives, they had to flee in different directions and some of them had to spend the night in the forest and reached safer places only on the next day. They have also stated that a case was registered against Soma and others bearing Crime

No. 31 of 2004 of P.S. Mohada on 18th July, 2004 and after investigation, challan has also been filed in the Court of Judicial Magistrate First Class, Bhaisdehi against Hannu and Shyamlal and investigation in respect of other persons is still in progress and as they are absconding, challan could not be filed against Soma and others.

7. Regarding the incidents of 21st August, 2004, the respondent Nos. 4(a), (b) and (c) have stated in their preliminary submissions that the Forest Chowkidars made a complaint that some people in the Village Kabra, Temar, Ghorpodmal and Batki were ploughing the field by illegally cutting teak trees, and Kesho Lodhi, Assistant Forest Range Officer, Piparia, Beat Guard Wamanrao and the complainant Forest Chowkidars went to the President of Van Suraksha Samiti, Sullo Bai and Village Sarpanch Vishram Singh and informed them about the complaint and about 25-30 persons went to Chimlakheda and saw 20-22 people ploughing the field and some women were sitting and when they did not stop ploughing the field despite warning, POR No. 291/03, dated 21st August, 2004 was issued against Hannu Thathia, Shamu Gond, Munnilal, Tulsiram, Prem Gond, Sammal Gond, Mangal Hoji, Shiv and others and getting annoyed they attacked Kesho Lodhi with lathis etc. and tore down his shirt. Thereafter, Kesho Lodhi alongwith Beat Guard Wamanrao came to the Police Station and lodged a report of the incident and Crime No. 36 of 2004, dated 22nd August, 2004 under Sections 147, 353, 186, 332, 342, 506-B and 294, Indian Penal Code was registered against Hannu, Thathia, Shyamlal and others. Thereafter, Hannu, Shyamlal and nine others were arrested and produced before the Judicial Magistrate First Class on 24th August, 2004. Hannu and Shyamlal then filed bail applications before the Judicial Magistrate First Class, Bhensdehi, which was rejected. When they filed a second bail application, the same was allowed by order dated 21st December, 2004 and Hannu and Shyamlal were released on bail. In the parawise return filed on behalf of the respondent Nos. 4(a), (b) and (c), the averments made in their preliminary submissions have been reiterated with regard to the incidents which took place on 17th July, 2004 and 21st August, 2004.

8. Since there were two divergent versions, one of the petitioner and the other of the respondent Nos. 4(a), (b) and (c) regarding the incident of 17th July, 2004, the Court passed an order on 3rd October, 2005 directing the learned District Judge, Betul, within whose jurisdiction Village Ghorpodmal is situated to make an enquiry into the incident on 17th July, 2004 and submit a report to this Court within a period of two months. By the order passed by the Court on 3rd October, 2005, the learned District Judge was also directed to hear the petitioner, respondent No. 4(a), (b), (c) or their representatives, examine witnesses and allow the concerned parties to cross examine the witnesses. Pursuant to the order of the Court, the learned District Judge, Betul conducted the enquiry and submitted a report that if any opinion is given by him, it will affect the interest of the parties in the sessions trial pending in the Sessions Court and also in the criminal case pending before the Judicial Magistrate First Class. Thereafter, on 20th July, 2006, the Third Additional Sessions Judge, Betul passed an order in Sessions Trial No. 65 of 2005 that there was absolutely no evidence to implicate the 13 tribals in offences under Sections 395 and 307, Indian Penal Code and the case has been sent for trial by Magistrate under Sections 147, 148, 149, 332 and 447, IPC.

9. At the hearing of the writ petition, the petitioner appearing in person submitted that the order passed by the learned Additional Sessions Judge on 20th July, 2007 would clearly show that 13 innocent tribals were falsely booked for dacoity and attempt to murder by the Forest Officials of the State of M.P. She submitted that on account of the false implication of 13 tribals in the offences of dacoity and attempt to murder, they were arrested and two of them, namely, Hannu and Shyamlal, were detained in custody for about four and half months and hence, they are entitled to compensation for gross violation of their rights under Article 21 of the Constitution. She cited *Rudul Shah vs.*

State of Bihar and Anr.: 1983CriLJ1644 , in which the Supreme Court has held that the right to compensation is some palliative for the unlawful acts of instrumentalities in the name of public interest and that the State must repair the damage done by its officers by paying compensation to those whose rights are violated. She also relied on the observations of JS Verma, J, as he then was, in *Nilabati Behera vs. State of Orissa and Ors.*: 1993CriLJ2899 , that the Court should forge new tools and devise new remedies for enforcing the fundamental rights guaranteed by the Constitution and award monetary compensation in appropriate cases. She submitted that in *D.K. Basu v. State of West Bengal*: 1997CriLJ743 , the Supreme Court, relying on the legal maxim 'Ubi jus, ibi remedium' has held that monetary compensation for redressal by the Court finding the infringement of the indefeasible right to life of the citizen is, therefore, useful and at times perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim, who may have been the bread winner of the family.

10. Mr. Kumaresh Pathak, learned Deputy Advocate General appearing for the respondent Nos. 4(a), (b) and (c), on the other hand, submitted that all the tribals were arrested for commission of forest and other offences in accordance with the provisions of the Code of Criminal Procedure, 1973 (for short 'the Cr.PC') and the applications for bail of some of the arrested tribals were rejected by the Court, but at the later stage, allowed by the Court in accordance with the Cr.PC. Hence, the arrest and detention of the tribals were in accordance with the procedure established by law and the rights of these tribals under Article 21 of the Constitution have not been violated and therefore these tribals are not entitled to compensation for their arrest and detention, as contended by the petitioner.

11. We find full force in the aforesaid submissions of Mr. Pathak. Article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to the procedure established by law. The personal liberty of person thus can be taken away by a reasonable procedure laid down in law. The tribals including Hannu and Shyamlal were arrested for various offences alleged to have been committed by them and they were produced before the Court of the Judicial Magistrate First Class, Bhaisdehi on 24th August, 2004. While the bail applications of two tribals were rejected, the other tribals were released on bail. Subsequently, however, the second bail applications of Hannu and Shyamlal were allowed by order dated 21st December, 2004 and Hannu and Shyamlal were released on bail. The arrest and detention of the tribals including Hannu and Shyamlal are therefore in accordance with the procedure laid down in the Cr.PC. The fundamental rights of the tribals including Hannu and Shyamlal under Article 21 of the Constitution have not been violated and they are not entitled to award of compensation.

12. In *Rudul Shah v. State of Bihar* (supra), cited by the petitioner, the facts were that Rudul Shah was acquitted by the Court of Sessions, Muzaffarpur, Bihar on 3rd June, 1968 but he was released from jail on 16th October, 1982, more than 14 years after he was acquitted. On these facts, the Supreme Court held that the detention of Rudul Shah for about 14 years from 1968 to 1982 was unauthorised and illegal and hence his liberty had been taken away for the period of 14 years without following the procedure under the law. The Supreme Court, therefore, granted compensation of Rs. 30,000/- in addition to compensation of Rs. 5000/- paid to Rudul Shah. In the present case, on the other hand, as we have found, the detention of 13 tribals was in accordance with law and we cannot hold that their personal liberty had been taken away without following the procedure established by law.

13. In *Nilabati Behera v. State of Orissa and Ors.* (supra), cited by the petitioner, the son of Nilabati Behera, aged about 22 years was killed while in custody and on these facts, the

Supreme Court held that the right guaranteed under Article 21 of the Constitution that no person shall be deprived of his life without following the prescribed procedure of law was violated and accordingly awarded compensation of Rs. 1,50,000/- to Nilabati Behera from the State of Orissa. In the present case, none of the tribals has been killed in custody.

14. *D.K. Basu v. State of West Bengal* (supra), cited by the petitioner was a case registered pursuant to a letter dated 26-8-1986 to the Chief Justice of India by the Executive Chairman, Legal Aid Services, West Bengal, a non-political organisation registered under the Societies Registration Act, drawing His Lordship's attention to news items published in The Telegraph dated 20-7-1986, 21-7-1986 and 22-7-1986 and in the Statesman and Indian Express dated 17-8-1986 regarding deaths in police custody and it is in this context that the Supreme Court held that award of compensation for established infringement of the indefeasible rights guaranteed under Article 21 is a remedy available in public law since the purpose of public law is not only to civilise public power but also to assure the citizens that they live under a legal system wherein their rights and interests shall be protected and preserved. The present case is not a case of custodial violence or custodial death and there is no violation of the rights of the tribals guaranteed under Article 21 of the Constitution on account of arrest and detention for commission of alleged offences according the provisions of the Cr.PC.

15. The petitioner next submitted that Section 3(1)(viii) of the Scheduled Castes and The Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short 'the 1989 Act') provides that any person who is not a member of Scheduled Caste or a Scheduled Tribe and who institutes false, malicious or vexatious suit or criminal or other proceedings against a member of a Scheduled Caste or a Scheduled Tribe is punishable with imprisonment. She submitted that similarly Section 3(1)(ix) of the 1989 Act provides that any person who is not a member of Scheduled Caste or a Scheduled Tribe and who gives any false or frivolous information to any public servant and thereby causes such public servant to use his lawful power to cause injury or annoyance to a member of a Scheduled Caste or a Scheduled Tribe is punishable with imprisonment. She submitted that the Forest and Police Officials are guilty of these offences as they instituted false, malicious or vexatious criminal proceedings or gave false or frivolous information to the Police against the members of the Scheduled Tribes because of which criminal cases were instituted against the members of the Scheduled Tribes. She submitted that the fact that the Third Additional Sessions Judge, Betul passed the order dated 20th July, 2006 saying that there was absolutely no evidence to implicate the accused persons in the offences under Sections 395 and 307, Indian Penal Code would show that a false, malicious and vexatious criminal case had been instituted against the members of the Scheduled Tribes for which the Police and Forest personnel are liable to be prosecuted for the offences under Section 3(1)(viii) and 3(1)(ix) of the 1989 Act.

16. Mr. Pathak, learned Deputy Advocate General, on the other hand, submitted that first an FIR has to be lodged and an investigation has to be carried out by the Police in accordance with the provisions of the 1989 Act and the Rules made thereunder as well as the Cr.PC and thereafter, if a charge-sheet is filed with materials to show that the Police or Forest Officials have committed the offences under Section 3(1)(viii) and 3(1)(ix) of the 1989 Act, then only the case can be tried by the Special Court constituted under Section 14 of the Act and the High Court, in exercise of its powers under Article 226 of the Constitution, cannot direct prosecution of the Police and Forest personnel straight away on the basis of allegations made by the petitioner in the writ petition.

17. The petitioner, however, submitted if the FIR is lodged against the Police and Forest Officials, the Police will not register the case and if the Police registers the case a fair

investigation into the offences alleged to have been committed by the Police and Forest personnel is not possible and for this reason the Court should straight away direct prosecution of the Police and Forest personnel guilty of the offences under Sections 3(1)(viii) and 3(1)(ix) of the 1989 Act.

18. We are unable to accept the submission of the petitioner. The High Court, in exercise of its powers under Article 226 of the Constitution, cannot direct prosecution of Police and Forest personnel merely on the allegations made by the petitioner in the writ petition that they have committed offences under Sections 3(1)(viii) and 3(1)(ix) of the 1989 Act. Section 4(1) of the Cr.PC provides that all offences under the Indian Penal Code shall be investigated, inquired into, tried, and otherwise dealt with in accordance with the provisions contained in the Cr.PC and Section 4(2) of the Cr.PC provides that all offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with in accordance with the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. Hence, the provisions of the Cr.PC are applicable to investigation, inquiry and trial of offences under the 1989 Act subject to specific provisions of the 1989 Act regulating the manner or place of investigation, inquiry and trial dealing with the offences under the 1989 Act. Unless, therefore, offences under the 1989 Act are investigated by the Police pursuant to an FIR, or inquired into by the Magistrate pursuant to a complaint and unless an order is passed by the Magistrate committing the case to the Special Court constituted under Section 14 of the 1989 Act as provided in the Cr.PC, the Special Court cannot take cognizance of the offences. In *Gangula Ashok and Anr. vs. State of AP* 2000(1) Crimes. 196 (SC), the Supreme Court had the occasion to decide the question whether the Special Court constituted under Section 14 of the 1989 Act could straight away take cognizance of offences under the 1989 Act, and referring to the provisions of Cr.PC and the 1989 Act as the Code and the Special Act held in Paragraphs 15 and 16:

> This Court, on a reading of Section 5 is juxtaposition with Section 4(2) of the Code, has held that 'it only relates to the extent of application of the Code in the matter of territorial and other jurisdiction but does not nullify the effect of Section 4(2); In short, the provisions of this Code would be applicable to the extent, in the absence of any contrary provision in the Special Act or any special provision including the jurisdiction or applicability of the Code'. (vide Para 128 in Directorate of Enforcement v. Deepak Mahajan). Hence we have no doubt that a Special Court under this Act is essentially a Court of Session and it can take cognizance of the offence when the case is committed to it by the Magistrate in accordance with the provisions of the Code. In other words, a complaint or a charge-sheet cannot straight away be laid before the Special Court under the Act.

19. Thus, in case the petitioner is apprehensive that the Police may not register a case at all pursuant to the FIR lodged against the Police and Forest personnel and investigate into the offences with fairness and impartiality, it is open to the members of the Scheduled Tribes to file complaints before the concerned Magistrate for inquiry in accordance with the Cr.PC and in case the Magistrate finds that the case is one for committal to the Special Court, he can pass orders accordingly and only then the Special Court can take cognizance of the offences under the 1989 Act alleged to be committed by the Police and the Forest Personnel.

20. The petitioner has filed written submissions contending that on 16-3-2007, three tribals, namely, Mangal Singh, Phool Singh and Sukhram were arrested, handcuffed and paraded through the public thoroughfare in Betul during their transit to the Court of SDM and made to sit handcuffed outside the Court of the SDM. She submitted that such handcuffing was in clear violation of the judgment of the Supreme Court in

Sunil Gupta and Ors. v. State of M.P. and Ors.: [1990]2SCR871 . She further submitted that all this was brought to the notice of this Court and on 10-4-2007, the Court, after considering the reply filed by the respondents, passed an order saying that it was not prima facie convinced with the reply filed on behalf of the respondents and gave an opportunity of hearing to Mr. A.L. Patel, ASI, on whose instructions, Mangal Singh, Phool Singh and Sukhram were handcuffed. Thereafter, Mr. Patel appeared before the Court and he was asked to submit an explanation to the higher authorities why three persons were handcuffed with a long chain contrary to the judgment of the Supreme Court in Sunil Gupta's case and Mr. Patel submitted an explanation but the order is yet to be passed by the authorities. She submitted that handcuffing of Mangal Singh, Phool Singh and Sukhram was a clear violation of right to dignity guaranteed under Article 21 of the Constitution and the Court must award compensation to Mangal Singh, Phool Singh and Sukhram for such violation of their rights.

21. After taking into consideration the observations of the Supreme Court in *Prem Shankar Shukla and Ors. v. Delhi Administration*: [1990]3SCR7 , the Supreme Court had held in *Sunil Gupta and Ors. v. State of M.P. and Ors.* (supra), cited by the petitioner that taking of persons from prison to the Court or back from the Court to the prison by the escort party is only under the judicial orders of the Court and, therefore, even if extreme circumstances necessitate the escort party to bind the prisoners in fetters, the escort party should record the reasons for doing so in writing and intimate the Court so that the Court considering the circumstances either approve or disapprove the action of the escort party and issue necessary directions. In the aforesaid case of Sunil Gupta and Ors. v. State of M.P. and Ors. (supra), the Supreme Court found that the escort party without any justification had handcuffed the petitioners when taking them from the prison to the Court and then from Court to prison and accordingly directed the State Government to take appropriate action against the erring officials who had unjustly and unreasonably handcuffed the petitioners in violation of the rights guaranteed under Article 21 of the Constitution.

22. In *State of Maharashtra and Ors. vs. Ravikant S. Patel*: (1991)2SCC373 , the Supreme Court relying on *Sunil Gupta and Ors. vs. State of M.P. and Ors.* (supra) and *Rudul Shah v. State of Bihar and Anr.* (supra), upheld the award of compensation of Rs. 10,000/- by the High Court of Bombay to an under-trial prisoner who had been handcuffed and taken through the streets in a procession by the Police during investigation for violation of his right under Article 21 of the Constitution.

23. The records of the present case reveal that Mr. Patel, ASI, who was heading the Police personnel carrying Mangal Singh, Phool Singh and Sukhram from jail to the Court of SDM, stated before the Court on 3-5-2007 that as per the directions of the SDM, Betul, he brought the three persons from jail to the Court. Mr. Patel did not dispute that the three persons were handcuffed by a long chain when they were brought to the Court of SDM, Betul. The SDM, Betul, who appeared before the Court on 16-5-2007, however stated that the three persons were not handcuffed when they were produced before the Court. No valid justification has thus been given for the handcuffing of the three persons when they were brought from jail to the Court and no orders appear to have been passed by the SDM for handcuffing all these three persons. Since no valid justification has been shown in the returns filed by the respondents for handcuffing Mangal Singh, Phool Singh and Sukhram, we award a compensation of Rs. 10,000/- (Rupees Ten thousand) to each one of these three persons, namely, Mangal Singh, Phool Singh and Sukhram and the respondent No. 4, State of Madhya Pradesh, is directed to pay the compensation within a period of two months from today. It will be open for the State of M.P. to recover the compensation from the police personnel or the officers found guilty in the disciplinary proceedings for such blatant violation of the law laid

down by the Supreme Court.

24. The petitioner has also contended in her written submissions that the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (for short 'the 2006 Act') provides in Section 4 for recognition of, and vesting of, forest rights in forest dwelling Scheduled Tribes and other traditional forest dwellers and Sub-section (5) of Section 4 of the 2006 Act states that save as otherwise provided, no member of a forest dwelling Scheduled Tribe or other traditional forest dweller shall be evicted or removed from forest land under his occupation till the recognition and verification procedure is complete. She has submitted that the Court should accordingly direct the respondents not to evict the tribals of Village Ghorpodmal from the forest land in their occupation till their claims are settled in accordance with the provisions of the 2006 Act.

25. During the pendency of this case, the petitioner had filed I.A. No. 8154 of 2005 praying for an order restraining the Forest Authorities of the State Government from taking any coercive steps against any Scheduled Tribe people of Village Ghorpodmal, District Betul and alongwith the I.A. had filed a Draft of Scheduled Tribes (Recognition of Forest Rights) Bill, 2005 and instructions of Government of India, Ministry of Environment & Forest in connection with the Draft Scheduled Tribes (Recognition of Forest Rights) Bill, 2005. One such instruction was a communication dated 12th May, 2005 issued by the Government of India, Ministry of Environment and Forests to the Principal Secretaries (Forests) to all the States and the Union Territories, in which it was inter alia stated that forest dwellers including tribals who are in continuous possession of forest land at least from prior to 25-10-1980, Le., the date of enactment of Forest (Conservation) Act, 1980 (for short 'the 1980 Act'), shall be eligible to be considered for settlement of land right including regularisation of encroachment on forest land. The communication dated 12th May, 2005 also contained instructions of the Government of India to the State Governments not to take action for eviction of Scheduled Tribes including tribals who are in occupation of Government land on or after 25th October, 1980. In view of these instructions of the Government of India, by order dated 18th October, 2005, the Court directed as an interim measure that no coercive steps would be taken to evict any of the forest dwellers including tribals who are in continuous possession of forest land prior to 25th October, 1980. In the order dated 18th October, 2005, the Court also made it clear that in any proceedings for eviction of encroachers, the person who is served with show-cause notice can take a stand before the authority in writing that he has been in continuous occupation of forest land from a date prior to 25th October, 1980, and if such a stand is taken, the Competent Authority will consider the same in accordance with law.

26. The Bill has now become the 2006 Act and a notification dated 31st December, 2007 has been issued by the Central Government under Section 1(3) of the 2006 Act appointing 31st December, 2007 as the date on which the provisions of the 2006 Act came into force. Section 3(1)(a) and Section 4 (1) and (5) of the 2006 Act are quoted here in below:

"3. Forest rights of Forest dwelling Scheduled Tribes and other traditional forest dwellers.- (1) For the purposes of this Act, the following rights, which secure individual or community tenure or both, shall be the forest rights of forest dwelling Scheduled Tribes and other traditional forest dwellers on all forest lands, namely:

(a) right to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood by a member or members of a forest dwelling Scheduled Tribe or other traditional forest dwellers.

4. Recognition of, and vesting of, forest rights in forest dwelling Scheduled Tribes and other traditional forest dwellers.-(1) Notwithstanding anything contained in

any other law for the time being in force, and subject to the provisions of this Act, the Central Government hereby recognises and vests forest rights in-

(a) the forest dwelling Scheduled Tribes in States or areas in States where they are declared as Scheduled Tribes in respect of all forest rights mentioned in Section 3;

(b) the other traditional forest dwellers in respect of all forest rights mentioned in Section 3.

(5) Save as otherwise provided, no member of a forest dwelling Scheduled Tribes or other traditional forest dweller shall be evicted or removed from forest land under his occupation till the recognition and verification procedure is complete.

27. It is clear from Sub-section (1) of Section 4 of the 2006 Act that notwithstanding anything contained in any other law, the forest rights including the right to hold and cultivate land as mentioned in Section 3(1)(a) of Forest Dwelling Scheduled Tribes and other traditional forest dwellers are now recognized. Sub-section (5) of Section 4 of the 2006 Act further provides that save as otherwise provided, no member of a forest dwelling Scheduled Tribe or other traditional forest dweller shall be evicted or removed from forest land under his occupation till the recognition and verification procedure is complete. Accordingly, we direct that the claims of the members of the Scheduled Tribes and other traditional forest dwellers of Village Ghorpodmal, District Betul will be decided in accordance with the provisions of the 2006 Act and the authorities will not evict a member of a forest dwelling Scheduled Tribe or any other traditional forest dweller from the forest land under his occupation till the recognition and verification procedure is complete.

28. The petitioner has next submitted in the written submissions that some contractors very close to the ruling party politicians in the State are involved in illegal excavations in the forest areas of Districts Betul and Harda and the Police and District Administration of Betul and Harda are not taking any action to stop such illegal excavations. She further submitted that by a letter dated 3rd September, 2005 of the Under Secretary, Forest, Government of Madhya Pradesh and by letter dated 5th November, 2005, the Chief Conservator of Forest, Government of Madhya Pradesh have permitted such, illegal excavations in contravention of the provisions of the 1980 Act and, therefore, a direction should be given for prosecution of officers under Section 3(B) of the 1980 Act, who in collusion with politically influential contractors have permitted such illegal excavations in the forest areas.

29. These allegations of illegal excavations were made in I.A. Nos. 8937, 8939 and 9438 of 2005 filed by the petitioner and were denied by the respondent Nos. 4(a), (b) and (c) in their replies. Hence, the Court passed an order on 6-1-2006 directing that an inquiry be conducted by Mr. L.L. Shukla, the then Registrar (Vigilance) of this Court. By the order dated 6-1-2006, the Court directed that Mr. Shukla will visit the concerned areas in Betul District alongwith a photographer and will submit a report whether or not such illegal excavations have taken place in the Betul District, as alleged in the I.As. The Court further directed that the petitioner and the Government may depute their representatives to the spots at the time Mr. Shukla visits the spot. Thereafter, Mr. Shukla conducted the inquiry and submitted a report dated 1st March, 2006 that illegal excavation has taken place in some of the places. The Court accordingly passed orders on 10th April, 2006 directing the Collector, Betul to ensure that such illegal excavations are stopped immediately and further directed the Collector to exercise all powers under the law to seize any material collected by such illegal excavations.

30. Again an application (I.A. No. 4185 of 2006) was filed by the petitioner complaining of

fresh illegal excavations in the reserved forest and revenue areas in Harda and Betul Districts and the respondents in their reply denied such fresh illegal excavations. The Court passed orders on 20th November, 2006 directing the Registrar (Vigilance) to make spot inspection of the areas mentioned in the I. A. and submit a report to this Court and in the order dated 20th November, 2006, the Court further directed that notice be issued to the petitioner and the Collector about the date and time of the spot inspection so that they may remain present at the time of spot inspection. Pursuant to the order dated 20th November, 2006, the Registrar (Vigilance) Mr. Jayant Chouhan reached the spot, carried out the inspection and submitted a report dated 10-1-2007 in which he has again confirmed illegal excavations in some of reserved forest areas and revenue areas of Harda and Betul Districts.

31. Section 2 of the 1980 Act is quoted hereinbelow:

> Section 2. Restriction on the preservation of forests or use of forest land for non-forest purpose.
>
> Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other Authority shall make, except with the prior approval of the Central Government, any order directing:
>
> (i) that any reserved forest (within the meaning of the expression 'reserved forest' in any law for the time being in force in the State) or any portion thereof, shall cease to be reserved.
>
> (ii) that any forest land or any portion thereof may be used for any non-forest purpose.
>
> (iii) that any forest land or any portion thereof may be assigned by way of lease or otherwise to any private person or to any authority, corporation, agency or any other organisation not owned, managed or controlled by Government.
>
> (iv) that any forest land or any portion thereof may be cleared of trees which have grown naturally in that land or portion, for the purpose of using it for reafforestation.
>
> Explanation: For the purpose of this Section 'non-forest purpose' means the breaking up or clearing of any forest land or portion thereof for:
>
> (a) the cultivation of tea, coffee, spices, rubber, palms, oil-bearing plants, horticultural crops or medicinal plants;
>
> (b) any purpose other than reafforestation, but does not include any work relating or ancillary to conservation, development and management of forests and wild life, namely, the establishment of check-posts, fire lines, wireless communications and construction of fencing, bridges and culverts, dams, waterholes, trench marks, boundary marks, pipelines or other like purposes.

32. It will be clear from a reading of Section 2(ii) of the 1980 Act quoted above, that notwithstanding anything contained in any other law for the time being in force, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing that any forest land or any portion thereof may be used for any non-forest purpose. Clause (b) to the Explanation appended to Section 2 states that for the purposes of this Section, 'non-forest purpose' means the breaking up or clearing of any forest land or portion thereof for any purpose other than reafforestation. Hence, no forest land or portion of forest land can be broken up for any purpose other than reafforestation, without the prior approval of the Central

Government. This being the clear position of law, excavations in forest land without the prior approval of the Central Government are prohibited under Section 2 of the 1980 Act.

33. In *T.N. Godavarman Thirumulkpad vs. Union of India and Ors.*: AIR1997SC1228 , the Supreme Court interpreting Section 2 of the 1980 Act held:

> The term 'forest land', occurring in Section 2, will not only include 'forest' as understood in the dictionary sense, but also any area recorded as forest in the Government record irrespective of the ownership. This is how it has to be understood for the purpose of Section 2 of the Act. The provisions enacted in the Forest Conservation Act, 1980 for the conservation of forests and the matters connected therewith must apply clearly to all forests so understood irrespective of the ownership or classification thereof....

34. Thus, no land in areas recorded as forest in Government records can be broken up by excavations without the prior approval of the Central Government as provided in Section 2 of the 1980 Act. We accordingly direct the respondent Nos. 4(a), (b) and (c) to ensure that no excavations in land recorded in Government records as forest takes place either the State or other authorities or private persons including contractors without the prior approval of the Central Government and in case such excavations are conducted by the Government Departments, authorities or by private persons including contractors steps will be taken for their prosecution for the offences under Sections 3-A and 3-B of the 1980 Act.

35. The petitioner finally submitted that the petitioner and her husband are being harassed by the Forest and Police Officials by registration of various criminal cases and appropriate directions be given to the authorities not to harass the petitioner and her husband in any manner. This relief cannot be granted to the petitioner in this PIL, which has been filed for the protection of rights of the tribals. In case, the petitioner or her husband is individually aggrieved by any particular action or order of the authorities, it is open for them to seek their remedies either under the Cr.PC or by separate writ petitions under Article 226 of the Constitution, as they may be advised.

36. With the aforesaid directions, the writ petition is disposed of. Interim orders passed by the Court are vacated.

Madhu & Ors vs. State of Madhya Pradesh & Ors.

MISC. APPEAL NO. 1966 OF 2010, ETC.
MADHYA PRADESH HIGH COURT, JABALPUR BENCH
20.09.2011
CORAM: J.K. MAHESHWARI, J.

SUMMARY

This was a batch of three suits under Order 39 Rules 1 and 2 of the Civil Procedure Code (CPC) for the declaration of title over lands in question, on the ground that they are 'forest dwellers' having possession on the said land (904.02 acres of land in village Saeedganj, Sehore district) and cultivating the same. The plaintiffs also belong to the Scheduled Tribe community, having no other source of livelihood except the said agricultural land.

On resistance by the plaintiffs to efforts at forcible dispossession, the respondent State authorities have registered offences. However, these suits were filed by the plaintiffs restraining the Respondents from interfering in the possession of the plaintiffs.

The plaintiffs had urged that the Scheduled Tribes and Other Traditional forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) has been enacted to recognize the rights of the Scheduled Tribe Forest Dwellers and Other Traditional Forest Dwellers, and till determination of the rights of the plaintiffs as per Section 6 of the FRA, their possession should not be disturbed. In addition, the Madhya Pradesh government has issued various circulars, whereby it has directed that the members of the Scheduled Tribes who are in possession of the forest land should not be evicted till determination of their rights over the land in question.

The respondents argued that the FRA has been enacted to protect a special category of forest dwellers, and the plaintiffs were not permanent residents of the village Saeedganj, but had been shifted from Jhabua, and subsequently were not covered by the Act. Oddly, the State government argued that the restoration and vesting of forest rights is only for the benefit of forest dwelling Scheduled Tribes and other traditional forest dwellers who are "critical wildlife habitat".

DECISION OF THE COURT

The Court held that a bare reading of the plaint showed that the ingredients as required under the Act had not been sufficiently pleaded. The plaintiffs have not been able to demonstrate they belong to a pastoral or rural community living in close connection with the environment.

The Court observed that "(u)ntil and unless a person falls within the definition of forest dwelling Scheduled Tribes and other traditional forest dwellers or critical wildlife habitat after following the procedure as specified under section 6 of the Act of 2006 the application of those circulars must be refrained by the officials, however, the State Government, the authorities, the Sub-Divisional Committee and the State Level Committee are duty bound to go through the basic provision of the enactment and to comply it in its true sense and spirit." Since there is a procedure provided in the FRA under Section 6, rights ought to have been determined in accordance with such procedure. Since this was not done, it is not possible to grant an injunction under Order 39 Rules 1 and 2 of CPC. Accordingly, the Court held that since the plaintiffs had not established possession before the Trial Court, the prayer for injunction was correctly declined on part of the court "even on making a submission to apply the provisions of the FRA". Accordingly the appeals were dismissed.

EDITOR'S NOTE

Even though the judgment is unhappily worded, the principle of law that mere enactment of FRA does not fulfill the condition precedent for invoking Order 39 Rules 1 and 2 of the CPC is difficult to fault. In addition, the Court clearly finds it difficult to enforce a law meant for protection of under- privileged class of persons in a petition involving a vast tract of over 904 acres of land.

JUDGMENT

1. Challenging three different orders passed on 25.11.2009 in three different suits rejecting the application under Order 39 Rules 1 and 2 read with Section 151 of the Code of Civil Procedure by the 3rd Additional District Judge, (Fast Track Court) Nasrullaganj, district Sehore, the plaintiffs have filed three different appeals which are being decided by this common order, as the facts and question of law as involved for adjudication is similar.

2. The plaintiffs have filed three suits for declaration of their title over the land of various survey numbers, total area 904.02 acres, situated in village Saeedganj, tahsilBudhni, district Sehore on the ground that they are 'forest dwellers' came from Jhabua having possession on the said land and cultivating the same. They also belong to the Scheduled Tribes community and having no other source of livelihood except the said agricultural land. The Collector, district Sehore by passing the order dated 3.7.2007 in Case No. 14-A-20(3)/2006-07 directed to convert the revenue land into forest land, with further direction to deliver possession after demarcation to the Forest Department. The compliance report has also been sought by the Collector, District Sehore. It is stated that the plaintiffs belong to the Scheduled Tribe community and forest dwellers having possession on the said land, however, declare them as owner of the disputed land. On resistance to take forcible possession from them, the respondent authorities have registered offence, however, by issuing a notice the suits for declaration and permanent injunction restraining the defendants to not to interfere in possession of plaintiffs have

been filed. An application seeking temporary injunction of the same nature was also filed by the plaintiffs which has been rejected by the order impugned.

3. The defendants by filing the reply to application for temporary injunction denied all the allegations and contended that the plaintiffs are not in possession on the suit land. It is also denied that ancestors of the plaintiffs were in possession and cultivating thereon. It is said that on the disputed land, area 904.02 acres, dense forest is situated which was recorded in the revenue papers in the name of Revenue Department, however, vide order dated 3.7.2007 passed by the Collector, District Sehore the said land has rightly allocated to the Forest Department. On the said land Sagon trees are standing and the plaintiffs are creating hindrance to protect the forest products and land, however, denied all other allegations as alleged in the application are denied. It is further denied that the plaintiffs have become owners under the M.P. Krishi Prayojan Ke Liye Ki Ja Rahi Dakhal Rahit Bhoomi Par Bhoomiswami Adhikaron Ka Pradan Kya Jana (vs.esh Upabandh) Adhiniyam, 1984. It is stated that when the employees of the defendants have restrained to plaintiffs to cut the Sagon trees, they made assault, therefore offence has rightly been registered against them, and the case is pending before the competent Court. In such circumstances prayer is made to reject the application filed by the plaintiffs upholding the order impugned.

4. Before the trial Court the argument was advanced on the basis of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (hereinafter it be called as The Act of 2006) contending that under the said Act they are having right to continue in possession of the lands in question and be declared owner thereof. The defendants are not entitled to take the possession from plaintiffs who belong to scheduled tribe community in view of the provisions of the said Act. Learned trial Court considering various documents filed by the Forest Department, Sthal NirikshanPanchnama, referring the cases registered against various persons and the report on the claims as set-forth by the plaintiffs passed an order that the plaintiffs are not in possession on the disputed land, however, no prima facie case is made out in their favour. As the land belongs to the Forest Department to which they want to grab forcibly, however, balance of convenience, do not lie in their favour. It is further held that there is no irreparable loss to the plaintiffs. Thus by passing the order impugned, the prayer for grant of temporary injunction has been disallowed.

5. Shri Greeshm Jain, learned counsel appearing on behalf of the plaintiffs has strenuously urged that 'the Act of 2006' has been enacted to recognize the rights of the scheduled tribe forest dwellers and other traditional forest dwellers alike the plaintiffs, however, till determination of their right as per section 6 of the of Act 2006, their possession should not be disturbed. The Government of Madhya Pradesh through Forest Department has issued various circulars dated 21st January, 2008, 15th February, 2008 and 25th September, 2009 whereby it was directed that the members of the Scheduled Tribes who are in possession of the forest lands be not evicted till determination of their rights over the land in question. It is submitted that as per the various affidavits filed before the trial Court it is apparent that they are in possession of the disputed land, therefore, till adjudication of their right, which are the issues triable by the Civil Court, the injunction protecting their possession may be directed, however trial Court committed an error ignoring the provisions of the Act of 2006 and various circulars, therefore by setting aside the order impugned, application filed by the plaintiffs may be allowed and the defendants may be restrained from interfering in plaintiffs' possession, by allowing the appeals.

6. Per contra, Smt. Sheetal Dubey, learned Govt. Advocate appearing on behalf of the respondents contends that the Act of 2006 has been enacted to protect the special

category of Scheduled Tribes and traditional forest dwellers which are pastoral or expressive of the life of shepherds living like a conventionalized manner and nomadic i.e. wanderer not having fixed home and also not the urban have been protected. It is submitted that restoration and vesting of forest rights are only to the forest dwelling Scheduled Tribes and other traditional forest dwellers who are 'critical wildlife habitat'. As per Section 6 of the Act of 2006, the authorities are required to determine their rights and not of the plaintiffs as per the procedure prescribed therein. As per Section 7 if the authorities have committed an error they are liable to face the prosecution. The plaintiffs are not the forest dwelling Scheduled Tribes or other traditional forest dwellers, however, under the garb of the provisions of the Act of 2006 they are having no right to get protection under the law. As per the plaint allegations it is apparent that the plaintiffs were not the permanent resident of village Saeedganj, in fact, they have been shifted from Jhabua. However, merely being members of a tribal community and on commencement of the Act of 2006 they want to grab the forest land contrary to the object of the said enactment. It is further said that as per Sthal Nirikraton Panchnama and various reports the plaintiffs are not in possession of the land in dispute, however, the trial Court referring those reports rightly recorded the finding and three ingredients of temporary injunction i.e. prima facie case, balance of convenience or irreparable injury are not in favour of the plaintiff, thus rightly rejected the application filed by the plaintiffs under Order 39 Rules 1 and 2 read with Section 151 of CPC, however, the appeals filed by the appellants may be dismissed.

7. After having heard learned counsel appearing on behalf of the parties it is seen that the plaintiffs have prayed for temporary injunction seeking protection under the Act of 2006. As per the plaint allegations it is said that they are the Scheduled Tribe belonging to the tribal area having possession over the forest land, however, their possession deserves to be protected as they fall within the definition of the forest dwelling Scheduled Tribes and other traditional forest dwellers. It is also submitted that the possession on the forest land which they are having may be protected by issuing temporary injunction till decision in the civil suit. While dealing with the contention as advanced by learned counsel appearing on behalf of the appellants and on going through the provisions of the Act of 2006, in the opinion of this Court, the object to which the said Act was enacted is pious. By the the said Act, vesting of forest right and occupation in forest land in forest dwelling Scheduled Tribes and other traditional forest dwellers residing in forest for generations but whose right could not be recorded were required to provide some framework for recognition of their right. While determining the rights for sustainable use, conservation of biodiversity and maintenance of ecological balance and thereby strengthening the conservation regime of the forests while ensuring livelihood and food security to such persons is required to be seen. In the said context forest rights on ancestral lands and their habitat which were not adequately recognised in the consolidation of State forests during the colonial period as well as in independent India resulting in historical injustice to the forest dwelling Scheduled Tribes and other traditional forest dwellers who are integral to the very survival and sustainability of the forest ecosystem. It was also thoughtful that the long standing insecurity of tenurial and access rights of forest dwelling Scheduled Tribes and other traditional forest dwellers including those who were forced to relocate their dwelling due to State development interventions is required to be settled.

8. Under the Act of 2006 in Section 2 various definitions have been given, some of them are relevant for determination of the issue involved in this case which are reproduced hereinunder.

> "2. (b) "critical wildlife habitat" means such areas of National Park and Sanctuaries where it has been specifically and clearly established, case by case, on the basis of scientific and objective criteria, that such areas are required to be kept as inviolate

for the purposes of wildlife conservation as may be determined and notified by the Central Government in the Ministry of Environment and Forests after open process of consultation by an Expert Committee, which includes experts from the locality appointed by the Government wherein a representative of the Ministry of Tribal Affairs shall also be included, in determining such areas according to the procedural requirements arising from sub-sections (1) and (2) of Section 4;

(c) "forest dwelling Scheduled Tribes" means the members or community of the Scheduled Tribes who primarily reside in and who depend on the forest or forest lands for bona fide livelihood needs and includes Tribe pastoralist communities;

(d) "forest land" means land of any description falling within any forest area and includes unclassified forests, undemarcated forests existing or deemed forests, protected forests, reserved forests, Sanctuaries and National Parks;

(e) "forest rights" means the forest rights referred to in Section 3:

(h) "habitat" includes the area comprising the customary habitat and such other habitants in reserved forests and protected forests of primitive tribal group and preagricultural communities and other forest dwelling Scheduled Tribes;

(o) "other traditional forest dweller" means any member or community who has for at least three generations prior to the 13th day of December, 2005 primarily resided in and who depend on the forest or forests land for bona fide livelihood needs."

Explanation.- For the purpose of this clause, "generation" means a period comprising twenty-five years.

9. Under the Act of 2006 Chapter II Section 3 deals with forest rights of forest dwelling Scheduled Tribes and other traditional forest dwellers wherein right to hold and live in the forest land to the habitats, community right on the land, right of ownership, access to collect, use and dispose of minor forest produce within or outside the village boundaries, other community rights such as fish and other products of water bodies, grazing and traditional, seasonal resource access of nomadic or pastoralist communities, tenures of habitat and habitation for primitive tribal groups and pre-agricultural communities, right in or over disputed lands, rights for conversion of Pattas or leases or grants issued by any local authority or any State Government on forest lands to title, rights of settlement and conversion of all forest villages, old habitation, unsurveyed villages and other villages, whether recorded, notified or not into revenue villages, right to protect regenerate or conserve or manage any community forest resource are required to be protected traditionally and conserving for sustainable use, rights recognised under any State law, right of access to biodiversity and community right to intellectual property and traditionally knowledge related to biodiversity and cultural diversity and any other traditional right customarily enjoyed by the forest dwelling Scheduled Tribes or other traditional forest dwellers, as the case may be, and right to rehabilitation including alternative land to the Scheduled Tribes and other traditional forest dwellers.

10. Section 4 recognises State forest rights in forest dwelling Scheduled Tribes in State or areas in State where they are declared as Scheduled Tribes and other traditional forest dwellers in context of Section 3. Sub-section (2) of Section 4 deals with critical wildlife habitats of National Parks and Sanctuaries. Section 5 specifies duties of holders of forest right. Chapter IV starts from Section 6 and specifies authorities for vesting the forest rights in forest dwelling Scheduled Tribes and other traditional forest dwellers.

Bare reading of Chapter IV which deals the authorities and procedure for vesting of forest rights, it is apparent that Gram Sabha shall be the authority who may initiate the process for determining the nature and extent of individual or community forest rights or both given to the forest dwelling Scheduled Tribes and other traditional forest dwellers within the local limits of its jurisdiction. It is further clear that on receiving the claim under this Act after consolidating, verifying and on preparing a map delineating the area of each recommended claim be prepared and then Gram Sabha shall pass a resolution to that effect. After resolution a copy thereof be forwarded to the Sub-Divisional Level Committee. If a person is aggrieved by the resolution of the Gram Sabha he may prefer a petition to the Sub-Divisional Level Committee constituted under Sub-Section 3. if such petition is preferred within 60 days from the date of passing of the resolution by the Gram Panchayat, it shall be decided after giving an opportunity of hearing to the aggrieved person. The Government is duty bound to constitute Sub-Divisional Level Committee and District Level committee. If a person feels aggrieved by the decision of the Sub-Divisional Level Committee he may prefer a petition before the District Level Committee and the decision of the District Level Committee shall be final and binding. The State Government is also required to constitute State Level Monitoring Committee with a view to assess that the procedure for recognition and vesting of right has been properly observed or not. Section 7 makes it clear that contravention of the aforesaid provision by any authority or committee or officer or member of such authority or authorities is liable to face prosecution, which is punishable also as per Section-8. Section 11 deals with Nodal Agency. The Ministry of the Central Government dealing with Tribal Affairs or any officer or authority authorized by the Central Government in this behalf shall be the Nodal Agency for the implementation of the provision of this Act. The Central Government is having ultimate powers to carry out the purpose of Chapter IV. In view of the foregoing it is apparent that the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 has been enacted to protect Tribal culture and rights of such Scheduled Tribes and other traditional forest dwellers as defined under the Act. Initiation to determine their right as per the Act of 2006 is to be made by the Gram Sabha. A claim may be submitted by forest dweller or any other traditional forest dweller showing any of the forest right. On submitting such claim the Gram Sabha is required to consolidate, verify and prepare a map delineating the area of each recommended claim in the manner as prescribed and thereafter if the Gram Sabha is of the opinion that forest dwelling Scheduled Tribes and other traditional forest dweller is having forest right a resolution be passed in this regard and be preferred to Sub-Divisional Level Committee. If the claim is not preferred after resolution of the Gram Sabha, the aggrieved person may take recourse of law as per sub-sections (2) and (4) of Section-6. If the authorities and the committees contravene the provision, they may be liable to face the prosecution, which is punishable also. The State Government is required to constitute a State Level Monitoring Committee, which is bound to report the matter to nodal agency. Thus, it is clear that for determination of the forest right of forest dwelling Scheduled Tribes and other traditional forest dwellers a complete Code has been specified giving the consequences, if any, contravention has been shown. However, in the said context facts of the present case are required to be seen.

11. In the present case plaintiffs showing their possession on 904.02 acres of land of Village Saeedganj showing themselves to be forest dwelling Scheduled Tribe and other traditional forest dwellers filed a suit for seeking declaration of tile over the said land. As per allegations of the plaintiff it is apparent that their ancestors were the resident of Jhabua and they came to reside in Village Saeedganj, District Sehore few years back. To show that they belong to forest dwelling Scheduled Tribe it is not enough that they belong to Scheduled Tribe Community. Simultaneously to demonstrate other traditional forest dwellers it is not sufficient that they belong to the Tribal Community.

In fact three generations not less than 25 years of period, who were pastoral living in non urban area likely to be a portraying or expressive of the life of shepherds or country people especially in an idealized and conventionalized manner living or in nomadic having no fixed resident and wandering here and there may fall within the purview of definition of forest dwelling Scheduled Tribes or any other traditional forest dwellers. Bare reading of the plaint shows that contents as required under the act to fall within the category is not sufficiently pleaded. In view of the foregoing it can safely be said that as per definition of 'critical wildlife habitat' they do not fall within that category. It is to be observed that in view of the object of the enactment it cannot be accepted that the plaintiffs, who are claiming themselves to be forest dwelling Scheduled Tribes or other traditional forest dwellers may fall within the aforesaid discussion having possession of 904.02 acres of land. A wanderer or pastoral cannot have possession of such huge land belonging to the Forest. Thus, in the facts of the present case the application of the Act of 2006 and the contravention thereof as prayed in view of the discussions made herein above, cannot be directed. However, the argument as advanced by Shri Greeshm Jain, counsel representing the appellants is of no substances and liable to be repelled.

12. In the aforesaid context the argument as advanced in reference to the circulars issued by the State Government is required to be explained that the State Government is duty bound to act as per the object and spirit of the provisions of Act of 2006. The circulars as issued do not disclose the manner and procedure for determination of rights of forest dwelling Scheduled Tribes and other traditional forest dwellers. It is to be observed here that their rights ought to have been determined in a manner and procedure as specified under the Act. Until and unless a person falls within the definition of forest dwelling Scheduled Tribes and other traditional forest dwellers or critical wildlife habitat after following the procedure as specified under section 6 of the Act of 2006 the application of those circulars must be refrained by the officials, however, the State Government, the authorities, the Sub-Divisional Committee and the State Level Committee are duty bound to go through the basic provision of the enactment and to comply it in its true sense and spirit.

13. In view of the foregoing discussion merely alleging possession of the plaintiffs which is prima facie not found established before the trial Court from the record, if grant of injunction was declined rejecting the application under Order 39 Rules 1 and 2 read with Section 151 of CPC by the impugned order, in the opinion of this Court, such finding do not warrant any interference even on making a submission to apply the provisions of the Act of 2006 in view of the discussion as made hereinabove.

14. Accordingly, the appeals filed by the appellants are devoid of any merit, hence they are dismissed. The impugned order passed on 25.11.2009 rejecting the application under Order 39 Rules 1 and 2 read with Section 151 of CPC is hereby upheld. In the facts and circumstances of the case there is no order as to costs.

Manaji Mawasi vs. State of Madhya Pradesh & Ors.

W.P. NO.8822 OF 2012
MADHYA PRADESH HIGH COURT
27.06.2012
CORAM: R.S. JHA, J.

SUMMARY

The petitioners had filed this petition, aggrieved by the order passed by the District Level Committee by which the pattas granted to them in 2010 under the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) had been cancelled. The pattas were granted to them on the basis that they were in occupation of the land prior to 2005. However, in a subsequent re-enquiry it turned out that the petitioners had, in fact, tried to take over possession after 2009 having destroyed Forest Department plantation. The petitioners had argued that once the pattas had been granted to them they could not be recalled, and therefore, the order of the District Level Committee must be quashed.

The Court did not find merit in the writ petition, relying upon a detailed enquiry by the District Level Committee (in which the petitioners had participated and recorded their statements) which recorded that the petitioners were not in possession of the forest land prior to 2005, but had deliberately given incorrect information in this regard. The Court felt that there was no reason to interfere with the finding, given that the authorities under the FRA had conducted a detailed enquiry, and had also given ample opportunity to the petitioners.

EDITOR'S NOTE

This judgment is rendered by a Single Judge in the specific facts of the case, and may not for this reason constitute a binding precedent. However, it is interesting to note the repeated use of negative terminology such as "encroacher" by the Court, and it is a matter of concern whether such approach may have weighed upon its adjudication.

ORDER:

1. Heard Shri Vipin Mishra, learned counsel for the petitioners on the question of admission and interim relief.

2. The petitioners have filed this petition being aggrieved by orders dated 16.06.2011 (Annexure P-1 to P-14) by which the lease (patta) granted to them under the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 in the year 2010 have been cancelled.

3. It is submitted by the learned counsel for the petitioners that the petitioners had been granted lease (patta) under the aforesaid Act in the year 2010 by treating them to be the persons who had encroached upon forest land prior to 2005, however, subsequently after re-enquiry the respondent authorities have cancelled the lease (patta) granted to the petitioners by the impugned orders dated 16.06.2011 (Annexure P-1 to P-14) on the ground that the petitioners were in fact not encroachers prior to 2005 on forest land and therefore the lease (patta) had wrongly been granted to them.

4. It is submitted by the learned counsel for the petitioners that once the land had been granted to the petitioners after due enquiry by the authorities themselves, they could not have reviewed/recalled their orders and, therefore, the impugned orders of cancellation (annexure-1 to P-14) deserve to be quashed.

5. I have heard the learned counsel for the petitioners at length. From a perusal of the documents filed by the petitioners along with the petition it is clear that in the year 2009 and prior to that the respondent forest authorities had registered cases against several persons including the petitioners for encroaching the forest land. It is also clear that plantation on forest land in compartment No.1645 of Sillewani range in Chhindwara had been undertaken by the forest authorities in 2009 subsequent to which the petitioners had destroyed the plantation and had tried to take over possession of the forest land in respect of which forest offences were registered against them and they were produced before the authorities. In these circumstances, on coming to know of the issuance of the lease, the forest authorities had filed complaints before the authorities, i.e., the District Level Forest Rights Committee, Chhindwara, bringing to their notice fact that the petitioners were not encroachers prior to 2005 but had infact encroached the forest land subsequently and by suppressing the aforesaid facts had obtained the lease.

6. The District Level Committee referred the matter for enquiry to the Sub-Divisional Level Committee, which conducted a detailed enquiry in which the petitioners were also given notice pursuant to which they appeared before the Committee and were heard and also recorded their statements. The committee after giving due opportunity of hearing to the petitioners had submitted its report before the District Level Committee to the effect that the petitioners were infact not encroachers prior to 2005, which is a prerequisite for grant of lease, and had encroached upon forest land subsequently and had obtained the lease in the year 2010 by giving false information. On the basis of the aforesaid detailed enquiry in which the petitioners also participated and recorded their statements, the District Level Forest Rights Committee, who is the competent authority, has passed the impugned orders cancelling the lease granted to the petitioners.

7. From a perusal of the report (Annexure P-19) and the documents filed by the petitioners along with the petition, it is clear that the action of cancellation of the lease by the impugned orders (Annexure P-1 to P-14) dated 16.06.2011 has been taken by the authorities after conducting a detailed enquiry and after giving due opportunity of hearing as well as adducing evidence to all the petitioners. It is further clear that the

committee has recorded a clear finding of fact to the effect that the petitioners were not the encroachers of the forest land prior to 2005 but had deliberately given incorrect information in this regard in order to obtain benefit of the provisions of the Act and had infact encroached upon the forest land subsequent to 2005 and in such circumstances, the lease granted to the petitioners in the year 2010 had wrongly been granted contrary to the provisions of the Act of 2006.

8. In view of the facts and circumstances, as the impugned orders have been passed by the authorities after following the procedure prescribed by law and as the order is in the interest of the public as well as to save the forest land, I find no reason to interfere with the same as the finding of fact recorded and the procedure followed, does not suffer from any legal infirmity, perversity or illegality.

9. The petition filed by the petitioner being meritless and is accordingly dismissed.

Ravindra Masane & Anr. vs. State of Madhya Pradesh & Ors.

WP 7727 OF 2008
MADHYA PRADESH HIGH COURT (JABALPUR BENCH)
08.01.2014
CORAM: A.M. KHANWILKAR C.J. AND KRISHNA JUMAR LAHOTI, J.

SUMMARY

The petitioners were apprehensive that they are likely to be dispossessed from the forest land occupied by them, which is their traditional abode, without following due process. Accordingly, they approached the High Court by way of this writ petition.

The Court was satisfied with the respondent's stand that in no case would any occupant of the forest land, including tribals such as the petitioners, be dispossessed without following due process.

The Court directed that before any action is taken, the competent authority must decide whether such occupant tribal can be permitted to cultivate the forest land under his occupation. Further, in case action is taken against the petitioners, they would be free to challenge the same by way of appropriate proceedings.

EDITOR'S NOTE

It may be noted that by an interim order dt. 16.7.2008 (extracted elsewhere in this compendium) the Court had given protection from dispossession to the petitioners in terms of Section 4(5) of FRA. It is heartening that the present order also protects the petitioners from dispossession until the competent authority under the FRA decides their applications.

ORDER

1. The apprehension of the petitioner that he is likely to be dispossessed from the land

occupied by him, which is his traditional abode, without following due process, in our opinion, is misplaced in view of the clear stand taken by the Respondent Authorities that in no case any occupant on the forest land including tribal will be dispossessed without following the due process. As and when the Authority decides to oust any occupant and his family members from the land in the forest area, they are expected to follow the procedure prescribed by the Central enactment and the Rules thereunder.

2. Besides the above, nothing more is required to be stated in this case except observing that in case action is taken against the petitioner, he will be free to challenge the same by way of appropriate proceedings.

3. We place on record that until competent Authority decides to dislodge the occupant/ tribal from the forest land, whether he can be permitted to cultivate the land, allegedly under his occupation, is a matter which can also be decided by the competent Authority, if and when required. We are not expressing any opinion regarding correctness of that stand in this order. All questions are kept open.

4. Petition is disposed of accordingly.

Baiga Mahapanchayat Madhya Pradesh vs. State of Madhya Pradesh

WP NO. 10519 OF 2009
MADHYA PRADESH HIGH COURT (JABALPUR BENCH)
16.01.2014
CORAM: A.M. KHANWILKAR, C.J. AND KRISHNA JUMAR LAHOTI, J.

SUMMARY

The writ petition seeks protection and enforcement of the forest rights vested in the Baiga Scheduled Tribe community of Madhya Pradesh. Certain orders of the State government have been challenged, but the detailed facts are not clear.

The State authorities were directed to not evict the petitioners, but rather to initiate the proceedings under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and Rules. The Court further granted the liberty to affected parties to challenge the decision of the State authorities on a "case to case basis".

ORDER

1. Counsel for the respondents/State in all fairness submits that in view of the Central enactment of the Scheduled Tribe and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, the State Authorities are obliged to follow the procedure prescribed under the said Act and the rules framed thereunder. In other words, the dispossession of concerned forest dwellers/tribals will be done only after due verification of their rights, if any. In view of this submission, nothing more is required to be done in the present petition. Needless to observe that it necessarily follows that the State Authorities shall not act upon the impugned order and instead initiate proceedings under the Act of 2006 and rules framed thereunder before resorting to eviction of any of the forest dwellers.

2. The affected party will be free to challenge the decision to be taken by the State Authorities on case to case basis. Petition is disposed of accordingly.

Ajmal Khan vs. State of Madhya Pradesh

WP NO. 16451 OF 2005
MADHYA PRADESH HIGH COURT
17.04.2014
CORAM: A.M. KHANWILKAR, C.J. AND K.K. TRIVEDI, J.
CITATION: 2014 SCC ONLINE MP 2999

SUMMARY

This writ petition was filed in December 2005 for a direction to the respondents to remove the encroachments from the forest land in specified forest compartments in District Satna. In the meantime, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) was enacted.

It was argued the FRA has been brought into force since the filing of the writ petition, and therefore the State Government has to take the proceedings under this Act to their logical end before it proceeds against persons protected under the FRA. However, there is nothing to stop such proceedings against persons who are not protected under the FRA.

Accordingly, the Court passed an order directing that "the Petitioner would be free to make a representation to the concerned Authorities for taking action, in respect of unauthorised structures and encroachers, not covered by the FRA, which inquiry can be taken forward by the Competent Authorities to its logical end expeditiously within the time frame".

ORDER

1. Heard counsel for the parties.

2. This petition was filed in December, 2005 for limited relief to direct the respondents to consider the representation expeditiously and thereafter to remove the encroachments from the forest land compartment No.457 and other Compartment Unchehara, District Satna. During pendency of this petition, the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (hereinafter referred to as

'the Act of 2006') has come into force, pursuant to which the Competent Authority is inquiring into the rights of the forest dwellers. Until all those proceedings are taken to its logical end, it may not be open to the competent Authorities to proceed in the matter against the persons protected under the Act of 2006.

3. However, at the same time, there will be no impediment to proceed against the persons who are not protected under the Act of 2006 and the unauthorised structures put up in the forest land referred to in the petition. That is the matter to be inquired into by the concerned Sub Divisional Officer, Revenue/Sub Divisional Officer, Forest, as the case may be. That inquiry be completed within reasonable time and appropriate decision be taken as may be advised expeditiously.

4. We hope and trust that the entire inquiry will be completed by the concerned Authorities within four weeks from today and the outcome thereof is communicated to the petitioner within the same time.

5. The petitioner will be free to make representation to the concerned Authorities for taking action in respect of unauthorised structures and encroachers not covered by the Act of 2006, which inquiry can be taken forward by the Competent Authorities to its logical end expeditiously within the time frame.

6. We are not expressing any opinion on the said plea of the petitioner or any defence available to the respondents in the said proceedings. All questions are left open. The petition is disposed of accordingly.

Dharmendra vs. State of Madhya Pradesh

WP NO. 6469 OF 2014
MADHYA PRADESH HIGH COURT
09.05.2014
CORAM: ALOK NATH, J.
CITATION: 2014 SCC ONLINE MP 3318

SUMMARY

The petition was filed challenging the order of the State respondent directing the demolition of the petitioner's hut, which is situated in forest land. The petitioner, who is an Other Traditional Forest Dweller (OTFD), claimed protection under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA). He also sought liberty to file an objection before the concerned Divisional Forest Officer.

The petition was disposed of with the direction that in case the petitioner submits an objection before the Divisional Forest Officer, Mandla, within a period of three weeks from the date of this order, the said authority shall decide the same by a speaking order within a period of three months. It was also directed that till the objection filed by the petitioner is decided, no coercive action shall be taken against him.

EDITOR'S NOTE

It may be noted that the directions of the Court are contrary to the appeal procedure laid down in the FRA, where one appeal lies from the order of the Gram Sabha to the Sub-Division Level Committee, and thereafter another appeal can be filed before the District Level Committee.

ORDER

1. With the consent of learned counsel for the parties the matter is heard finally. In this

petition, the petitioner inter alia has assailed the validity of the order dated 5.4.2014 by which the respondent No. 4 has directed demolition of the hut of the petitioner which is situate in forest land.

2. Learned counsel for the petitioner submitted that the petitioner is a traditional forest dweller and is entitled to allotment of the land in view of the provisions of the Scheduled Tribe and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. It is further submitted that with regard to his claim the petitioner may be granted liberty to file an objection before the Divisional Forest Officer and the instant petition may be disposed of with the direction to the said authority to consider and decide the same expeditiously. On the other hand, learned Panel Lawyer fairly submitted that the claim of the petitioner shall be decided in accordance with law.

3. Taking into account the submissions made by learned counsel for the parties and as agreed to by them, the instant petition is disposed of with the direction that in case the petitioner submits an objection before the respondent No. 2 - Divisional Forest Officer, Mandla within a period of three weeks from the date of receipt of certified copy of this order, the said authority shall consider and decide the same by a speaking order expeditiously preferably within a period of three months from the date of filing of such objection. However, in the facts of the case, it is directed that till the objection filed by him is decided, no coercive action shall be taken against the petitioner. It is made clear that this Court has not expressed any opinion on the merits of the case.

4. With the aforesaid directions, the writ petition is disposed of.

Hameer Singh & Anr. vs. State of Madhya Pradesh & Ors.

W.P. NO. 5264 OF 2014
HIGH COURT OF MADHYA PRADESH, GWALIOR BENCH
03.09.2013
CORAM: SHEEL NAGU, J.
CITATION: 2014 SCC ONLINE MP 4834

SUMMARY

In this case, a favourable decision had been taken by the Gram Sabha on the applications of the petitioners under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA). However, no decision from the District Level Committee (DLC) was forthcoming.

The petitioner filed this writ petition seeking directions to the DLC to take such decision vesting forest rights in the petitioner in accordance with the FRA and FR Rules, and also for a direction that they should not be evicted from the land in question.

Disposing of the petition, the Court directed the DLC to take up the case of the petitioners, and decide it expeditiously. The Court also directed that till such decision is taken, the possession of the petitioners should not be disturbed.

ORDER

1. This petition filed under Article 226 of Constitution of India seeks the following reliefs:

I. The respondents may kindly be directed to act in accordance with the Act of 2006 and the rules made thereunder for the purpose of vesting the forest right to the petitioners in pursuance to the resolution passed by the concerning Gram Sabha.

II. The respondents may kindly be directed not to evict the petitioners from the property in question.

III. Any other suitable direction which this Hon'ble Court deems fit in the facts and circumstances of the case may kindly be passed.

2. Learned counsel for the petitioner in this petition makes a short prayer that the District Level committee has not taken any the decision u/S 6 of Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, despite there being favourable recommendation of the Gram Sabha u/S 6(1) of the Act of 2006 in favour the petitioners who claim themselves to be 'Traditional Forest Dwellers'. Despite the above, it is submitted that the petitioners are being threatened to be evicted. With the consent of both the parties, this petition stands disposed of, that in case, the District Level committee has not already taken any decision u/S 6(6), then the case of petitioners shall be considered and decided by the said committee as expeditiously as possible.

3. Till such decision is taken, the possession of the petitioners shall not be disturbed.

4. With the above said, this petition stands disposed of sans cost.

Shivaji Sune vs. Union of India

WP (PIL) NO. 1025 OF 2011
HIGH COURT OF MADHYA PRADESH
30.09.2014
CORAM: A.M. KHANWILKAR, C.J. AND ANIL SHARMA, J.
CITATION: 2014 SCC ONLINE MP 4473

SUMMARY

The writ petition seeks a restraining order against the respondent State authorities from constructing and operating an Ashbund associated with the Thermal Power project at Sarni, District Betul.

The petitioner argued that before allotment of land, the procedure as per the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) was not followed, in particular the procedure required under Circular dt. 3.08.2009 (wrongly cited as 3.10.2009) of the Ministry of Environment and Forests (MoEF). It was further argued that no environmental clearance was obtained for constructing the Ashbund. He also argued that before granting environmental clearance, the social impact of such activity ought to have been examined.

The respondent State contested these submissions, stating that the land is completely free from tribals, which exempts it from adhering to the procedure provided in the FRA. Further, the environmental clearance was granted by the MoEF on 27.02.2009.

Regarding the argument of the petitioner pointing out there is failure to comply with the FRA, the Court accepted the *ipse dixit* of the State government. Insofar as the grant of environmental clearance is concerned, the Court was of the view that clearance has been granted by the competent authority, which order has not been challenged by the petitioner.

The Court dismissed the writ petition with the following observation:

> **"There is presumption that the Authority has acted in public interest until established to the contrary. In our opinion, the basis on which the petitioner is opposing the project, to say the least, is unstable and for that reason, we decline to interfere in this writ petition".**

EDITOR'S NOTE

The decision is clearly *per incuriam*, failing as it does to take note of the binding decision of the Supreme Court of India in *Orissa Mining Corporation vs. Ministry of Environment and Forests & Ors* (2013) 6 SCC 476. The Court also, quite clearly, failed to exercise its constitutional jurisdiction with regard to the various violations of the right to a clean environment (Article 21) as pointed out by the petitioner, choosing instead to take a hyper-technical approach. There can be no doubt that this judgment, for these reasons, does not constitute good law.

JUDGMENT

1. Heard counsel for the parties.

2. The relief claimed in this petition is to restrain the respondents from constructing and operating Ashbund associated with Thermal Project at Sarni, District Betul. The first argument of the petitioner is that the procedure, as was required to be followed in terms of Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, before allotment of the land to the respondent No. 5 has not been complied with. That was mandatory requirement and more so, postulated in the clearance accorded by the Ministry of Environment and Forests (F.C Division), Government of India vide communication dated 13.10.2009 (Annexure R-1), in particular Clause-10 thereof.

3. In response to this argument, the respondent/State is relying on the assertion made in the reply-affidavit that the land which has been allotted to respondent No. 5 is completely free from tribals. As a result, the question of adhering to the formalities specified in the Act of 2006 does not arise. No rejoinder has been filed to counter this assertion. In other words, if the land is free from tribals, the respondents, in particular State was entitled and competent to allot the land to the respondent No. 5 for the stated purpose. In our opinion, therefore, this grievance of the petitioner does not take the matter any further.

4. The second point urged before us is that no environmental clearance has been obtained for constructing Ashbund. This submission has been countered by the respondents by pointing out that environmental clearance has been granted by the Ministry of Environment and Forests, Government of India vide communication dated 27.02.2009 (Annexure R-5). To get over this position, the petitioner contends that such environmental permission could not have been accorded, unless respondent No. 5 already possessed land for the stated purpose or the land was allotted to the respondent No. 5. Before allotment of the land, since it was required to be acquired, the concerned authorities ought to have examined the social impact issue on account of such acquisition. The argument completely overlooks the basis on which environmental clearance has been accorded by the competent authority.

5. In paragraph 2 of the communication dated 27.02.2009, it is plainly stated that the land requirement for the main plant and auxillary facilities is 57.86 ha, which is available within the existing plant boundary. It is further noted that 136 ha of land is to be acquired for the ash disposal area which includes 18 ha for alternate road in lieu of the existing roads to be included in the ash pond area.

6. The petitioner, however, would rely on the next statement found in the same paragraph of the communication that:

> "no forestland is involved in the land to be acquired for the proposed unit Coal

requirement will be 2.576 million metric tonnes per annum at 80% PLF Water requirement is estimated as 1855 m3.hr, which will be met from Satpura Reservoir. It was also stated that about Rs. 10 crore per year will be spent on CSR activities. Public hearing was held on 27.02.2008 There will be 69 land oustees families due to this project extension. No National Park and Wildlife Sanctuary is located within 10 Km from project area. Total cost of the project is Rs. 2637.00 crores which includes 140.00 crores for environmental protection measures."

7. We fail to understand as to how this statement will be of any avail to the petitioner to oppose the environmental clearance already granted by the authority. Suffice it to observe that the competent authority whilst according environmental clearance was fully aware about the factum of acquisition of 136 ha land for Ash disposal area. Notwithstanding that information, it thought it appropriate to accord environmental clearance to the project in question.

8. The argument of the petitioner further proceeds that the environmental clearance authority could not have examined the proposal, until the land was actually allotted to the respondent No. 5. We are afraid, there is no express provision, at least brought to our notice, in any of the Central or State Legislation, which prohibits the authority and such as the State and State Corporation for obtaining environmental clearance in respect of the project in anticipation of acquisition of the land for that project. Rather, the attempt of the State authorities, the respondent No. 5 and the State was to ensure early completion of the project. The petitioner has not challenged the environmental clearance granted by the competent Authority of Government of India vide communication dated 27.02.2009 If the competent Authority has granted permission after considering all aspects of the matter, it is not for this Court to sit over that decision of the Authority as a Court of appeal and that too in absence of challenge to that decision. There is presumption that the Authority has acted in public interest until established to the contrary. In our opinion, the basis on which the petitioner is opposing the project, to say the least, is unstatable and for that reason, we decline to interfere in this writ petition.

9. Notably, the decision of the Environmental Authority is an appealable action and that has been made amply clear in paragraph 8 of the communication dated 27.02.2009 (Annexure R-5). The statutory remedy of appeal has not been availed by any one, much less the petitioner before this Court.

10. Taking any view of the matter, therefore, this petition is devoid of merits. The same is dismissed.

11. With the dismissal of writ petition, the pending interlocutory application is also disposed of.

Pandurang Sitaram Mahajan vs. State of Madhya Pradesh

W.P. (PIL) NO. 4571 OF 2013
HIGH COURT OF MADHYA PRADESH
28.10.2014
CORAM: A.M. KHANWILKAR, C.J. AND VANDANA KASREKAR, J.
CITATION: 2014 SCC ONLINE MP 6360

SUMMARY

A writ petition was filed by the petitioner as a public interest litigation against the casual manner in which certificates were issued for the recognition of rights as per the Scheduled Tribes & Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA). The petitioner argues that forest land has been assigned to unauthorised occupants.

Denying the allegation of the petitioner, the respondent State submitted that the authorities had received 13,182 applications, out of which 6,421 have been rejected and only 6,761 have been considered for grant of certificates. It was also posited that the State government will take corrective measures as per the law, if any illegal issuance of certificate is brought to its notice.

The Court observed that without approaching the proper authority, the petitioner had filed this petition based on some records collected by him during a private enquiry. It accordingly disposed of the matter by granting an opportunity to the petitioner or any other person who is aggrieved by the issuance of such certificate to pursue the matter with the Collector. The Court also directed the Collector to conduct an enquiry and take corrective measures in accordance with law on receiving such representation.

EDITOR'S NOTE

Interestingly, this writ petition had been transferred to the National Green Tribunal vide orders of the Supreme Court[62]. When the National Green Tribunal took up this matter, it took the view that the FRA is not a Scheduled Act under the National

Green Tribunal Act, 2010, and accordingly transferred the matter back to the High Court[63].

ORDER

1. Heard counsel for the parties.

2. The grievance in this petition filed as public interest litigation is, essentially, about the casual manner in which certificates have been issued for recognizing the rights of persons in the context of provisions of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. As a result of issuance of such improper certificates, those persons are occupying the forest land referred to in the certificates, who otherwise would be unauthorised occupants.

3. In the first place, the petitioners have not approached any Authority, but, have rushed to this Court on the basis of some record collected by them during private enquiry made by them. The reply-affidavit filed by the State makes it amply clear that the Authorities had received in all 13182 applications, out of which 6421 have been rejected and only 6761 have been considered for grant of certificates. It is further stated in the reply-affidavit that if any illegality in issuance of such certificates is brought to the notice of Authority, the Authority will take corrective measures, as may be warranted in law.

4. In view of this position, we do not intend to keep these proceedings pending. Instead, we deem it appropriate to give opportunity to the petitioners or any other person(s) interested in pointing out impropriety in issuance of certificate(s) to any person or person who is aggrieved by issuance of such certificate to take up the matter with Collector, Burhanpur and if such representation is received, the Collector, Burhanpur will cause to make necessary inquiry and take corrective measures, as may be warranted in law, expeditiously and in any case within eight weeks from the receipt of such representation/communication. Besides this, nothing more is required to be observed including about the documents at pages 87 and 89 depicting the names of same persons as 'the Certificatee'.

5. The petitioners are free to point out that aspect to the Collector, Burhanpur, as aforesaid.

6. Petition is disposed of accordingly.

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[62] Order dt. 09.08.2012 in *Bhopal Gas Peedith Mahila Udyog Sangathan & Ors. vs. Union of India & Ors*, (2012) 8 SCC 326 .

[63] Order dt. 11.03.2014, *Pandurang Sitaram & Ors. vs. State of M.P. & Ors.* OA No. 3/2014 (CZ) (THC) National Green Tribunal. This is extracted elsewhere in the compendium.

Mangal Singh Lokhande vs. State of Madhya Pradesh

W.P. (PIL) NO.12429 OF 2014
HIGH COURT OF MADHYA PRADESH
22.01.2015
CORAM: A.M. KHANWILKAR, C.J. AND C.V. SIRPURKAR, J.

SUMMARY

The petition, filed as public interest litigation, sought two complementary reliefs. One, it sought quashing of eviction notices issued by the respondent State authorities. Secondly, it sought direction to the respondent to constitute Village Forest Rights Committees in Markaadhana and Danwaakheda villages as per the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) and to start the process of verification and recognition of individual and community forest rights of the concerned villages.

While the respondent State argued that the mechanisms as per the FRA are already available, the petitioners argued that the Committees have not been constituted in accordance with law.

The Court, refusing to go into these questions in a public interest litigation, observed that those who are in receipt of eviction notices can raise these arguments in response to those notices. The Court also observed that the claimants are free to pursue their remedy before "the Committee established by the respondent - State in that behalf".

EDITOR'S NOTE

This order, like many others emerging from the Madhya Pradesh High Court extracted elsewhere in this compendium, appears to grant relief to the petitioners.

However, when examined closely, we find it proceeds on the erroneous assumption that a challenge to incorrect constitution of FRCs would constitute a response to an eviction notice. Further, by giving the petitioners the 'freedom' to approach the FRCs for recognition of their forest rights, without addressing their fundamental

challenge to the constitution of these very Committees, is no remedy in law or in equity.

ORDER

1. Heard counsel for the parties.

2. This petition is filed as Public Interest Litigation broadly for two reliefs, firstly, to set aside the notices issued by the appropriate Authority to individuals such as Annexures P/6 and P/7. The second relief is to direct the respondents to constitute Village Forest Rights Committee in Markaadhana and Danwaakheda villages in terms of the Forest Rights Act, 2006 so as to commence the process of verification and recognition of individual and community forest rights of the concerned villagers as per the representations made by them.

3. As regards the second relief, in the reply filed by the respondents/State dated 3rd November, 2014, it is stated that dispensation as provided by the Act of 2006 is already made available and it is open to the claimants to submit representation for determination of their tribal rights and on receipt of such representation, the concerned Authority would examine the claim, in accordance with law.

4. Counsel for the petitioner, however, submits that the dispensation provided by the respondent/State is not in conformity with the provisions of the Act of 2006 and the Rules framed thereunder.

5. It will be open to the concerned noticees to take up that plea in response to the notices received by them respectively, namely, objection regarding the constitution of the Committee not being in conformity with the provisions of the Act of 2006 and the Rules framed thereunder, if so advised, besides the response/representation to be submitted with reference to the notice received by them regarding their tribal rights in the concerned forest area.

6. The question of interfering with that process by way of Public Interest Litigation consequent to notices, does not arise as the noticees are free to pursue their remedy before the Committee established by the respondent-State in that behalf.

7. Petition is disposed of leaving all questions open regarding the matters that may have to be decided in the context of notices, Annexures P/6 and P/7, served on the concerned noticees as also about the constitution of the Committee by the State. The said issues be decided, expeditiously.

Shiv Ratan vs. State of Madhya Pradesh

SECOND APPEAL NO. 1152 OF 2006
HIGH COURT OF MADHYA PRADESH
09.03.2015
CORAM: R.S. JHA, J.

SUMMARY

The appellant who is a non-tribal, has been in possession of a plot of forest land since 1976-77, which is continuing. The land was notified as a forest, vide notification dated 02.02.1968, after which efforts to remove him began. The appellant filed a civil suit for injunction before the Civil Judge, Satna, who rejected the plaint on the ground that the land in question was forest land. The appeal before the Additional District Judge was also dismissed.

Now the appellant/plaintiff has filed this appeal against the judgment of the Additional District Judge, Satna at which stage he submitted that he is entitled to protection under Section 2(o) of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA).

The Court observed that the land has been declared as forest land through a notification dated 02.02.1968, and therefore the Courts below have rightly held that since the land was notified as a forest land, patta could not be granted to the appellant.

With regard to the contention of the appellant that he is entitled to protection under the FRA, the Court rejected the same, observing that there was no pleading or prayer in this regard before the Courts below, and it cannot be raised at the stage of second appeal.

EDITOR'S NOTE

The decision of the Court, insofar as it refuses to entertain a legal argument under FRA at the belated stage of a second appeal, cannot be faulted. At the same time, the decision demonstrates the rigid nature of legal proceedings for protection of rights, governed as they are by the Civil Procedure Code, and gives occasion to reflect

upon the inherent benefits of the non-technical, yet robust, rights recognition mechanism in Section 6 of FRA and the FR Rules.

ORDER

1. Heard Shri Parag Chaturvedi, learned counsel appearing for the appellant on the question of admission.

2. The appellant/plaintiff has filed this appeal being aggrieved by the judgment and decree dated 24-2-2006, passed by the Additional District Judge, Satna, in C.A. No. 95/2005 arising out of the judgment and decree dated 28-1-2003, passed by Second Civil Judge Class-II, Satna, in C.S. No. 46-A/1999 whereby both the Courts below have dismissed the suit for injunction filed by the appellant/plaintiff by recording a concurrent finding of fact to the effect that the land in question is the forest land and was wrongly granted to the appellant on Patta.

3. It is submitted by the learned counsel appearing for the appellant that after demarcation, the Patwari has granted him possession of the land in question in the year 1976-77 and since then he has been in possession of the land. It is submitted that as the possession of the appellant was lawful, the Court below was bound to grant a decree of injunction in favour of the appellant but the Courts below have failed to do so thereby giving rise to a substantial question of law.

4. Having heard the learned counsel for the appellant/plaintiff and after perusing the record, it is observed that the Courts below have recorded a finding to the effect that the land in question had been declared as forest land vide notification dated 2-2-1968 which was published in the Gazette and that the proceedings against the appellant for his removal was taken up in the year 1977 and on another occasion thereafter in spite of which the appellant again took over possession of the land. Learned Courts below have recorded a finding to the effect that as the land was notified as a forest land, the same could not have been granted to the appellant on Patta.

5. Having heard the learned counsel for the appellant it is observed that the aforesaid concurrent finding of fact recorded by both the Courts below is based on the oral and documentary evidence on record, specially, statement of Satyanarayan, D.W.1 and the documents Ex.D-1 to D-3.

6. At this stage, learned counsel for the appellant submits that he is entitled to the protection under the provisions of sub-section (o) of Section 2 of The Scheduled Tribes and Other Tradition Forest Dwellers (Recognition of Forest Rights) Act, 2006.

7. The contention of the appellant is heard only to be rejected as the appellant has failed to make any pleading or prayer in this regard before any Court and this Court is dealing with the validity of the judgment and decree passed by the Courts below wherein the appellant had claimed a decree of injunction only. There is no pleading or claim in the plaint or in the suit filed by the appellant in respect of the aforesaid Act of 2006 and, therefore, the contention of the appellant in this regard cannot be considered.

8. In the circumstances, I do not find any perversity or material irregularity in the concurrent finding of fact recorded by both the Courts below warranting interference of this Court in the present appeal, therefore, the appeal filed by the appellant/plaintiff being meritless is accordingly dismissed.

Kuman Singh Armo vs. State of Madhya Pradesh & Ors.

WP (PIL) NO. 6894 OF 2015
HIGH COURT OF MADHYA PRADESH, JABALPUR BENCH
13.05.2015
CORAM: RAJENDRA MENON AND M.C. GARG, J.J.

SUMMARY

The facts of this case are not clear from the order passed by the Court. However, it is apparent that the petitioners approached the Court for protection of their rights under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) and also for rehabilitation. The Court directed that the petitioners submit a detailed representation to the Collector with particulars of persons entitled under the FRA as well as rehabilitation schemes. The Collector shall examine the claims and pass appropriate orders and intimate the decision to the concerned persons within a period of six weeks.

The Court also observed that the Collector is free to delegate this power to such authorities as provided under the FRA.

EDITOR'S NOTE

Through this order, the Court has tried to give an impetus to the appropriate authorities to address the claims relating to FRA within a time frame. The observation regarding delegation to the proper authority under the FRA is apt, since such authority for determination of forest rights is the Gram Sabha, and not the District Collector.

ORDER

1. Having heard learned counsel for the parties, we are of the considered view that petitioner should submit a detailed representation indicating the particulars of the persons who are entitled for claiming rehabilitation in accordance with the schemes for

rehabilitation or the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and on the same being done, the Collector shall examine the claim of the individuals and pass appropriate orders with regard to grant or otherwise of the rehabilitation benefit in accordance with the scheme or statutory provisions.

2. The Collector shall conclude the exercise and intimate the decision to the persons concerned within a period of six weeks thereof.

3. In case, statutory provisions permit delegation of powers to any other authority, the Collector is free to delegate the powers to the said authority and the said authority shall proceed to decide the claim in the matter within a period of six months from the date of receipt of certified copy of this order.

4. With the aforesaid, the petition stands disposed of.

MADRAS HIGH COURT

TABLE OF JUDGMENTS AND ORDERS

V. Sambasivam vs. Govt of India through MoTA & Ors.

WP (C) 4533 OF 2008
MADRAS HIGH COURT
30.04.2008 (INTERIM ORDER)
CORAM: AJIT PRAKASH SHAH, C.J. AND PRABHA SRIDEVAN, J.

SUMMARY

The main writ petition challenges the constitutional validity of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA).

The interim applications sought stay of implementation of FRA (by petitioner) and vacation of stay (by the State and the Centre).

The petitioner submitted that while the Act may have the laudable purpose of recognizing and vesting the forest rights for Scheduled Tribes, its provisions are vague and open to misuse. The implementation of the FRA will result in massive denudation of forests.

The Additional Solicitor General, appearing for the Union Government, submitted that there was a misconception that titles (pattas) are being issued under the Act, where in fact what was being done was recognition of 'forest rights', as defined under Section 2 (e) of the FRA. It was further submitted that as per Section 4(4) of the Act, the rights conferred under Section 4(1) are heritable, but neither alienable nor transferable.

Arguments were also addressed on behalf of tribals by Adivasigal Kurumbas Munnetra Sangam, which submitted that the rights of the forest dwellers and Scheduled Tribes cannot be defeated, nor can the recognition of the rights be postponed. Moreover, the concepts in the Act were not entirely new and had existed in the form of guidelines in the past.

The Court examined the relevant provisions of the FRA, and also observed that the diversion of the forest lands for the tribals subject to certain conditions had been under the consideration of the Government for some time. However, given the apprehension of the petitioners it felt that pending disposal of the writ petition,

a balance should be struck between the implementation of the Act and the rights of the Scheduled Tribes on one hand, and the ecological balance and the issue of sustainable development on the other.

DIRECTIONS ISSUED

Accordingly, the Court issued the following directions:

(i) If claims are made for community rights or rights to forest land, then the process of verification of claims after intimation to the concerned claimant shall go on, but before the certificate of title is actually issued, orders shall be obtained from the Court;

(ii) As regards felling of trees for providing diversion of forest land under Section 3(2) of the Act, the process shall go on till the clearance of such development projects and also the Gram Sabha's recommendation is obtained, but before the actual felling of trees, orders shall be obtained from the Court.

EDITOR'S NOTE

Despite efforts to move the High Court for vacation of this interim order, it remained in force for several years. Finally, this order was set aside by the Supreme court in the following terms on 1.2.2016:

"Having regard to the fact that except for the State of Tamil Nadu, in all other States, the inquiry regarding the various claims under the above-mentioned Act proceeded substantially, we do not see any justification to hold up the inquiry only in the State of Tamil Nadu. Therefore, we deem it appropriate to vacate the interim order dated 30th April, 2008."

The writ petition is pending before the Supreme Court as TC (C) No. 39 of 2015.

ORDER

(Order delivered by Prabha Sridevan, J.)

1. The writ petitioner has challenged the validity of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (Act 2 of 2007), hereinafter referred to as 'the Act' and in particular, Chapters II, III and IV of the Act and seeks a declaration that it is illegal, unconstitutional and void.

2. While ordering notice in the writ petition, the respondents were directed not to alienate any land by issuing patta or by any other manner pursuant to the provisions of the said Act, particularly from out of the Reserved Areas.

3. Against this, a Special Leave Petition was filed and on 21.4.2008, the Supreme Court, on the submissions made by the learned Attorney General of India that the Interim order will come in the way of the implementation of the Act, gave Union of India the liberty to move the High Court for vacating or varying the order and accordingly disposed of the S.L.P. The matter is again listed before us.

4. In the meantime, by order dated 1.4.2008, the Adivasigal Kurumbas Munnetra Sangam

has been impleaded as the seventh respondent in the writ petition and the seventh respondent has also moved an application to vacate the interim injunction.

5. Learned Additional Solicitor General Mr. Mohan Parasaran submitted that there appears to be a misconception that pattas are issued under the Act, but actually what is done under the Act is recognition of 'forest rights' as defined by Section 2 (e)of the Act. 'Forest Rights' are enumerated in Section 3 of the Act and it only recognises the right to hold and live in the forest land, inter alia, the right for conversion of pattas or leases or grants issued by any local authority on forest lands to titles. Learned Additional Solicitor General submitted that Annexure-I, Form-A is the scheme form for rights to forest land, and the title for forest land under occupation is granted under Annexure-II. It was further submitted that as per Section 4 (4) of the Act, the rights conferred by Sub-Section 4 (1) are heritable, but neither alienable nor transferable. It was also submitted that Section 3 (2) of the Act provides for diversion of forest land for the facilities mentioned in the said sub-section, which involves felling of trees not exceeding 75 trees per hectare, and adequate safeguard is given under the Act, which provides that the clearance will be subject to recommendation by Gram Sabha. It was also submitted that Gram Sabhas are constituted under Rule 3 of the Schedule Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007. Therefore, nothing has happened to warrant the apprehension of the petitioner to obtain an order of injunction. Until schemes are framed and are about to be implemented, there will be no felling of trees and further, under the Act, no patta is granted.

6. Learned counsel appearing for the petitioner Mr. N.L. Rajah submitted that while the Act may have the laudable purpose of recognising and vesting the forest rights for Scheduled Tribes, the Act also seeks to protect the rights of what the Act terms as 'other traditional forest dwellers' and the definition of this term is so widely worded and vague that it gives scope for abuse. The learned counsel also submitted that implementation of the scheme uniformly across the country may give rise to denudation of forests. He submitted that out of the geographic area of 1,30,058 sq. kms for the State of Tamil Nadu, only 22,643 sq. kms is under forest and this is for less than the minimum prescribed by the National Forest Policy. Learned counsel also submitted that it is a matter of public knowledge that in north eastern States, similar provisions have been misused by creating what are called 'partnerships' amongst one tribal person with persons have nothing to do with forests who would embark upon feeling of trees purportedly sanctioned by law. Learned counsel relied upon *T.N. Godavarman Thirumulkpad vs. Union of India*, (1997) 2 S.C.C. 267, where as regards the State of Tamil Nadu, the Supreme Court, besides issuing other directions, had directed that there will be a complete ban on felling of trees in all forest areas which will, however, not apply to trees which have been planted and grown, and are of spontaneous growth; and are in areas which were not forests earlier, but were cleared for any reason.

7. Ms. Nagasaila, learned counsel appearing for the seventh respondent submits that while there may be some truth in the apprehensions voiced by the petitioner, on this ground, the rights of the forest dwellers and the Scheduled Tribes cannot be defeated, nor an the recognition of the rights be postponed. She submitted that it not as if the Act is introducing certain concepts for the first time these have been in force even earlier in the form of guidelines or diversion of forest land for non-forest purposes-she pointed out Government of India letters in F.No.2-3/2004-FC dated 12.05.2005 and F.No. 2-3/2004-FC dated 03.11.2005. Learned counsel submitted that all that has been done now is to put those guidelines in a statutory form.

8. We have considered the relevant provisions. Section 3 of the Act deals with forest rights as follows:

3. Forest rights of Forest dwelling Scheduled Tribes and other traditional forest dwellers:
(1) For the purposes of this Act, the following rights, which secure individual or community tenure or both, shall be the forest rights of forest dwelling Scheduled Tribes and other traditional forest dwellers on all forest lands, namely;
(a) Right to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood by a member of members of a forest dwelling scheduled tribe or other traditional forest dwellers;

(b) community rights such as nistar, by whatever name called, including those used in erstwhile Princely States, Zamindari or such intermediary regimes;

(g) Rights for conversion of Pattas of leases or grants issued by any local authority or any State Government on forest lands to titles;

Section 2 (e) defines 'forest rights' as follows:
"(e) 'Forest rights' means the forest rights referred to in Section 3"

Section 2 (g) defines 'Gram Sabha' as follows:
"(g) 'Gram Sabha' means a village assembly which shall consist of all adult members of a village and in case of State having no Panchayats, Padao, Tolas and other traditional village institutions and elected village committees, with full as unrestricted participation of women".

Section 2 (o) defines 'other traditional forest dweller as follows;
"(e)' Other traditional forest dweller' means any member or community who has for at least three generations prior to the 13th day of December, 2005 primarily resided in and who depend on the forest or forests land for bonafide livelihood needs".

Section 4 of the Act reads thus:
"4. Recognition of and vesting of, forest rights in forest dwelling Scheduled Tribes and other traditional forest dwellers:
(1) Notwithstanding anything contained in any other law for the time being in force, and subject to the provisions of the Act, the Central Government hereby recognises and vests forest rights in-

(4) A right conferred by sub-section (I) shall be heritable but not alienable or transferable and shall be registered jointly in the name of both the spouses in case of married persons and in the name of the single head in the case of a household headed by a single person and in the absence of a direct heir, the heritable right shall pass on to the next of kin".

9. Annexure-I to the Notification dated 1.1.2008 is relevant:

"Annexure-I
(See rule 6 (1))
Form-A

CLAIM FORM FOR RIGHTS TO FOREST LAND

(See rule 11 (1) (a))

Signature/ Thumb Impression of the Claimant (s):

Annexure-II of the Notification reads thus:

"Annexure-II
(See rule 8 (h)
Form-A

TITLE FOR FOREST LAND UNDER OCCUPATION

Divisional Forest Officer/ Deputy District Tribal Welfare Officer conservator of Forests

District Collector / Deputy Commissioner

10. A perusal of the Government guidelines also shows that diversion of forest lands subject to certain conditions has been under the consideration of the Government for some time. However, in view if the apprehensions voiced by the petitioner and the possible ecological abuse, we feel that pending disposal of the writ petition, balance should be struck between the implementation of the Policy and the rights of the Scheduled Tribes on the one hand and the ecological balance and the issue of sustainable development on the other. We are also not very confident of how strong a check the Gram Sabhas will provide if a claim is made by the Government that felling of trees is required for the construction of certain facilities.

11. Therefore, we issue the following directions:

(a) If claims are made for community rights or rights to forest land and applications are submitted as per Sections 3 and 4 of the Act read with Rules 11 and 12 of the Rules, then the process of verification of the claim after intimation to the concerned claimant shall go on, but before the certificate of title is actually issued, orders shall be obtained from this court.

(b) As regards felling of trees for providing diversion of forest land under Section 3 (2) of the Act is concerned, the process shall go on till the clearance of such development projects and also the Gram Sabha's recommendation is obtained, but before the actual felling of trees, orders shall be obtained from this Court.

12. The matter stands adjourned to be listed after vacation.

Salem Mavatta Ezhpulli Malaivazh Makkal Nala Sangam vs. State Of Tamil Nadu

WRIT APPEAL NO. 376 OF 2008
MADRAS HIGH COURT
20.10.2009
S.J. MUKHOPADHAYA AND K. KIRBAKARAN, J.J.
CITATION: 2009 SCC ONLINE MAD 1650

SUMMARY

The issue is whether the members of the appellant-association, who are Scheduled Tribes and other traditional forest dwellers, and who otherwise fulfill the requisite conditions, have the forest rights and right of occupation in the forest lands in question. The writ petition was originally filed in 2005 challenging the declaration as a "reserve forest" under Section 4 of the Tamil Nadu Forest Act, 1882 (hereafter '1882 Act') of lands in which the petitioners are forest dwellers. The writ petition was dismissed by the Single Judge, and the writ petitioner has filed the present appeal. The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) came into force during the pendency of the writ appeal.

The counsel appearing for the appellant-association argued that the members of the association being tribal, and their ancestors being in possession and enjoyment of the lands in question from time immemorial, the State is bound to recognize their rights by issuing pattas in their favour. The appellant argued that not only have their rights not been settled in accordance with the provisions of 1882 Act, they now are eligible for recognition of rights under the FRA as well.

According to the respondents, neither the Sangam (association) nor its members presented any claim in 1978 during the settlement proceeding before the Forest Settlement Officer under Section 10 of the 1882 Act, which indicates that they were not cultivating during the year 1978. Their representation to the government for allotment of the lands was filed only during 1999, claiming that they were cultivating lands from 1991 onwards. The respondents also submitted that when once the objections under Section 6(d), and enquiry made under Section 8 of the 1882 Act are complete, and on that basis an order has been passed under Section 10,

the authority has no jurisdiction to entertain further objections under Section 6(d), nor can it make any further enquiry under Section 8 or pass a second order under Section 10 of the said Act.

FINDINGS OF THE COURT

The Court was of the view that the claim of the members of the appellant-association should be re-considered and the impugned Judgment (in WP No. 10954) was set aside. It held that in so far as the 1882 Act is concerned, the members of the appellant-association still had a right to claim occupancy, ownership, and other rights, if they satisfy the Forest Settlement Officer that they had sufficient cause for not preferring such claim within the period fixed under Section 6 of the said Act, and such a claim can be made under Section 7 of the Act after publication of notification under Section 16 of the Act, declaring the lands as a "Reserve Forest". Further, they now are eligible under FRA also to claim forest rights.

Accordingly, the Court remitted the case to the respondents to re-consider the case of the members of the appellant-association in terms of the provisions of the FRA and FR Rules and after determination of their claim, if so required. It is noteworthy that the Court took note of the interim order dated 30.4.2008 in WP 4533 of 2008 (extracted elsewhere in this compendium) where it was directed the respondents will obtain permission of this Court before issuance of certificate of title in favour of one or other member of the appellant-association.

Reiterating the FRA, the Court held that the members of the appellant-association have a right to consideration of their cases for "forest rights" conferred under Section 3 of the Act. Also, till the claim is finalized, they have a right to hold the land in their possession, and till such decision is given, in terms of the Interim Order dated 01/04/2005 in WP 10954/2005, the claim as made by members of the Association were required to be verified in terms of the FRA, but for issuance of patta or certificate of title an order is required to be obtained from the Court.

EDITOR'S NOTE

The present approach is in harmony with not only the letter, but also the spirit of FRA as articulated in its Preamble. It is also noteworthy that there is a marked difference between the manner in which the Madras High Court has dealt with the present case, and other High Courts which have been confronted with similar fact situations.

JUDGMENT

(The judgment of the Court was delivered by S.J. Mukhopadhaya, J)

1. The members of the appellant-Salem Mavatta Ezhpulli Malaivazh Makkal Nala Sangam (writ petitioner) (for short, 'Association') are all hill tribes, cultivating the waste dry Government poramboke land(s) from time immemorial and are in possession and enjoyment of S.No.1/1 Malayalapatti Village, AtturTaluk, Salem District. They sought for a Writ of Mandamus, to forbear the respondents from issuing declaration under Section 16 of the Tamil Nadu Forest Act, 1882 for the land(s) in S.No.1/1 of the aforesaid

Malayalapatti Village, without considering the claim of the members of the appellant-Association, totally 217 persons, whose names were given in the annexure to the Writ Petition in question and to grant patta to them for an extent of four acres of each of the said land(s) in the said S.No.1/1.

2. The learned single Judge, taking into consideration the facts of the case, maintenance of ecological balance and environmental protection, referring to some of the decisions of the Supreme Court, and having refused to grant the relief, the present Writ Appeal has been preferred by the appellant-Association.

3. The only question to be determined in the present case is as to whether the members of the appellant-Association, who are Scheduled Tribes and those who are other traditional forest dwellers, who otherwise fulfill the requisite conditions, have the forest rights and right of occupation in the forest lands in question.

4. It appears that the land(s) in question i.e. in S.No.1/1 of Malayalapatti Village was proposed for declaration as a "reserve forest" under Section 4 of the Tamil Nadu Forest Act, published on the Gazette, vide G.O.Ms.No.3133, dated 28.12.1972 issued from Agricultural Department, followed by Notification under Section 6 published in the District Gazette on 24.11.1978, calling for claims on right, which was existing in the said land(s). According to the respondents, neither the Sangam (Association), nor its members did present any claim during 1978 before the Forest Settlement Officer under Section 10 of the Tamil Nadu Forest Act, which indicates that they were not cultivating during the year 1978. Their representation to the Government for allotment of the land(s) was filed only during 1999, claiming that they were cultivating land(s) from 1991 onwards.

5. The Tahsildar, Attur, by letter dated 22.6.1992, forwarded the claim of the members of the appellant-Association to the District Revenue Officer, Salem, with a report/Survey Notes and other enclosures. It was informed that the land(s) in S.No.1/1, an extent of 1205.27.0 hectares is made up of flat surface and heightend like a small hillock. Huge thick trees are found in the small hillock and some bushes are found in the foot of this small hillock. 538 people, whose names are found in the Adangal, have removed these bushes and have cultivated punja crops and in some places, have removed the bushes and have levelled the land(s). On enquiry, it was learnt that since the boundaries of the forest have not been demarcated, those lands could not be developed any further. It was further informed that Malayalapatti Village is surrounded by hillocks on three sides. For a very long period of time, it is the Adivasis (malayalis, i.e. the Scheduled Tribes), who are in inhabitation. All time passed, other backward people have also settled there. The list showing the land(s) which were allotted for public purpose for the Malayalapatti Village people was also enclosed. It was further informed that the land(s) in dispute are situated 2 kms from Malayalapatti Village and cannot be used for public purpose. There are no Mosques, Temples, burial ground, ancient sculptures in the above said Survey Number. There are no mineral deposits in the said S.No. and there is no possibility of any river to flow and lakes or ponds to form for any small water irrigation. The land(s) are in the nature of red sand and are fertile. The water source is available approximately 30% to 50%. In the midst of the same S.No.1/1, cultivation in S.No.315 consisting of an extent of 23.00 acres were classified as patta land(s) and are enjoyed by four persons by an earlier settlement of lands. In the aforesaid S.No., a Well has been dug and rice crops are being cultivated. There was no objection in the village for converting and allotting the land(s) to the poor, such as landless power and Scheduled Tribes.

6. The Revenue Divisional Officer, Salem, in his turn, by letter dated 10.7.1992, informed the District Revenue Officer, Salem, the aforesaid facts. It was also intimated that pursuant to G.O.No.28, dated 7.12.1997, issued from Forest Department, with regard to

the abovesaid land(s), action to be taken according to the Forest Boundary Assessment Act and the recommendation was made to sub-divide 1205.27.0 hectares in S.No.1/1, 131-Malayalapatti Village and to handover the same to the landless poor people.

7. On 8.7.1992, the Revenue Divisional Officer, Salem, vide his note, mentioned that prior to UDR, the land(s) were classified as Government poramboke. The land value was Rs.1,560/- as was recommended by the Tahsildar and the land(s) had not been of any use for all these days and only bushes which are of no use is grown there. As the forest boundaries have not been demarcated, it was recommended to transfer the land(s) in favour of the poor. Similar report was submitted by the District Revenue Officer in 1992, but the matter remained pending.

8. It appears that inspite of favourable reports, no action having been taken by the State, the appellant-Association moved before this Court in W.P.No.6815 of 2000 for issuance of a Writ of Mandamus, to consider the claim of its members for grant of patta. This Court, by order dated 6.6.2000, directed the District Collector and the District Revenue Officer to initiate proper enquiry and communicate the decision to the appellant-Association within three months. A detailed enquiry was conducted by the Tahsildar and by proceedings dated 14.3.2001, a favourable report was submitted in favour of the members of the appellant-Association and recommended for grant of patta in their favour.

9. The Forest Settlement Officer, Attur, by order dated 11.9.2002, having noticed the fact that the Notification under Section 4 of the Tamil Nadu Forest Act, 1882 was published long ago, followed by the Gazette publication on 19.5.1976 and the District Gazette publication on 21.9.1981 and that the Notification under Section 6 of the Tamil Nadu Forest Act was also published in the District Gazette on 21.4.1977, 21.11.1977, 21.2.1984 and again on 21.3.1990, submitted his report under Section 8 of the Tamil Nadu Forest Act.

10. The District Collector, Salem, by proceedings, dated 31.3.2003, forwarded his remarks to the Secretary to Government, Environment and Forest Department, Secretariat, Chennai, to the effect that since the Government has already issued the Notifications under Sections 4 and 6 of the Tamil Nadu Forest Act, proposing the declaration, and declaring the area of 1205.27.0 hectares including the impugned land(s), namely in S.No.1/1, Malayalapatti Village, AtturTaluk, Salem District, as 'reserve forest', it is for the Government to call for the objections from the encroachers and to take appropriate decision.

11. Similarly, the Principal Chief Conservator of Forests, Chennai, in his proceedings, dated 1.3.2004, addressed to the Secretary to Government, Environment and Forests Department, Secretariat, Chennai, while referring to G.O.Ms.No.313, dated 28.12.1972, issued from Agricultural Department, proposing to declare the land(s) in question as a 'reserve forest', expressed his opinion that there is no provision under the Tamil Nadu Forest Act, 1882 to call for a fresh application in the matter and since the Notification has already been issued under Section 4 of the Tamil Nadu Forest Act, 1882, it is to culminate into the Notification under Section 16 of the Tamil Nadu Forest Act and hence, the question of receiving fresh application now from the encroachers does not arise.

12. Learned counsel appearing on behalf of the State submitted that when once the objections were received under Section 6(d) of the Tamil Nadu Forest Act and enquiry made under Section 8, and on that basis, an order was passed under Section 10, the authority has no jurisdiction to entertain further objections under Section 6(d), nor can

make any further enquiry under Section 8, nor can pass a second order under Section 10 of the Tamil Nadu Forest Act, 1882.

13. Per contra, according to the learned counsel appearing for the appellant-Association, the members of its Association being Tribal, and they and their ancestors being in possession and enjoyment of the land(s) in question from time immemorial, the State is bound to recognise their right by issuing patta in their favour.

14. The impugned order was delivered by the learned single Judge on 1.4.2005, against which the present Writ Appeal is preferred and is pending. During the pendency of this Writ Appeal, a Central Act was promulgated, namely "The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006". Learned counsel for the appellant-Association, while relying on the relevant provisions of the said Act, 2006, and the Rules framed thereunder, also referred to Sections 16 and 17 of the Tamil Nadu Forest Act, 1882.

15. We have heard the learned counsel appearing for the parties and noticed the rival contentions.

16. The Madras Forest Act 5 of 1882, now known as Tamil Nadu Forest Act, 1882, was promulgated with the object to provide for the constitution of more important forests as "State Reserves" and to give powers for the conservancy of forest lands not included in the "Reserve Forests". While Section 4 of the Tamil Nadu Forest Act, empowers the Government to issue Notification of proposal to constitute any land a Reserved Forest, under Clause (c) of Section 4, the State Government is empowered to appoint an officer (Forest Settlement Officer) to enquire into and determine the existence, nature and extent of any rights claimed by, or alleged to exist in favour of, any person or over any land comprised within such limits or to any forest produce of such land, and to deal with the same as provided under Chapter-II of the Tamil Nadu Forest Act, 1882. When a Notification is issued under Section 4 of the Tamil Nadu Forest Act, 1882, the Forest Settlement Officer is empowered to issue proclamation under Section 6 of the Tamil Nadu Forest Act, 1882, specifying the situation and limits of the land proposed to be included in the reserved forests. Under Clause (d) of Section 6, the Forest Settlement Officer is supposed to fix a period not less than three months from the date of publication of such proclamation, requiring every person claiming any right referred to in Section 4 either to present to such Officer, within such period, a written notice specifying, or to appear before him within such period and state the nature of such right and in either case, to produce all documents in support thereof. After serving of notice to the same effect of every known or reputed owner or occupier of any land in or adjoining the land proposed to be constituted a reserved forest, the Forest Settlement Officer is to make enquiry under Section 8 into all claims made under Section 6 recording the evidence in the manner prescribed by the Code of Civil Procedure Code in appealable cases. At the same time, the Forest Settlement Officer is to consider and record any objection which the Forest Officer (if any) appointed under Section 4 may make to any such claim. After such enquiry, the Forest Settlement Officer shall pass an order under Section 10 specifying the particulars of such claim and admit or reject the same, wholly or in part with regard to (a) right of way; (b) a right to a water course, or to use of water; (c) a right of pasture; or (d) a right to forest produce. With regard to the admitted claim, the Forest Officer may come to the agreement with the claimant for the surrender of the right or exclude the land from the limits of the closed forests or may proceed to acquire such land in the manner provided by the Land Acquisition Act, 1870 (Land Acquisition Act 1 of 1894). However, with regard to the rejected claims, there is a provision for appeal provided under Section 10 of the Tamil Nadu Forest Act within a reasonable period. Finally, under Section 16 of the Tamil Nadu Forest Act, 1882, Notification is required

to be issued declaring the Forest Reserved, after the period fixed under Section 6 for preferring the claims has elapsed and all claims (if any) made within such period, have been disposed of by the Forest Settlement Officer and in case, such claims have been made and determined, the appeals presented and disposed of by the appellate authority. Under Section 16(c) of the Tamil Nadu Forest Act, 1882, all proceedings prescribed by Section 10 have been taken and all lands (if any) to be included in the proposed forest, which the Forest Settlement Officer has under Section 10 elected to acquire, under the Land Acquisition Act, 1870 and on such issuance of Notification under Section 16, the lands stand vested in the Government. Under Section 17 of the Tamil Nadu Forest Act, 1882, rights in respect of which no claim has been preferred under Section 6, shall thereafter be extinguished, unless before publication of such Notification, the person claiming them has satisfied the Forest Settlement Officer that he had sufficient cause for not preferring such claim within the period fixed under Section 6, in which case, the Forest Settlement Officer shall proceed to dispose of the claim in the manner provided under the Tamil Nadu Forest Act.

17. From the aforesaid provisions of the Tamil Nadu Forest Act, 1882 it would be evident that apart from the claim of right of occupation and ownership, which can be made under Section 6 and determined under Section 10, even after vesting of the land on issuance of the Notification under Section 16, the Forest Settlement Officer, if on the claim of such right, is satisfied that the claimant had sufficient cause for not preferring such claim within the period fixed under Section 6, can prefer objection under Section 17 and in such a case, the Forest Settlement Officer shall proceed to dispose of the claim in the manner provided under the Tamil Nadu Forest Act.

18. In the present case, it has not been brought to the notice of the Court as to what was the time prescribed under Section 6 of the Tamil Nadu Forest Act, 1882, but from the records, it appears that such a proclamation under Section 6 was issued on 24.11.1978 and it is informed that the three months' period was prescribed for submitting the claim of rights and it is also informed that 36 claims were received, of which, many claims were rejected in 1979. The right to claim water course, etc., under Section 10 also lapsed on 24.2.1979. However, it is admitted that till date, no Notification has been issued under Section 16, declaring the land(s) in question as 'Forest Reserve' and thus, it cannot be argued that the right to claim occupancy and ownership or other rights, extinguished under Section 17 of the Tamil Nadu Forest Act, 1882.

19. The learned single Judge has failed to notice the aforesaid provisions of law and thus, we hold that the members of the appellant-Association still have a right to claim occupancy, ownership and other rights, if they satisfy the Forest Settlement Officer that they had sufficient cause for not preferring such claim within the period fixed under Section 6 of the Tamil Nadu Forest Act and such a claim can be made under Section 17 of the Tamil Nadu Forest Act, after publication of the Notification under Section 16 of the Tamil Nadu Forest Act, declaring the land(s) as a "Reserve Forest".

20. The learned single Judge has referred to the decision of the Supreme Court in the case of "*M.C.Mehta vs. Kamal Nath and others*" reported in 1997 (1) SCC 388, in maintaining the ecology in the context of doctrine of public trust, wherein the Supreme Court held as follows: "The notion that the public has a right to expect certain lands and natural areas to retain their natural characteristic is finding its way into the law of the land. The ancient Roman Empire developed a legal theory known as the "Doctrine of the Public Trust". The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made

freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. Though the public trust doctrine under the English common law extended only to certain traditional uses such as navigation, commerce and fishing, the American Courts in recent cases expanded the concept of the public trust doctrine. The observations of the Supreme Court of California in Mono Lake case clearly show the judicial concern in protecting all ecologically important lands, for example fresh water, wetlands or riparian forests. The observations therein to the effect that the protection of ecological values is among the purposes of public trust, may give rise to an argument that the ecology and the environment protection is a relevant factor to determine which lands, waters or airs are protected by the public trust doctrine. The Courts in United States are finally beginning to adopt this reasoning and are expanding the public trust doctrine should not be expanded to include all ecosystems operating in our natural resources. Our legal system-based on English Common law-includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership. Thus the Public Trust doctrine is a part of the law of the land."

21. Learned single Judge has also placed reliance on the decision of the Supreme Court regarding maintenance of ecology balance and environmental protection in the case of "*T.N. Godavarman Thirumalpad vs. Union of India and others*" reported in 2002 (10) SCC 606, wherein the Supreme Court observed as follows:

"19. Environmental law is an instrument to protect and improve the environment and to control or prevent any act or omission polluting or likely to pollute the environment. In view of the enormous challenges thrown by the industrial revolution, the legislatures throughout the world are busy in this exercise. Many have enacted laws long back and they are busy in remodelling the environmental law. The others have moved their law-making machineries in this direction except the underdeveloped States who have yet to come in this wavelength. India was one of those few countries which paid attention right from the ancient times down to the present age and till date, the tailoring of the existing law to suit the changing conditions is going on. The problem of law-making and amending is a difficult task in this area. There are a variety of colours of this problem. For example, the industrial revolution and the evolution of certain cultural and moral values of humanity and the rural and urban area developments in agricultural technology, waste, barren or industrial belts; developed, developing and underdeveloped parts of the lands; the rich and poor Indians; the population explosion and the industrial implosion; the people s increasing awareness and the decreasing State exchequer; the promises in the political manifestos and the State s development action. In this whole gamut of problems the Tiwari Committee came out with the data that we have in India "nearly five hundred environmental laws" and the Committee pointed out that no systematic study had been undertaken to evaluate those legislative developments. Some legal controls and techniques have been adopted by the legislatures in the field of Indian environmental laws. Different legislative controls right from the ancient times, down to the modern period make interesting reading. Attention has to be paid to identify the areas of great concern to the legislature; the techniques adopted to solve those problems; the pollutants which require continuous exercises; the role of the legislature and people s participation outside. These are some of many areas which attract the attention in the study of history of the Indian environmental law.

"20. Since time immemorial, natural objects like rivers enjoyed a high position in the life of the society. They were considered as goddesses having not only purifying capacity but also self-purifying ability. Fouling of the water of a river was considered a sin and it attracted punishments of different grades which included penance, outcasting, fine etc. The earth or soil also equally had the same importance, and the ancient literature provided the means to purify the polluted soil. The above are some of the many illustrations to support the view that environmental pollution was controlled rigidly in the ancient times. It was not an affair limited to an individual or individuals but the society as a whole accepted its duty to protect the environment. The "dharma" of environment was to sustain and ensure progress and welfare of all. The inner urge of the individuals to follow the set norms of the society, motivated them to allow the natural objects to remain in the natural state. Apart from this motivation, there was the fear of punishment. There were efforts not just to punish the culprit but to balance the ecosystems. The noteworthy development in this period was that each individual knew his duty to protect the environment and he tried to act accordingly. Those aspects have been highlighted by a learned author C.M.Jariwala in his article "Changing Dimensions of the Indian Environmental Law" in the book Law and Environment by P. Leelakrishnan.

21. The Economic and Special Council of the United Nations passed a resolution on 30-7-1968 on the question of convening an international conference on problems of human environment. In the United Nations Conference on Human Environment at Stockholm from 6-6-1972 to 16-6-1972, proclamation was made on United Nations on Human Environment. It was stated in the proclamation in these profound words: "Man is both creature and moulder of his environment which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights even the right to life itself. The protection and improvement of the human environment is a major issue which affects the well-being of people and economic development throughout the world, it is the urgent desire of the peoples of the whole world and the duty of all Governments."

22. When the necessity to promote the environment turned grave, doubt was expressed by some commentators whether the issue of the environment would last. They have been proved wrong, since it is clearly one of the big issues, perhaps the biggest issue of the 1990s. It is a big issue in political terms, since protection of the environment is high on most people s priorities for the 1990s. As a result political parties and Governments are falling over each other in their eagerness to appear green, even if as yet their actions rarely match their rhetoric. It is big in terms of the size of the problem faced and the solutions required; global warming, the destruction of the ozone layer, acid rain, deforestation, overpopulation and toxic waste are all global issues which require an appropriate global response. It is big in terms of the range of problems and issues--air pollution, water pollution, noise pollution, waste disposal, radioactivity, pesticides, countryside protection, conservation of wildlife--the list is virtually endless. As observed by Simon Bell and Stuart Bell in Environmental Law: "....In the words of the White Paper on the Environment. This Common Inheritance (cm. 1200, 1990) the issues range 'from the street corner to the stratosphere'. Finally, it is big in terms of the knowledge and skills required to understand a particular issue. Law is only one element in what is a major cross-disciplinary topic. Lawyers need some

understanding of the scientific, political and economic processes involved in environmental degradation. Equally all those whose activities and interests relate to the environment need to acquire an understanding of the structure and content of environmental law, since it has a large and increasing role to play in environmental protection."

22. It has not been made clear as to how the aforesaid observations made by the Supreme Court will affect the right of the Scheduled Tribes, who can claim their right of occupancy and ownership, including the right of way, right of water course, or use of water, right of pasture, or right of forest produce, as prescribed under Section 4(c) read with Section 6(d) and determined under Section 10 of the Tamil Nadu Forest Act, 1882.

23. In India, one cannot think of a Scheduled Tribe without a forest. In Arabian countries, there are Tribes in the deserts. In India, the Tribes mostly live in forests and depends on the forest lands for bona-fide livelihood needs. Apart from the forest dwelling Scheduled Tribes, there are other traditional forest dwellers, who are also depending on the forest, its produce and the forest lands. They do not disturb the conservancy or bio-diversity or ecological balance. In fact, the forest dwelling Scheduled Tribes and other traditional forest dwellers, who are depending on forest produce and the forest, conserve bio-diversity and maintain the ecological balance by conserving the forest. They do not allow others to destroy the forest. It is for the said reason, even under the Tamil Nadu Forest Act, 1882, the claim of rights of occupancy and ownership, even in the "reserve forest" was recognised and is still continuing.

24. The Act, namely The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 was enacted and published in the Gazette of India, on 2.1.2007 to recognise and vest the forest rights and occupation in forest land in forest dwelling Scheduled Tribes and other traditional forest dwellers who have been residing in such forests for generations, but whose rights could not be recorded; to provide for a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land. It was also made for strengthening the conservation regime of the forests while ensuring livelihood and food security of the forest dwelling Scheduled Tribes and other traditional forest dwellers. It was also noticed that the forest rights on ancestral lands and their habitat were not adequately recognised in the consolidation of State forests during the colonial period as well as in independent India resulting in historical injustice to the forest dwelling Scheduled Tribes and other traditional forest dwellers who are integral to the very survival and sustainability of the forest ecosystem. These will be evident from the objects of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (for short, 'the Act, 2006'). Section 2(c) of the Act, 2006, defines the "forest dwelling Scheduled Tribes" as under:

> "Section 2(c): "forest dwelling Scheduled Tribes" means the members or community of the Scheduled Tribes who primarily reside in and who depend on the forest or forest lands for bona fide livelihood needs and includes the Scheduled Tribes pastoralist communities."
>
> Section 2(o) defines "other traditional forest dweller", as quoted hereunder:
> "Section 2(o): "other traditional forest dweller" means any member or community who has for at least three generations prior to the 13th day of December, 2005 primarily resided in and who depend on the forest or forests land for bona fide livelihood needs."

"Forest land" means land of any description falling within any forest area and includes unclassified forests, undemarcated forests, existing or deemed forests, protected forests, reserved forests, Sanctuaries and National Parks, as evident from Section 2(d) of the Act, 2006. The "Forest Rights" have been dealt with under Chapter II of the Act, 2006, and relevant portion of the same is quoted hereunder:

"Section 3: (1) For the purposes of this Act, the following rights, which secure individual or community tenure or both, shall be the forest rights of forest dwelling Scheduled Tribes and other traditional forest dwellers on all forest lands, namely: ....

....

(g) rights for conversion of Pattas or leases or grants issued by any local authority or any State Government on forest lands to titles;

(h) rights of settlement and conversion of all forest villages, old habitation, unsurveyed villages and other villages in forests, whether recorded, notified or not into revenue villages;

(i) right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use;

(j) rights which are recognised under any State law or laws of any Autonomous District Council or Autonomous Regional Council or which are accepted as rights of tribals under any traditional or customary law of the concerned tribes of any State; (k) right of access to biodiversity and community right to intellectual property and traditional knowledge related to biodiversity and cultural diversity;

(l) any other traditional right customarily enjoyed by the forest dwelling Scheduled Tribes or other traditional forest dwellers, as the case may be, which are not mentioned in clauses (a) to (k) but excluding the traditional right of hunting or trapping or extracting a part of the body of any species of wild animal; (m) right to in situ rehabilitation including alternative land in cases where the Scheduled Tribes and other traditional forest dwellers have been illegally evicted or displaced from forest land of any description without receiving their legal entitlement to rehabilitation prior to the 13th day of December, 2005."

It would be evident that the forest dwellers, Scheduled Tribes and other traditional forest dwellers have right of conversion of pattas or leases or grants issued by any local authority or any State Government on the forest land(s) to titles. Recognition, restoration and vesting of forest rights in forest dwelling Scheduled Tribes and other traditional forest dwellers, have been provided under Chapter III of the Act, 2006, relevant portion of which are discussed hereunder: Under Section 4(3), while such recognition and vesting of forest rights under the Act, 2006, shall be subject to the condition that such Scheduled Tribes or tribal communities or other traditional forest dwellers had occupied forest land before 13.12.2005, under Section 4(4), a right conferred by Section 4(1) shall be heritable but not alienable or transferable and shall be registered jointly in the name of both the spouses in case of married persons. Under Section 4(5), no member of a forest dwelling Scheduled Tribe or other traditional forest dweller shall be evicted or removed from forest land under his occupation till the recognition and verification procedure is complete. Chapter IV of the Act, 2006, prescribes the authorities and procedures for vesting of forest rights.

Under Section 6(1), the Gram Sabha is authorised to initiate the process for determining the nature and extent of individual or community forest rights or both that may be given to the forest dwelling Scheduled Tribes and other traditional forest dwellers. Against the decision of the Gram Sabha, any person aggrieved has a right to prefer a petition under Section 6(2) to the Sub-Divisional Level Committee constituted under Section 6(3).

There is a provision for further petition under Section 6(4) before the District Level Committee against the decision of the Sub-Divisional Level Committee.

Under Section 6(5), the State Government is empowered to constitute a District Level Committee, whose decision regarding the forest right is final under Section 6(6).

25. The Rules, namely the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights), Rules, 2007 (for short, 'the Rules, 2007'), have been framed under Section 14(1) of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights), Act, 2006, and published in the Gazette of India, Extraordinary, Part-II, dated 1.1.2008. It has come into effect and in the said Rules, 2007, provision has been made as to how Gram Sabha shall be convened by the Gram Panchayat, as evident from Rule 3; the functions of the Gram Sabha is prescribed under Rule 4, which includes initiating the process of determining the nature and extent of forest rights, receive and hear the claims thereto; preparation of list of claimants of forest rights and maintain a register containing such details of claimants and their claims as the Central Government, may by order determine, etc. Sub-Divisional Level Committee has to be constituted by the State Government in terms of Rule 5 of the Rules, 2007 and the said Sub-Divisional Level Committee is required to function and determine in the manner prescribed under Rule 6. The State Government is also required to constitute a District Level Committee in terms of Rule 7, which is required to function in terms of Rule 8.

    There is a State Level Monitoring Committee to be constituted by the State Government in terms of Rule 9, which is required to function and devise the criteria and indicators for monitoring the process of recognition and vesting of forest rights, etc., in the manner prescribed under Rule 10. The process of verifying claims by Forest Rights Committee and the evidence for determination of forest rights, have also been prescribed under Rules 12 and 13 of the Rules, 2007, respectively.

    Form-A is enclosed with the said Rules, 2007 in terms of Rule 6(1) of the Rules, 2007, wherein the details of the claimants, his name, spouse name, etc., are to be reflected and the extent of the right claimed on the land is also to be reflected therein.

26. The forest right over the land(s) has been casually referred to as "title" for the purposes of Act, 2006 and Rules, 2007, and the Tamil Nadu Forest Act, 1882, but like title under the general law, it is not alienable or transferable, though it is heritable by descendants.

27. In view of the aforesaid Act, 2006 and the Rules, 2007 framed thereunder, if one or other member of the appellant-Association can show that he or she is a forest dwelling Scheduled Tribe or any other traditional forest dweller, primarily residing and is depending on the forest or forest land(s) for bona-fide livelihood needs, can bring such evidence on record, they have a right to consider their case of vesting of the "forest rights" as provided under Section 3 of the Act, 2006 and cannot be evicted from the land(s) till such rights are determined.

28. It has been brought to our notice that the Act, 2006, has been challenged before this

Court in the case of "*V.Sambasivam vs. Govt. of India, Ministry of Tribal Affairs*, rep. by its Secretary, ShastriBhavan, New Delhi-110 001 and others" in Writ Petition No.4533 of 2008 and in the said case, while challenging the said Act, 2006, M.P.No.1 of 2008 was also filed for grant of order of interim injunction restraining the respondents therein from giving effect to the said Act, 2006, pending disposal of the above said Writ Petition. A Division Bench of this Court, by its unreported order dated 30.4.2008 in M.P.No.1 of 2008 in W.P.No.4533 of 2008, while noticing the relevant provisions of the Act, 2006, refused to grant interim injunction as sought for, but issued the following directions by way of interim order:

> "11. Therefore, we issue the following directions:
>
> (a) If claims are made for community rights or rights to forest land and applications are submitted as per Sections 3 and 4 of the Act read with Rules 11 and 12 of the Rules, then the process of verification of the claim after intimation to the concerned claimant shall go on, but before the certificate of title is actually issued, orders shall be obtained from this Court. (b) As regards felling of tress for providing diversion of forest land under Section 3(2) of the Act is concerned, the process shall go on till the clearance of such development projects and also the Gram Sabha's recommendation is obtained but before the actual felling of tress, orders shall be obtained from this Court."

29. Therefore, it will be also evident that under the Act, 2006, the members of the appellant-Association have a right for consideration of their cases for "forest rights" conferred under Section 3 of the Act, 2006 and till the claim is finalised, they have a right to hold the land in their possession and till such a decision is given, in terms of the said interim order of this Court, the claim as made by the members of the appellant-Association, is required to be verified in terms of the Act, 2006, but for issuance of patta or certificate of title, order is required to be obtained from this Court, in view of the interim order aforesaid passed in M.P.No.1 of 2008 in W.P.No.4533 of 2008, dated 30.4.2008.

30. We have already held that the members of the appellant-Association have a right to make their claim under Section 17 of the Tamil Nadu Forest Act, 1882, after the notification under Section 16 of the Tamil Nadu Forest Act, 1882, is issued, subject to the conditions that if they satisfy the reasons for not filing the claim within the time prescribed under Section 6 of the Tamil Nadu Forest Act, 1882.

31. In view of the aforesaid provisions of law, as referred to above, we are of the view that the claim of the members of the appellant-Association should be re-considered and the impugned order passed by the learned single Judge cannot come in their way to defeat their claim. We accordingly set aside the impugned order passed by the learned single Judge in W.P.No.10954 of 2005, dated 1.4.2005 and remit the case to the respondents to re-consider the case of the members of the appellant-Association in terms of the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, read with Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007 and after determination of their claim, if so required, the respondents will obtain permission of this Court before issuance of certificate of title in favour of one or other member of the appellant-Association, in view of interim order as noticed and quoted above.

32. The Writ Appeal is allowed with the aforesaid observations and directions. No costs.

In Defence of Environment and Animals vs. The Principal Chief Conservator of Forests & Ors., etc.

W.P.NOS.10098 OF 2008 AND 2762 AND 2839 OF 2009
MADRAS HIGH COURT
3.12.2009 (INTERIM ORDER)
CORAM: S.J. MUKHOPADHAYA AND M. DURAISWAMY, JJ.

SUMMARY

Writ Petition No. 10098 of 2008 was filed by an elephant rights activist, Mr. 'Elephant' G. Rajendran, seeking directions to the respondent State government to declare and maintain an elephant corridor, and keep the same free of encroachments and other disturbances. Towards this end, the Court had passed interim orders previously, directing removal of encroachments and submission of status reports.

Subsequently, two writ petitions were filed before the Court on behalf of forest dwelling Scheduled Tribes and other traditional forest dwellers who are residing in the forest of the District of Nilgiris, being WP Nos.2762 and 2839 of 2009. The petitioners in these writ petitions asserted that they are eligible for recognition and vesting of rights under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA). These petitions were heard together to ensure that no conflicting orders are passed.

The Court also modified its interim orders with respect to the forest dwellers claiming protection under the FRA, directing the authorities concerned not to evict such forest dwellers whose claims are pending and who may have some right under the said Act. In addition, the State Level Monitoring Committee constituted under the FRA was directed to look into the matter and submit its report. By further orders, the Court directed that with regard to those tribals and forest dwellers who have been identified as occupying the elephant corridor, status quo shall be maintained, allowing the State government to proceed with the process of determination of rights.

While Mr. Rajendran continued to argue that the forest dwellers in occupation of lands within the elephant corridor should be evicted, the State government agreed with the forest dwellers' submission that they cannot be dispossessed from the

corridor.

The present interim order reiterated several of these orders passed previously, and further issued several directions with regard to the solar fences erected within the elephant corridor and their time-bound removal. While observing that the State government must follow the necessary procedure as provided under the FRA before commencing the process of acquisition of land and rights of the forest dwellers, the Court stated:

> **"we further make it clear that the above order to remove the unauthorised solar fencing will equally be applicable to the tribals and other traditional forest dwellers." (@ para 25)**

The matter was adjourned for further proceedings. Eventually, the said cases were disposed of by a common judgment and order dt. 7.4.2011.[64]

EDITOR'S NOTE

In terms of the doctrine of merger, the present interim order, along with all the other interim orders passed in the present case, have merged with the final judgment and order dt. 7.4.2011 in this case. However, it is interesting to note how vigorously the rights of the forest dwellers were defended by counsel at every stage, and the extent to which the Court ensured that every direction made by it was modified in its operation to the right-holders under the FRA.

ORDER

(The Order of the Court was made S.J. Mukhopadhaya, J.)

1. As all the cases relate to the forest of the District of Nilgiris, and as in Writ Petition No.10098 of 2008, prayer has been made to direct the respondents to keep the corridor of the animal (Elephant Corridor) without any encroachment and any other disturbances, and two other Writ Petitions in W.P.Nos.2762 and 2839 of 2009 relate to the rights of the tribals and traditional forest dwellers who are residing in the forest of the District of Nilgiris, they were heard together to ensure that no conflict orders are passed.

2. On 30.9.2008 in W.P.No.10098 of 2008, this Court noticed that the State Government has taken some steps and letter dated 24.6.2008 was addressed by the Principal Chief Conservator of Forests and Chief Wildlife Warden to the Secretary to Government, Environment and Forests Department, Chennai, giving suggestions with regard to the Elephant Corridor. The State Government was directed to send a complete proposal to the Central Government with regard to the funds which are required for acquisition of land for development of the Elephant Corridor. On the basis of this proposal, the Central Government was directed to communicate its response to the State Government and to file an affidavit to that effect before this Court.

3. On 2.2.2009 in W.P.No.10098 of 2008, this Court directed the District Collector, Nilgiris to file status report showing the steps taken to remove all the encroachments from the

[64] The judgment dt. 7.4.2011 is extracted elsewhere in the present compendium.

Revenue land(s), which have been identified for development of the Elephant Corridor, pursuant to the Court's order dated 30.9.2008.

4. At that stage, W.P.Nos.2762 and 2839 of 2009 were preferred by the Scheduled Tribes and other traditional forest dwellers, claiming that they are residing in the Revenue lands for more than 50 to 100 years and had right to occupy the lands under the provisions of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. In view of the stand taken by them, this Court, by order dated 13.2.2009, modified the earlier orders dated 30.9.2008 and 2.2.2009 passed in W.P.No.10098 of 2008 and directed the authorities concerned not to evict the Scheduled Tribes and other traditional forest dwellers and others, whose claims are pending and may have some right under the provisions of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. The State Level Monitoring Committee, which was constituted by the State under the provisions of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, vide G.O.Ms.No.19, Adi Dravidar and Tribal Welfare (TD2) Department, dated 19.2.2008, was directed to look into the matter and submit its report to the State Government and also to file a copy to this Court.

5. On 8.4.2009, this Court ordered to main status quo with respect to the tribals and forest dwellers, who have been identified as occupying the Elephant Corridor, and allowed the State Government to proceed with the identification of the tribals and forest dwellers under the provisions of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (Central Act 2 of 2007), until the matter is further heard.

6. On 10.9.2009, the Collector of Nilgiris District along with the District Forest Officer (North), Ooty, appeared to assist this Court. It was informed that the Forest Department has an idea with regard to the Elephant Corridor in the District in question. The Collector further informed that to allow the elephants to pass through the Corridor, the unauthorised occupants are to be evicted. However, it was admitted that those who are tribals and traditional forest dwellers and are protected under the provisions of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, their rights will be protected and they will not be evicted from the Corridor. It was also informed that certain portions of the land which belong to private individual may have to be acquired by the State Government to ensure that the Corridor is free from any outsiders, except the tribals or other forest dwellers. The Court, on 10.9.2009, on hearing the parties, observed as follows:

> "4. After hearing the parties, prima facie, it appears that the following procedure may required to be followed:
>
> (i) Forest department, which has the knowledge of movement of elephants in the corridor, may identify and inform the same;
>
> (ii) the State Government may publish the information regarding the elephant corridor and the area, in leading newspapers and also by drum beating/tom tom, calling for objections of locals, if any, in the area in question;
>
> (iii) after hearing the locals, particularly those who may be affected, they may finalise the elephant corridor from which unauthorised occupants are to be evicted;
>
> (iv) to ensure that scheduled tribes and other forest traditional dwellers are not affected, it is required to identify the other traditional forest dwellers in terms with the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of

Forest Tribes) Rules, 2007; and

(v) only after the recommendation and recording their names in the appropriate register, they may proceed with eviction, by giving notice in the newspaper, by drum beating/tom tom and by giving individual notice to the unauthorised occupants.

5. So far as the acquisition of the land is concerned, if any private land is required to be acquired, they will have to follow the procedure under the Land Acquisition Act. Prima facie, as the tribals and other forest dwellers cannot be evicted from the unauthorised lands, their lands need not required to be acquired, if it is a forest land. Learned counsel for the parties are requested to give further suggestion in the matter, in the interest of public and elephants."

7. It appears that there has been a dispute with regard to the Elephant Corridor. It was informed by the District Collector, Nilgiris that he had verified the matter and prepared a map for the Elephant Corridor. This was opposed by the counsel appearing on behalf of the Scheduled Tribes and traditional forest dwellers. According to them, it is the Forest Department which is empowered to point out the Elephant Corridor to the State.

8. On 22.10.2009, the Principal Secretary of the Environment and Forest Department, the Principal Chief Conservator of Forest and Chief Wildlife Warden, the Principal Chief Conservator and Head of the Forest Department and the District Forest Officer, Nilgiris Northern Division, appeared in person to assist the Court. The matter was discussed and it was agreed upon by the officials that a team of experts of the Environment and Forests Department, may be constituted, which may include the Principal Chief Conservator of Forest and others. The said Committee will suggest the Elephant Corridor and submit a report after taking into consideration the different books published with regard to the Elephant Corridor, namely:
   (a) Ecology of the Asian Elephant,
   (b) The Asian Elephant in Southern India,
   (c) A brief documentation of Elephant Corridors in South India,
   (d) Acquisition/Transfer of sensitive areas for restoring/maintaining the sanctity of the Moyar Valley Elephant Corrider and Evaluation of the status, and
   (e) Land use pattern and Habitat Utilization of Elephants in Corridors between Western Ghats and Eastern Ghats through Mudumalai Wildlife Sanctuary and National Park and Nilgiris, Tamil Nadu and they were asked to give reference of page numbers of the books in the said report.

9. The case was again taken up on 4.11.2009 when the Expert Committee submitted its report along with the field staff reports. Though certain maps have been enclosed showing the Elephant Corridor, no demarcation of the Elephant Corridor has been shown therein. The Secretary of the Environment and Forest Department, the Principal Chief Conservator of Forests and Chief Wildlife Warden, Chennai (Chairman of the Expert Committee), the Conservator of Forests, Ooty and the District Forest Officer, Nilgiris North Division, Ooty, who were present in the Court, submitted that a detailed map will be produced on the next date, showing the boundaries of the Elephant Corridor, as suggested by the Expert Committee and in the said map, the details of the Survey Numbers of the private lands, which may fall within the Elephant Corridor, were also directed to be given. The Court accordingly allowed the Expert Committee to file such map showing the boundaries of the Elephant Corridor. The Secretary of the Environment and Forest Department, in the meantime, was directed to place a copy of the report before the State Government along with the map, which will be prepared and produced on the next date. The State Government was also directed to state as to whether they intend to accept the report in

its totality or with modification. On 4.11.2009, the following interim order was passed:

"4. During the pendency of the Writ Petitions, the respondents will ensure that no illegal construction is made in the area shown as Elephant Corridor in the report of the Expert Committee. Further, they should not allow any new construction in the area without prior intimation to the Court.

5. No person should be allowed to put a fresh solar/electrical fencing within the area as proposed to be Elephant Corridor by the Expert Committee.

6. So far as the existing solar/electrical fencing is concerned, the Court will hear and pass appropriate orders on the next date."

10. On 1.12.2009, learned counsel for the sixth respondent-The Hospitality Association of Mudumalai, in W.P.No.10098 of 2008, (intervenor in the said Writ Petition) submitted that there are resorts legally constructed, after permission, on the private forest area. It is not clear as to whether they will fall within the Elephant Corridor on the basis of the report of the Expert Committee of the State. According to him, the Central Government has already issued certain directions with regard to 88 Elephant Corridors of India and have prepared a map showing the proposed Elephant Corridor. It was suggested that the said proposal of the Elephant Corridor prepared by the Central Government, should be accepted. This was opposed by the learned counsel appearing for the State and according to him, it is the State Government which can decide as to what is the Elephant Corridor within their territory. Learned counsel appearing on behalf of the Central Government, submitted that it is the State Government which is to decide the Elephant Corridor. Taking into consideration the rival stand, on 1.12.2009, the State Government was directed to file an affidavit:

(i) giving the time by which they will approve the map of the Elephant Corridor on the basis of the Expert Committee's report,

(ii) what is their stand with regard to the Elephant Corridor map prepared by the Central Government,

(iii) the action which the State Government intends to take against illegal resort owners, who have constructed resorts in the forest lands or Elephant Corridor without permission of the Forest Department or other competent authorities,

(iv) what action the State Government intends to take with regard to the residents, who have erected solar fencing already, what is the specification prescribed for solar fencing, if any to be allowed and which authority can allow such erection of solar fencing.

11. On 2.12.2009, learned counsel appearing on behalf of the State produced a decision of the State, as contained in Letter No.2805/FR.5/2008, dated 2.12.2009, which reads as follows:

"2. As per the directions of the High Court, during the pendency of the writ petitions, the Government will ensure that no illegal construction is made in the area shown as Elephant Corridor in the report of the Expert Committee. Further, Government should not allow any new construction in the area without prior intimation to the Court. Further immediate action should be taken against illegal, unauthorised holiday resorts under relevant rules/laws.

3. No person should be allowed to put a fresh solar/electrical fencing within the area as proposed to be Elephant Corridor by the Expert Committee. Further action should be taken for the removal of existing unauthorised electrical/solar fencing.

4. In view of the above, I am directed to request you to comply with the above directions and send a report."

At that stage, learned counsel for the tribals and other traditional forest dwellers submitted that in the letter dated 2.12.2009, a vague direction has been given to take steps to remove the existing unauthorised electrical/solar fencing; according to the counsel for the Tribals and other traditional forest dwellers, there is no prescription made by the State for obtaining any permission for having electrical/solar fencing and therefore, it cannot be stated that as to which one is existing unauthorised electrical/solar fencing. The matters were adjourned for further hearing.

12. Learned counsel for the State submitted that the proposed map of the Elephant Corridor, on the basis of the report of the Expert Committee, has now been prepared. The publication will be made recently, calling for objections from the private land owners, whose lands fall within the proposed Elephant Corridor. Only on hearing them, finality will be given and thereafter, it will be decided as to whether the private lands will be acquired to enable the Elephants to pass through the Elephant Corridor without any obstruction, except those which belongs to Scheduled Tribes and other traditional forest dwellers.

13. Learned counsel Mr.Elephant Rajendran, appearing for the petitioner in W.P.No.10098 of 2008 referred to Tamil Nadu Private Forests (Assumption of Management) Act (LV of 1961) and it was suggested that under Section 3 therein, it is open for the State Government to take over the Management of the private forest.

14. Learned counsel appearing for the Scheduled Tribes and other traditional forest dwellers submitted that the solar power fencing which has already been erected, should not be removed, without giving proper opportunity to the parties.

15. It has been brought to the notice of the Court that the Government of India, from its Ministry of Environment and Forests, has issued two directions with regard to the Elephant Corridors. One, by Letter No.2-15/2002-PE, dated 11.8.2006 addressed to the Chief Wildlife Wardens (PE) of all the States and Union Territories, in which the Government of India has directed the individual States/Union Territories to identify the Elephant Corridor of their respective States and to nofify the Elephant Corridor to protect the Elephants, with a request to take action, if no such action has already been taken. The said letter dated 11.8.2006 reads as follows:

"Sub: Regarding Elephant corridors.

Sir,

You may be aware that Wildlife Trust of India has published a book "Right of Passage--Elephant Corridors of India". In the book it has been mentioned that 88 elephant corridors have been identified with the help of State forest Department and NGOs.

It is necessary that elephant corridors are protected and conserved. It has been informed by CWLW, Uttaranchal that the State is in the process of notifying the elephant corridors in Uttaranchal. I am sure similar action must be under consideration in your State. It will also be necessary that the elephant corridors are provided with some legal protection like under EP Act. May I request to take necessary action if not already initiated, for notification and protection of the identified elephant corridors in your State. An Action Taken Report on the issue will

be highly appreciated.

Yours faithfully,

Sd/-

(A.N.Prasad)
IGF & DIRCOR (PE)."

By the other letter in No.2-2/04-PE, dated 11.11.2009, issued by the Government of India, from its Ministry of Environment and Forests, Project Elephant, addressed to the Chief Wildlife Wardens (of all PE States), a specific direction has been given to ensure that no solar power fencing is erected in future. It is also mentioned that wherever the deaths of elephants due to electrocution in such places have taken place, the management needs to be prosecuted for hunting and such fencing needs to be removed at once. The said letter dated 11.11.2009 is also quoted hereunder:

"SUB: Death of elephants by electrocution-reg.

Sir,

The Ministry is receiving reports of deaths in tea/coffee estates especially in Assam and Karnataka due to unregulated voltage in the solar power fencing erected by them. This is a serious issue and in fact such an act tantamounts to wilful hunting as per Section 16(b) and thus is in violation of Section 9 of the Wildlife (Protection) Act, 1972.

2. You are, therefore, requested to make it known to all the tea gardens, coffee estates and others located in the elephant areas to ensure that no such fencings are created in future. Wherever deaths of elephants due to electrocution in such places have taken place, the management needs to be prosecuted for hunting and such fencing needs to be removed at once.

Yours faithfully,

Sd/-

(A.N.Prasad),
Inspector General of Forests and Director (Project Elephant)"

16. From the aforesaid directions of the Central Government, it would be evident that:
    (i) even the Central Government has asked the State Governments to identify and notify the Elephant Corridor of their respective States, by giving protection to the elephants.

    (ii) the authorities of all the State Governments have been directed to ensure that no solar power fencing is erected in future to ensure that no death of any animal including elephant, takes place.

17. Unregulated voltage in the solar power fencing, to the animals in general, particularly, within the forest area, is not only injurious to the wild animals, but fatal accident may cause to human beings, particularly, the staffs and officials of the Forest Department and other tribals and traditional forest dwellers, who are staying within the forest area.

18. In the above background, we have already issued a direction on 4.11.2009, directing the respondents to ensure that no fresh solar/electrical fencing is erected in future, and the said direction is hereby confirmed.

19. So far as the solar power fencing erected within the forest area, whether Government Forest or private forest, we are of the view that unregulated voltage solar power fencing cannot be allowed to be permitted. The State Government, in its letter dated 2.12.2009, has already directed the authorities to take further action for removal of existing unauthorised electrical/solar fencing. In the absence of any guidelines issued by the State Government in this regard, we are of the view that the following procedures should be followed for the present, to find out as to whether the existing solar power fencing should be removed or not:

    (i) A notice should be published in the newspaper, asking the persons residing within the area to obtain post-facto approval of the solar power fencing, if already erected. The publication should be made in two local newspapers, one in English and another in vernacular Tamil and intimation should be given to all the local Panchayats so as to give information to the concerned persons. The time schedule of about one month should be given for obtaining such post-facto approval.

    (ii) While asking for such post-facto approval, the persons should be asked to give the details of design and supply of the solar power fencing system already erected by them. They will specifically state as to what is the voltage used in the solar power fencing and how they regulate such voltage.

20. We have also noticed that the Government of Tamil Nadu, through its Forest Department, Tirunelveli Division, Tirunelveli, earlier issued a "Short Tender Notice" in 2006, and the tender documents were made available for sale in the Office of the District Forest Officer, Tirunelveli Division, Tirunelveli, upto 1.3.2006 and therein, the tenders were called for, for erection of solar fencing in the lower boundaries of Sivagiri RF of Sivagiri Range in Sivagiri Taluk during 2005-2006. That means, the State Government has knowledge as to what should be the minimum criteria for erecting the solar power fencing and to find out the standards of the solar power fencing criteria, it is the criteria which the State Government has sanctioned for them. They will apply the same criteria with regard to the existing owners of the solar power fencing, who may apply for the post-facto approval.

21. If no application is filed within the time frame, on receipt of such application and taking into consideration the standards of solar power fencing, if any adverse decision is taken, the authorities will communicate such decision to such owners. All such solar power fencing should be treated to be unauthorised solar power fencing, which should be removed in terms of the decision of the Government, in its letter dated 2.12.2009.

22. So far as the publication of map for the Elephant Corridor is concerned, if the authorities have prepared or will finalise on the basis of the Expert Committee's Report, in terms of the earlier orders of this Court, we pass the following order:

    (i) The State Government will have to decide as to which Elephant Corridor has to be identified, i.e. corridor identified by the Central Government in the letter dated 11.8.2006, with the help of the State Forest Department and NGOs, or the proposed Elephant Corridor as identified by the Expert Committee in the present cases, preferably within one month.

    (ii) The publication of such map showing the Elephant Corridor, should be made by the State through the Forest Department, in two local newspapers, one in English and another in vernacular Tamil, giving the details of Survey Numbers

of private lands which are falling within the proposed Elephant Corridor. The persons may be asked to submit their objections within a time frame, say one month.

(iii) The intimation of such proposed Elephant Corridor along with a copy of the report of the Expert Committee, should be also forwarded to each local Panchayats, which fall within the proposed Elephant Corridor, so that the local persons can have the knowledge of the corridor of their own, if they so choose.

(iv) No separate individual hearing is required to be given to any person, though a mass hearing may be given as generally given in the "Land Acquisition" cases and on hearing such objections, the proposed Elephant Corridor including the map containing the different Survey Numbers should be finalised and be also published at an early date, say maximum within six months.

(v) No individual or any Association generally should intervene in the case. If they have any objection, they may raise before the authorities concerned.

23. On such finalisation, it will be open for the State to decide:

(a) whether the private lands which are falling within the Elephant Corridor, do not belong to Scheduled Tribes and other traditional forest dwellers, who have a right under the provisions of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, and whether such lands should be acquired. If the decision is taken to acquire the lands, they will follow the regular procedures as laid down under the provisions of the Land Acquisition Act.

(b) If the State Government, in the meantime, wants to take over the management of the private forest, it may do so in terms of Section 3 of the Tamil Nadu Private Forests (Assumption of Management) Act (LV of 1961), so as to enable the elephants to pass through the corridor without any hindrance till the lands are acquired.

24. We make it clear that this Court has not decided the question as to who is a Scheduled Tribe or a traditional forest dweller, residing within the proposed Elephant Corridor. It is for the competent authorities who will decide the forest rights of such Scheduled Tribes and traditional forest dwellers, as conferred on them under Section 3 of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. Till such claim is finalised, as under the provisions of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, they have a right to hold the lands in their possession, they be not evicted during the procedures and directions as given above, but for issuance of patta or certificate of title in their favour, the State Government is required to obtain permission from this Court, in view of the interim order dated 30.4.2008 passed by a Division Bench of this Court in M.P.No.1 of 2008 in W.P.No.4533 of 2008, wherein, the vires of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, are under challenge.

25. However, we further make it clear that the above order to remove the unauthorised solar fencing will equally be applicable to the tribals and other traditional forest dwellers.

26. So far as the unauthorised buidlings in the area in question, are concerned, this Court, by order dated 1.12.2009 in W.P.Nos.32747 of 2007 and 28693 of 2008, has already

issued directions to remove the unauthorised constructions. Hence, in respect of all the unauthorised constructions made within the District of Nilgiris, which includes the unauthorised constructions if any made on the private lands, private forest lands, Government lands, Government Forest lands, the District Collector, Nilgiris, will ensure removal of such illegal constructions in terms of the order dated 1.12.2009 already passed in W.P.Nos.32747 of 2007 and 28693 of 2008.

27. Further, we also make it clear that in the forest areas, if there is any unauthorised commercial buildings, as may be found by the Forest Department, including the resorts, and if it is found that some of the buildings are used for commercial purposes, such as resorts, resort houses, etc., and if they have been given electricity connection as residential houses, the Tamil Nadu Electricity Board will ensure disconnection of power supply to such premises.

28. We adjourn the case for a month with a direction to the respondents-authorities of the State (Forest Department) to submit a report with regard to the publication of the proposed Elephant Corridor and the other steps as may be taken for removal of unauthorised solar power fencing, by the next date.

29. Post the matters under the caption "For Orders" on 7.1.2010 at 2.30 p.m.

30. Let a copy of this order be handed over to the learned counsel appearing for the parties.

Rani vs. State of Tamilnadu & Ors.

MADRAS HIGH COURT (MADURAI BENCH)
WP (MD) NO. 5280 OF 2010
28.10.2010
CORAM: R. BANUMATHI AND S. NAGAMUTHU, JJ.
CITATION: 2010 SCC ONLINE MAD 5473

SUMMARY

The writ petition has been filed seeking rehabilitation of the 40 tribal families who are members of the Kodaikanal Ambedkhar Unorganised and Construction Workers Welfare Rights Sangam, Kumbarayur Unit, which includes permanent house shelters and other basic amenities such as drinking water, electricity, health care and education. In particular, the petition seeks directions to the respondent to allot alternative agricultural lands in accordance with Section 3(1)(m) of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA), arguing that their ancestors were illegally evicted and displaced from the forest land.

The Court examined the documentation produced by the State government that it has already initiated acquisition proceedings for the purpose of allotting house sites to the 15 families who have made applications in this regard. The Court indicated that it is satisfied with this endeavour, directing only that the process should be expedited.

The Court observed that with regard to the remaining 25 families who have not yet made applications under the FRA, they should do so. These applications will be duly considered by the second respondent (District Collector, Dindigul District) and if they are found to be eligible, he shall take appropriate steps for grant of house sites. The Court further directed that the other amenities be provided in terms of the FRA.

EDITOR'S NOTE

The Court has not considered or passed any directions with regard to the main prayer of the petitioners, namely, the grant of agricultural lands. It does not appear to have examined the meaning and content of the forest right under Section 3(1)

(m) of FRA. Further, the Court appears not to have noticed the detailed three-tier mechanism for recognition and vesting of rights under Section 6 of FRA, choosing instead to issue a direction that the District Collector shall consider the applications of the petitioners. This is contrary to the statute.

ORDER

(Order of the Court was delivered by R. Banumathi, J.)

1. Petitioner who is the President of Kodaikanal Ambedkhar Unorganised and Construction Workers Welfare Rights Sangam, Kumbarayur Unit has filed this Writ Petition seeking for Writ of Mandamus directing the Respondents to take immediate steps to rehabilitate the enlisted 40 Tribal families belonging to Paliyan Tribe with permanent shelters and other basic amenities like drinking water, electricity, health care and education facilities and further direction to the Respondents to rehabilitate the 40 families with alternative agricultural lands in accordance with Sec.3(1)(m) of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

2. We have heard Mr. P. Rathinam, learned counsel appearing for the Petitioner. We have also heard Mr. R. Balasubramani, learned Additional Government Pleader for Respondents. 3rd Respondent-Special Tahsildar, Adi Dravidar Welfare Office is also present in the Court.

3. On instruction, the learned Additional Government Pleader has submitted that proposals had been sent for acquiring the patta lands in S.F.No.82/2 - 0.16.0 Hectares belonging to one Jayaraj for allotment of house sites to 15 persons who have already given applications to the District Collector, Dindigul. It was further submitted that steps are being taken to complete the acquisition proceedings. In this regard, the learned Additional Government Pleader has drawn our attention to the letter (illegible) dt. 28.10.2010 addressed to him which reads as under:

(illegible)[65]

4. Recording the above communication dated 28.10.2010, the Writ Petition is disposed of directing the 1st Respondent to expedite the acquisition proceedings and on completion of acquisition proceedings to allot house sites to the 15 applicants who have already made applications to the District Collector, Dindigul.

5. In so far as, the remaining 25 families, the learned Additional Government Pleader submitted that so far no applications were received. The remaining 25 families shall file their applications before the 2nd Respondent and the 2nd Respondent shall consider the same and take appropriate steps for giving house sites to those 25 families in the light of the special enactment of Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 subject to their eligibility. In so far as the other amenities to be provided, the Authorities shall consider the same in the light of the provisions of the Act and take appropriate steps. There is no order as to costs.

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[65] This portion of the judgment, which is probably an extract from a letter in the vernacular, has unfortunately been scrambled while being uploaded on to the High Court website. Unfortunately, efforts to access the judgment from other sources also met with the same result.

In Defence of Environment and Animals vs. The Principal Chief Conservator of Forests & Ors., etc.

WP (C) NO. 10098 OF 2008, ETC.
MADRAS HIGH COURT
07.04.2011
CORAM: ELIPE DHARMA RAO, D. HARIPARANTHAMAN, JJ.
CITATION: (2011) 4 MLJ 20

SUMMARY

The main writ petition was filed as a public interest petition by an elephant rights activist, Mr. Elephant G. Rajendran seeking directions from the High Court for the declaration of elephant corridors in the State of Tamil Nadu. Among other things, the petition sought the removal of encroachments from the lands falling within the projected elephant corridor, including forest lands.

A large number of persons who were likely to be affected either impleaded themselves as respondent parties, or filed substantive writ petitions seeking protection of a variety of rights. This included organisations and individuals representing the rights of forest dwellers under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA). Interim orders were passed to protect the forest dwellers from dispossession during the pendency of the proceedings[66].

The detailed arguments addressed in the case are not being summarised. Insofar as forest dwelling STs and OTFDs are concerned, substantive writ petitions were filed on their behalf seeking protection of their rights under FRA[67]. They argued that the forest rights recognition process is underway in the State and they cannot be dispossessed.

[66] See, for instance, order dt. 3.12.2009 in WP Nos. 10098 of 2008, etc. extracted elsewhere in this compendium.

[67] See, in particular: Writ Petition No. 2839 of 2009, *M. Narasimhan, President, Tamil Nadu Vivasaya Sangam vs. State & Ors.*; Writ Petition No. 2762 of 2009, *Mudumalai Pazhangudiyanar Nala Sangam vs. State & Ors.*

FINDINGS AND DIRECTIONS OF THE COURT

The Court was of the view that in terms of the clear mandate of Article 51-A (g) of the Constitution to protect forests, wildlife, animals and birds, and also relying upon various expert committee reports in this regard, it is necessary and important to issue directions for the declaration of an elephant corridor in the State of Tamil Nadu, to ensure the free movement of elephants from one territory to another, and prevent human-animal conflict. It accordingly directed the State government to declare such elephant corridor without any further delay, and directed that all persons who are within the corridor area must give vacant possession of the lands to the State government within a fixed timeframe.

The Court, however, made it clear that with regard to the forest dwellers whose rights are protected under FRA, the State government must strictly comply with the provisions of the Act, and in the event any forest dweller is evicted, they must be provided with alternate and suitable accommodation, or monetary compensation if they so wish.

EDITOR'S NOTE

It may be noted that this judgment was appealed against in the Supreme Court by a multiplicity of parties, including persons/bodies which were not parties before the High Court, other than forest dwellers whose rights are protected. The Supreme Court has through various interim orders protected the petitioners, by directing an interim stay of dispossession and demolition of the buildings of the petitioners. The batch of petitions is pending adjudication.

JUDGMENT

(The judgment of the Court was delivered by Elipe Dharma Rao, J.)

1. By these matters, the legality or otherwise of the decision of the Government of Tamil Nadu to identify and notify 'Elephant Corridor' at Nilgiris, and its consequential actions have been questioned by various parties.

2. The greatness of a Nation and its moral progress can be judged by the way its animals are treated', so said the Father of the Nation Mahatma Gandhi.

3. It is with this spirit, the 'Project Elephant' was launched in February, 1992 by the Government of India, Ministry of Environment and Forests, as a centrally sponsored scheme, to provide financial and technical support of wildlife management efforts by States for their free ranging populations of wild Asian Elephants. This project was to provide financial and technical support to major elephant bearing States in the country for protection of elephants, their habitats and corridors. The project aims to ensure long term survival of viable conservation reliant populations of elephants in their natural habitats by protecting the elephants, their habitats and migration corridors. Other goals of Project Elephant are supporting research of the ecology and management of elephants, creating conservation awareness among local people, providing improved veterinary care for captive elephants. It also seeks to address the issues of human elephant conflict and welfare of domesticated elephant. This project also aims to achieve the following

objects:

1. Ecological restoration of existing natural habitats and migratory routes of elephants.
2. Development of scientific management planning for conservation of elephant habitats and viable elephant populations in India;
3. Promotion of measures for mitigation of man-elephant conflict in crucial habitats;
4. Moderating impact of human and domestic stock activities in crucial elephant habitats;
5. Strengthening of measures for protection of wild elephants from poachers and unnatural causes of death;
6. On Elephant management related issues;
7. Increase public conservation education and awareness programmes about elephants;
8. Eco-development of elephant habitats;
9. Provide improved veterinary care for elephants.

4. Under this scheme, with a view to minimize the incidents of man-animal conflict and to have effective control to check poaching, the Principal Chief Conservator of Forests and Chief Wildlife Warden has suggested that the private/patta lands forming the traditional movement corridors of animals, particularly elephants, between the Mudumalai Wildlife Sanctuary and National Parks to other parts and also from Eastern and Western Ghats may be brought under the control of the Forest Department, by acquiring the lands after paying compensation to the owners. The Ministry of Environment and Forests, Government of India, by its proceedings No. 2-15/2002-PE, dated 11.8.2006 has requested the Government of Tamil Nadu to take necessary action for notification and protection of the identified elephant corridors in the State. This is followed by another communication dated 14.12.2009.

5. Pursuant to the Government of India's communication, above referred, dated 11.8.2006, the Government of Tamil Nadu, under G.O. Ms. No. 93, Environment and Forests Department, dated 21.8.2007, has appointed an Exploratory Committee with Collector of Nilgiris as the Chairman, the members being (i) District Forest Officer, Nilgiris North Division; (ii) Wildlife Warden, Ooty; (iii) Revenue Development Officer, Ooty and (iv) the concerned Tahsildar. It has been stated by the official Respondents that the said Committee was pursuing action to explore the possibility of acquiring the patta lands with the willingness of the farmers, who can spare their lands for elephant corridors.

6. While things stood thus, W.P. Nos. 10098 of 2008 has been filed by an Organisation named 'In Defence of Environment and Animals', represented by its Managing Trustee Elephant G. Rajendran, a practicing advocate of this Court as a pro bona publico praying to issue a writ of mandamus directing the official Respondents to keep the corridor of the animal without any encroachment and any other distribution for the free movement of elephants and other animals. It has been contended by this Petitioner that the elephant corridor is being disturbed by some encroachers and builders and due to several factors including mushrooming of resorts, elephant corridors were either closed or becoming narrow. While appreciating the move of the Government to acquire the lands near the corridor, the Petitioner has stated that the corridor to be kept without any encroachment since, to his knowledge, there are several encroachments by way of constructing buildings and cultivation process. According to the Petitioner, the Forest Department has not taken any stringent action to evict the encroachers of all kinds. Therefore, he contended that the electric power connection to all the encroachments and resorts to be disconnected at once and the Forest and Revenue Departments shall take necessary steps to evict all the encroachings from the elephant corridor and that all the corridors are to be kept available for the free movement of the animals since there

cannot be any disturbance to the corridors.

7. During the pendency of the W.P. No. 10098 of 2008, this Court, by the order dated 2.2.2009, has directed the District Collector to file a status report showing the steps taken to remove all the encroachments from lands identified for development of the elephant corridor. Aggrieved against this order of this Court, W.P. Nos. 2762 and 2839 of 2009 have been filed by the Scheduled Tribes and others traditional forest dwellers.

8. It has been averred in this writ petitions that they are residing in the Revenue lands for more than 50 to 100 years and had right to occupy the lands under the provisions of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. They have also contended that the District Collector of Nilgiris, issued proceedings dated 11.8.2008 constituting the Divisional Level and Sub Divisional Level Monitoring Committees as stipulated in Rules 5 and 7 of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007. It is their contention that the officials such as the Tahsildar, RDO along with the police on the orders of the District Collector have visited the village on 7.2.2009 and directed all the villagers to stop all cultivation activities and threatened to destroy all the standing crops. They have also threatened to disconnect the electricity to these villages. The officials are also preventing the Petitioners from carrying on their regular livelihood activities such as collector of minor forest produce and they have also prohibited the Petitioners from grazing cattle and other the stock and these acts of the District Collector are contrary to the Act. These Petitioners fear that they are likely to be evicted as encroachers and be deprived of their livelihood. In this writ petition, status quo was ordered by the Court on 12.2.2009 by a learned single Judge and after it has been brought to the notice of the said Court about the order of removal of encroachments already passed by a Division Bench, the said order of status quo was recalled by the order dated 13.2.2009 and a modified order was passed by the Division Bench, after posting these two writ petitions along with W.P. No. 10098 of 2008, directing the authorities concerned not to evict the Scheduled Tribes and other Traditional forest dwellers and others, whose claims are pending and may have some right under the provisions of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. The State Level Monitoring Committee, which was constituted by the State under the provisions of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, vide G.O. Ms. No. 19, dated 9.2.2008 was also directed to look into the matter and submit its report to the State Government and also to file a copy of the same before this Court.

9. At this stage, Hospitality Association of Mudumalai, has come forward to file an impleadment petition, objecting the writ petition on the ground that their association consists of residents of the Masingudi Bokkapuram area and they are providing hospitality to the tourists who visit the area to see wildlife; that there is misguided sense of hostility towards the people who own and run guest houses in this area from the authorities and self proclaimed environmentalists dwelling outside the area and one needs to understand that wild life tourism sustains conservation as it is in the interest of the promoters of wild life tourism to conserve and sustain the environment, ecology and wild life in the region and therefore, they act as guardians of nature.

10. Though this argument advanced on the part of association seems to be attractive, in practice, the facts are different. There is voluminous material on record to show that the guest house owners in this area have indulged in nature destruction causing obstruction to the free passage of the wild life since there is continuous vehicle passages and under the name of eco- home stay accommodation in the locality, they have indulged in eco-destruction.

11. It is also their contention that the members of the Petitioner association are living there for more than 50 to 60 years; that there is virtually no man animal conflict in the area since there is little or no agriculture and the elephant can freely move around throughout the area. They would further say that they are very keen and will cooperate to a scientific solution for living in harmony and co-exist with wild life and nature.

12. Elephant is the largest terrestrial mammal of India. Elephant being wide ranging animal requires large areas. It being the herbivore, the requirement of food and water for elephants are very high and therefore their population can be supported only by forests that are under optimal conditions. The status of elephant can be the best indicator of the status of the forests. About half of the Asian elephant population is in India. We are informed that elephants need 200-250 kgs. of food and 200-300 litres of water daily and since it has a very weak digestive system, which can only digest 40% of the food it eats, the elephant needs to move around other areas of the habitat or food to enable the greenery to revive before it can feed in same area again and therefore, the elephant needs to move around for the purposes of breeding since it has been scientifically programmed by nature never to inbreed within its own birth family and hence it needs to move around between gene pools.

13. The District Forest Officer at Nilgiris North Division did a power point presentation before this Court during the course of arguments wherefrom it is seen that Nilgiris Eastern Ghats landscape is more 10,000 sq.km. in forest area with good connectivity and nearly all the western forests are connected to the eastern ghats landscape by the crucial area of the Nilgiris North Division; that more than 8000 elephants are found in this connected landscape with more than 260 tigers in the same space. Explaining the connectivity aspect, it has been asserted that forests of Nagerhole are connected to the forests of the Bandipur in the East and western side the forests of Brahmagiri, Bandipur in turn connects to the forests of Mudumalai which connects to Nilgiris North Division and to the forests South and the Eastern ghats. This landscape is the single largest population of the Asian Elephant in the world and also has the largest tiger area, which indicates the quality of the forest. The importance of the area led to the declaration of Nilgiris as the first designated Biosphere Reserve in India in 1986 since it is a hotspot among the Western ghats. It is also seen that even though there is more than 50% of area covered by forests, only a small fraction is available for the Tigers in this area. But this information furnished by the District Forest Officers has also been objected by the petitioners as being one sided. We do not understand such a blanket negative statement made by the private land owners as against a scientific study made by the Forest Officer, who is having personal working experience in the area and to whom no bias could also be attributed.

14. The Elephant habitations in Tamil Nadu seem to lie primarily along the slopes of the Western Ghats adjoining the State of Kerala and Karnataka and portions of Eastern Ghats abutting Mysore Plateau. It is also seen that the largest population of elephant in Tamilnadu is found in Nilgiris Eastern Ghats Elephant Reserve at Nilgiris.

15. Since the Moyar Elephant Corridor plays a vital role in migration of elephants from Eastern Ghats to Western Ghats and vice versa, an extent of 515.22 acres of patta lands in Masinagudi, Hullathi and Kadanad villages has been proposed for acquisition by the Forest Department at a cost of ` 1,545.66 lakhs. Likewise, another elephant corridor, Kallar, Jakkanarai which lies in the jurisdiction of Kotagiri range of North Nilgiris division is very critical one for connecting silent valley. Coimbatore/Nilgiris North/ Nilgiris East and in turn connecting Western Ghats and Eastern Ghats. So, an extent of 68.20 acres of patta lands in Jackanarai village at the cost of ` 390 lakhs has also been proposed to be acquired with the financial assistance from the Government of

India. The Forest Department is the requisiting Department in the land acquisition proceedings initiated to acquire patta lands for the elephant corridor.

16. On 10.9.2009, the then District Collector, Nilgiris (Mr. Anandrao Patil, IAS) appeared before this Court and has shown certain slides in the laptop showing the corridor of elephant. He has stated that to allow the elephants to pass through the Corridor, the unauthorised occupants are to be evicted, but it has been admitted by him that those who are tribals and traditional forest dwellers and are protected under the provision of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, their rights will be protected and they will not be evicted from the corridor. While on the part of the petitioner, Mr. Elephant Rajendran, it has been argued and requested the Court to direct the eviction of the unauthorised occupants from the elephant corridor for smooth movement of elephants, Ms. Vaigai, learned Counsel appearing on behalf of the petitioner in W.P. No. 2839 of 2009 and representing other forest dwellers submitted that without giving proper opportunity to all affected persons, neither an area can be declared as forest corridor not persons could be evicted.

17. Considering the facts and circumstances, this Court has issued the following directions:

"(i) Forest Department, which has the knowledge of movement of elephants in the corridor, may identify and inform the same;

(ii) the State Government may publish the information regarding the elephant corridor and the area, in leading newspapers and also by the drum beating/tom torn, calling for objections of locals, if any, in the area in question;

(iii) after hearing the locals, particularly those who may be affected, they may finalise the elephant corridor from which unauthorised occupants are to be evicted;

(iv) to ensure that scheduled tribes and other forest traditional dwellers are not affected, it is required to identify the other traditional forest dwellers in terms with the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Tribes) Rules, 2007; and

(v) only after the recommendation and recording their names in the appropriate register, they may proceed with eviction, by giving notice in the newspaper, by them beating/tom torn and by giving individual notice to the unauthorised occupants.

5. So far as the acquisition of the land is concerned, if any private land is required to be acquired, they will have to follow the procedure under the Land Acquisition Act. Prima facie, as the tribals and other forest dwellers cannot be evicted from the unauthorised lands, their lands need not required to be acquired, if it is a forest land. Learned counsel for the parties are requested to give further suggestion in the matter, in the interest of public and elephants."

18. When the case proceeded, the map prepared by the District Collector was stiffly objected by the learned Counsel appearing on behalf of the Scheduled Tribes and Traditional Forest Dwellers on the ground that it is the Forest Department, which is empowered to point out the elephant corridor to the State. In this background, on 22.10.2009, the Principal Secretary of the Environment and Forest Department the Principal Chief Conservator of Forest and Chief Wildlife Warden; the Principal Chief Conservator and Head of the Forest Department and the District Forest Officer, Nilgiris Northern Division appeared person before the Court and after hearing them, it was felt that a team of experts of the environment and forest departments be constituted, including the Principal Chief Conservator of Forests, to suggest the elephant corridor and submit a report after taking into consideration the different books published with regard to the elephant corridor, namely:

"(a) Ecology of the Asian Elephant

(b) The Asian Elephant in Southern India;

(c) A brief documentation of elephant corridors in South India;

(d) Acquisition/Transfer of sensitive areas for restoring/maintaining the sanctity of the Moyar Valley Elephant Corridor and Evaluation of the status, and

(e) Land use pattern and Habitat Utilization of Elephant in Corridors between Western Ghats and Eastern Ghats through Mudumalai Wildlife Sanctuary and National Part and Nilgiris, Tamil Nadu."

19. In pursuance of the directions of the Court, an Expert Committee was constituted by the Government with the following members:
    1. Principal Chief Conservator of Forests and Chief Wildlife Warden, Chennai- Chairman
    2. Chief Conservator of Forests (Tamil Nadu Afforestation Project) and Regional Chief Conservator of Forests for Nilgiris District, O/o. Principal Chief Conservator of Forests, Chennai - Member
    3. Conservator of Forests, Coimbatore Circle, Coimbatore - Member
    4. Conservator of Forests and Field Director, Mudumalai Tiger Reserve, Udhagamandalam - Member
    5. District Forest Officer, Nilgiris North Division, Udhagamandalam Member-Secretary

20. The terms of reference of this Committee are:
    "(1) Examine the books and study reports referred in Para 3 above and also other authenticated/specialized books and documents relating to elephant corridor, identify the elephant corridor and prepare a detailed report;
    (2) The books, reports and other particulars referred in the Expert Committee Report shall be specifically referenced with page numbers.
    (3) Enquire Forest Officers, local people, tribal and also avail option from the experts etc. regarding the elephant corridor in the Nilgiris area and specify the results in the report.
    (4) Any other points/suggestions relating to elephant corridor."

21. It is seen from the records that the said Expert Committee visited the elephant corridor area on 28.10.2009 and 29.10.2009 and enquired the field officers, tribal people and local people and obtained opinion from the following experts, scientists and senior forest officers about the elephant corridor in the Moyar Valley of Nilgiris.

    Senior Forest Officers

    1. Mr. S. John Joseph, IFS
       Former Principal Chief Conservator of Forests and Chairman,
       Society for Social Forestry Research and Development,
       Tamil Nadu

    2. Mr. S. Sankaramurthy, I.F.S.,
       Former Principal Chief Conservator of Forests,
       World Wide Fund for Nature-India,
       Tamil Nadu State Office,
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Experts and Scientists

3. Mr. R. Sukumar,
Professor and Chairman,
Centre for Ecological Sciences,
Indian Institute of Science, Bangalore.

4. Mr. Ajay A. Desai,
Wild Life Consultant

5. Dr. N. Sigaganesan,
Principal Consultant,
Wild Life and Forests,
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Mayiladuthurai,
Nagapattinam District.

6. Mr. B. Ramakrishnan,
Field Officer,
Wild Life Trust of India,
No. 10, Sandal Wood Depot Road,
Northpet, Sathyamangalam-638401,
Erode District.

7. Mr. R. Arumugam,
Wild Life Biologist
Wild Life Trust of India,
149/13, Sumangali Nagar, Suleeswaranpatti, Pollachi,
Coimbatore NGOs:

NGOs

8. Mr. A.C. Soundarrajan,
Member- The Nilgiris Wild Life and Environment Association
Member - State Wild Life Advisory Board
Member - Governing Council Mudumalai Tiger Reserve
"Aaditya", 129 Avalanchi Road, Fern Hill Post,
Ootacamund-643001.

9. Mr. Krupakar and Senani,
Wild Life Film Maker,
Nilgiris South Biosphere Reserve,
Mysore.

10. Mr. N. Mohanraj,
WWF-India,
Western Ghats Landscape Officer,
5/2, Second Cross, Chinthamani Nagar,
K.K. Pudur Post, Coimbatore-643038.

11. Mr. S. Jayachandran,
Joint Secretary,
The Nilgiris and Environment Association,
C/o. District Forest Office (North) Mount Stuart Hill,

Udhagamandalam, Nilgiris.

12. Mr. Ramesh Bellie,
Secretary, Nilgiris Potato and Vegetable Growers Association,
Geetha Lodge Complex,
Ooty.

22. Thereafter, the Expert Committee submitted its report on 4.11.2009 along with its field staff reports, to this Court. Considering this arguments advanced, this Court allowed the Expert Committee to file a map showing the boundaries of the Elephant Corridor and the State Government was also directed to state as to whether they intend to accept the report in his totality or with modification.

23. At that stage, the learned Counsel for one of the writ Petitioners viz. The Hospitality Association of Mudumalai (who is also the sixth Respondent in W.P. No. 10098 of 2008) has argued that there is hostile attitude towards the resorts and that they have constructed the resorts after obtaining permission on the private forest area.

24. Considering the stand of the Central and State Governments that it is the State Government which is to decide as to what is the elephant corridor within their territory and the rival arguments, this Court, by the order dated 1.12.2009, directed the State Government to file an affidavit stating as to what action it intends to take with regard to the resort owners residents and also on the corridor map prepared by the Central Government. Accordingly, on 2.12.2009, the State Government has come forward with its decision, as contained in the letter No. 2805/FR.5/2008 of the even date, thereby stating that they will ensure that no illegal construction is made in the area shown as elephant corridor in the report of the Elephant Committee and that no person will be allowed to put a fresh solar/electrical fencing within the proposed area of elephant corridor.

25. Thereafter, hearing both the parties and taking into consideration the earlier actions of the State Government with regard to the issues involved in the matter, this Court, by the order dated 3.12.2009 has ordered as follows:

"(i) The State Government will have to decide as to which Elephant Corridor has to be identified, i.e. corridor identified by the Central Government in the letter dated 11.8.2006, with the help of the State Forest Department and NG Os, or the proposed Elephant Corridor as identified by the Expert Committee in the present cases, preferably within one month.

(ii) The publication of such map showing the Elephant Corridor, should be made by the State through the Forest Department, in two local newspapers, one in English and another in vernacular Tamil, giving the details of Survey Numbers of private lands which are falling within the proposed Elephant Corridor. The persons may be asked to submit their objection within a time frame, say one month.

(iii) The intimation of such proposed Elephant Corridor along with a copy of the report of the Expert Committee, should be also forwarded to each local Panchayats, which fall within the proposed Elephant Corridor, so that the local persons can have the knowledge of the corridor of their own, if they so choose.

(iv) No separate individual hearing is required to be given to any person, though amass bearing may be given as generally given in the 'land Acquisition' cases and on hearing such objections, the proposed Elephant Corridor including the map containing the different Survey Numbers should be finalised and be also published

at an early date, say maximum within six months.

(v) No individual or any Association generally should intervene in the case. If they have any objection, they may raise before the authorities concerned.

23. On such finalisation, it will be open for the State to decide:
(a) whether the private lands which are falling within the Elephant Corridor, do not belong to Scheduled Tribes and other traditional forest dwellers, who have a right under the provisions of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, and whether such lands should be acquired. If the decision is taken to acquire the lands, they will follow the regular procedures as laid down under the provisions of the Land Acquisition Act.

(b) If the State Government, in the meantime, wants to take over the management of the private forest, it may do so in terms of Section 3 of the Tamil Nadu Private Forests (Assumption of Management) Act (55 of 1961), so as to enable the elephants to pass through the corridor without any hindrance till the lands are acquired."

26. It is to be mentioned that pursuant to the directions of this Court dated 3.12.2009, the Forest Department has issued a public notice dated 7.1.2010, thereby publishing the proposed elephant corridor and requiring the persons, whose private lands are falling within the proposed corridor to submit objections. Challenging this action of the Government, in issuing the Notice dated 7.1.2010, W.P. Nos. 1897 of 2010; 2915 of 2010; 3326 of 2010; 4978 of 2010; 5740 of 2010; 5774 of 2010; 7960 of 2010; 7962 of 2010; 8022 of 2010 and 8237 of 2010 have been filed. Review Application No. 131 of 2010 has been filed to review the order dated 3.12.2009. The formation of the above said Expert Committee by this Court and the report filed by the Expert Committee dated 4.11.2009 have been challenged in W.P. Nos. 7961 of 2010, 7963 of 2010, 8023 of 2010 and 7672 of 2010.

27. Pursuant to the publication of the public notice dated 7.1.2010 along with the maps of proposed corridor and other documents in four villages viz. Sholur, Masingudi, Hullathi and Kadanadu, which are to affect by the proposed corridor, public hearings were held on 8.2.2010 and after verifying all the objections and rejecting the same, the Government has issued G.O. Ms. No. 125, Environment and Forest (FR.5) Department, thereby confirming the elephant corridor map published and further mentioning that the lands falling within the boundary description form the elephant corridor. This G.O. has been challenged in W.P. Nos. 23578 of 2010; 23939 of 2010; 23950 of 2010; 23951 of 2010; 25713 of 2010; 26053 of 2010; 27550 of 2010; 27561 of 2010; 28580 of 2010; 1519 of 2011; 1520 of 2011 and 2845 of 2011. Since all these matters are thus, inter-connected with each, they are heard together and are being disposed of by this common order.

28. The contention of the Petitioners, challenging this public notice dated 7.1.2010 are that it is bereft of details; that the constitution, composition and recommendations of the Expert Committee is without jurisdiction in law; that the procedure prescribed in law to initiate the process for acquisition of lands which are not forest lands has not been followed; that immense prejudice has been caused by the impugned notice to the Petitioners since the official Respondents have not followed any of the statutorily prescribed rules and/or regulations before the issue of the impugned notice.

29. From the voluminous material available on record, it is seen that as against the above extracted order dated 3.12.2009 passed by this Court, appeals have been filed before the Honourable Apex Court in C.C. Nos. 6342 to 6348 of 2010 and a Three Judge Bench of the Honourable Apex Court, headed by His Lordship. The Honourable The Chief Justice of India, has disposed of the matters by the order dated 30.4.2010. Since this order of

the Honourable Apex Court has also been attempted to be interpreted by some of the parties in these batch of cases, to suit their convenience, we extract hereunder the said order for better understanding:

"Permission to file special leave petition is granted.

Delay condoned.

Heard learned Counsel for the Petitioner and learned Counsel for Respondent No. 1.

The learned Counsel for the Petitioner contends that if proposed Elephant Corridors established, the Petitioner would be seriously effected as his agricultural land falls in that area.

The Petitioner would be at liberty to approach the committee which is likely to finalize the Elephant Corridors and also would be at liberty to approach the High Court and seek intervention proceedings though the Division Bench has already indicated under other proceeding that no intervention is allowed.

With the above directions, the Special Leave Petition is disposed of."

30. On the part of the Petitioners, it has been argued that under Section 6 of the Wildlife Protection Act, a Committee has been constituted and when law contemplates a particular way of doing things, by way of constituting a Committee under Section 6 of the Wild Life Protection Act, both resorting to constituting a Committee and entrusting the matter to the Committee is in violation of the provisions of the Act.

31. At this juncture, it is to be pointed out that all the points which have been raised before this Court were also argued before the Honourable Apex Court. Even though arguments have been advanced before the by this Court, the same was not interfered with by the Honourable Apex Court. Instead, as could be seen from the order of the Honourable Apex Court, the Petitioners were given liberty 'to approach the Committee, which is likely to finalize the Elephant Corridors'. Therefore, it goes without saying that the aspect of constitution of an expert committee by this Court was confirmed by the Honourable Apex Court. Further, the constitution of this Committee by this Court was done in the best interest of all the parties concerned. It is to be mentioned that in *Tirupur Dyeing Factory Owners Association vs. Noyyal River Ayacutdars Protection Association* (2009) 9 SCC 737: (2009) 8 MLJ 1164, also when his High Court has constituted a monitoring committee, the Honourable Apex Court has held it as not vitiated by law, since towards upholding the majesty of law and justice. Therefore, the argument advanced on the part of the Petitioners with regard to the validity of constitution of the Expert Committee by this Court cannot be appreciated.

32. In the meantime, W.P. Nos. 2839 and 2762 of 2010 have been filed by the forest dwells praying for a direction to the authorities to implement the Schedule Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and to complete the process of recognition of forest rights of the traditional forest dwelling communities and traditional forest dwellers.

33. Considered as the supreme most level of creation on earth, we, the human beings, must not forget that Mother Earth, which is full of lots of creatures and living organisms, is for all and like humans, animals also have a right to live, because they are the same as us, but, may be with a lower brain capacity than humans. That does not give any unassailable power and right for the humans to act in a manner detrimental to the interest and welfare of the so called lower brain capacity beings on earth/the animals

since animals too have rights to live their lives free from suffering and pain and we, as the humanbeings, must feel solidarity with them. Preservation of wildlife is important for maintaining the ecological balance in the environment and sustaining the ecological chain.

34. The framers of Constitution, being well aware of these, have introduced Article 51-A (g) of the Constitution which says that it is the duty of every citizen of India to protect and improve the natural environment including the wildlife'. The Government of India has enacted a comprehensive legislation 'Wild Life (Protection) Act, 1972 for this constitutional purpose. Chapter III of the said Act prohibits hunting of wild animals except in certain limited circumstances. Chapter IV enables the State Government to declare any area as a sanctuary or national park, and destruction or removal of animals from those areas is prohibited except under very limited circumstances. Chapters v. and V-A prohibit trade or commerce of wild animals, animal articles or trophies. Chapter VI makes violation of the provisions of the Act a criminal offence. By the Wild Life (Protection) Amendment Act, 2002, the punishment has been increased vide Section 51 as amended, and the property derived from illegal hunting and trade is liable to forfeiture vide Chapter VI-A. In 1977, the Indian elephant was brought within the purview of I Schedule 'A' of the Act.

35. Nature is a series of complex biotic communities of which the man is an interdependent part and that it should not be given to a part to trespass and diminish the whole. It is considered that the largest single factor in the depletion of the wealth of animal life in nature has been the "civilised man" operating directly through excessive commercial hunting or, more disastrously, indirectly through invading or destroying natural habitats, so observed by the Honourable Apex Court in *State of Bihar vs. Murad Ali Khan* AIR 1989 SC 1: (1988) 4 SCC 655.

36. The policy and object of the wild life laws have a long history and are the result of an increasing awareness of the compelling need to restore the serious ecological imbalances introduced by the depredations inflicted on nature by man. The state to which the ecological imbalances and the consequent environmental damage have reached is so alarming that unless immediate, determined and effective steps were taken, the damage might become irreversible. The preservation of the fauna and flora, some species of which are getting extinct at an alarming rate, has been a great and urgent necessity for the survival of humanity and these laws reflect a last ditch battle for the restoration, in part at least, a grave situation emerging from a long history of callous insensitiveness to the enormity of the risks to mankind that go with the deterioration of environment. The only way we can guarantee-our continued survival on earth is to recognize the importance of other non human life forms and stop pretending we are on top of some pyramid of domination over other beings. It is the time to think big and accept no limits as we have to work towards a better tomorrow.

37. With regard to the argument advanced on the part of some of the writ Petitioners challenging the power of the State Government to exercise its executive power to identify elephant corridors when the same is occupied by a Parliamentary legislation and a statute occupying the field viz. National/State Wild Life Boards having extensive powers rather duty to protect wild life, it is to be mentioned that the subject, protection of wild animals and birds has been made concurrent by the Constitution (42nd Amendment) Act, 1976 by making Entry as 17B, while the subject 'Forest' has also been included by the same amendment as Entry No. 17A to the concurrent list. This empowers the Central Government to issue advisories/directions to the States/U Ts from time-to-time to take appropriate actions for conservation and protection of wildlife and its habitats. The Wildlife being in the concurrent List (Entries 17A and 17B of List III) of

the Constitution, both the Central and State Governments/U Ts are mandated with the responsibility of the protection and conservation of the wildlife and its habitat. Therefore, the primary duty of protection and management of wildlife and its habitat lies with the State Forest Department and the States/U Ts are at liberty to take steps for conservation and protection of wildlife and its habitat. Under the Wildlife (Protection) Act, 1972, the State Governments are empowered to declare protected areas, including Sanctuaries, National Parks, Conservation Reserves and Community Reserves under Chapter IV of the Act. Therefore, when the State Governments are empowered under the said Act to notify any area having adequate ecological, faunal, floral, geomorphological, natural or zoological significance, for the purpose of protecting, propagating or developing wildlife or its environment as Protected Areas under Chapter IV of the Act, the authority of the State Government in identifying the elephant corridors cannot be challenged. Therefore, the Petitioners are not justified in contending that the State Government is bereft of its powers in identifying the elephant corridor.

38. It is also to be stated that the impugned G.O. (Ms) No. 125, Environment and Forests (FR.5) Department, dated 31.8.2010 has been issued, confirming the elephant corridor map published on 6.1.2010 and 7.1.2010 furnishing the boundary details to form the elephant corridor, further directing the Principal Chief Conservator of Forests to publish the final elephant corridor in the cadastral map prepared by the Expert Committee, pursuant to the direction of this Court dated 3.12.2009 and 1.3.2010. But, the said G.O. is also being challenged by some of the writ petitions as being illegal and ultra vires of the provisions of the Wildlife (Protection) Act, 1972.

39. The contentions of the Petitioners, who are challenging the G.O. Ms. Nos. 125, dated 31.8.2010 are that the constitution of the Expert Committee in W.P. No. 10098 of 2008, whose report led to the issuance of this impugned G.O., is also in violation of the provisions of the Act; that the proposed elephant corridor as identified by the Committee is erroneous specifically in respect of the areas marked across the undulating hills in the south of the village of Bokkapuram; that the impugned G.O. 125, dated 31.8.2010 has been issued by the State Government in violation of the Scheduled Tribes and other Traditional Forest Dwellers Act, 2006.

40. The Expert Committee was constituted by the orders of this Court dated 22.10.2009 under the chairmanship of Principal Chief Conservator of Forests and Chief Wildlife Warden, who is the highest expert in the field.

41. The main attack made on the part of the Petitioners the formation of such an Expert Committee by this Court is that under the Wild Life Protection Acts, State and National Boards are formed and therefore, the formation of the Expert Committee by the Court is nothing but in derogation of the said Act. In these circumstances, they have argued that when the law contemplates certain things to be done in a particular manner, the same has to be done only in that manner and not otherwise.

42. No doubt, State and National Boards are formed under the Wild Life Protection Act. But, while hearing the Public Interest Litigation W.P. No. 10098 of 2008, when this Court has thought it fit and proper to frame a body of experts to go into the matter and the said committee formation was not interfered with by the Honourable Apex Court in the proceedings initiated by some of the Petitioners in C.C. Nos. 6342-6348 of 2010 and further, no motives could be imparted to the said expert committee, which has gone a long way to assess the entire gamut, we are unable to appreciate the arguments advanced on behalf of the Petitioners in this regard.

43. It is also to be mentioned that the are in question has already been notified in 1991 under

the 'Tamil Nadu Preservation of Private Forests Act' and therefore, the Government can very well take possession of the said lands. The arguments advanced on the part of private land owners that the said notification dated 1.11.1991 is a blanket one and is illegal cannot be appreciated in view of the admitted fact that no orders of such nature have been passed in W.P. Nos. 7612 and 7613 of 2010 filed before this Court challenging the Notification dated 1.11.1991 issued under Section 1 (2) (ii) of the Tamil Nadu Preservation of Private Forest Act, 1949 and published in the District Gazette on 15.11.1991 by the District Forest Officer, Nilgiris.

44. The Scheduled Tribes and other Traditional Forest Dwellers Act, 2006 has been enacted to recognise and vest the forest rights and occupation in forest land in forest dwelling Scheduled Tribes and other traditional forest dwellers who have been residing in such forests for generations but whose rights could not be recorded; to provide for a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land. The learned Counsel appearing for the forest dwellers have argued that because of the action of the Government to identify the elephant corridor, the rights of the forest dwellers ensured under the said Act are infringed.

45. It has been asserted before us on behalf of the State Government that the proposed notification of elephant corridor is only a management activity, to take care of the welfare of the elephant and other wildlife and the notification of the elephant corridor has nothing to do with the possession, legal ownership and rights of the concerned. It is also the stand of the State Government that the legal status of the land is not the criteria for notifying the Elephant corridor and the lands which are in the pathway of movement of elephants and other wildlife, including patta lands and estates, which are already notified as private forest under the Tamil Nadu Preservation of Private Forest Act, 1949 irrespective of the legal status, are proposed to be notified as Elephant corridor. It has been assured on behalf of the State Government before us that the interest of the existing community and interest would not be affected.

46. No doubt, under the scheme of things, it is the responsibility of the State Government to implement the Scheduled Tribes and other Traditional Forest Dwellers Act. In view of the above and in view of the assertions made before us by the State Government, we direct the State Government to stick on the assertions made before us, while dealing with such communities.

47. It has also been argued on behalf of the private land owners that never there was any movement of elephants in South of Bokkapuram as the village of Bokkapuram is abutting the step slopes of the Nilgiris and therefore, the inclusion of this area also in the elephant corridor is illegal. On a perusal of voluminous materials placed on record, it is clear that on an earlier occasion, two elephants were caught in Hassan (Karnataka) radio collared and released in Bandipur, which found their way to the Sigur Plateau and used all areas including the Sough of the village of Bokkapuram and that a French lady was attacked and killed in Bokkapuram. Therefore, on a factual analysis of the materials placed on record, we are unable to appreciate this stand taken on the part of the private land owners and hence this argument advanced on their part is rejected.

48. A fancy argument has been advanced on the part of the private land owners that with a view to create an 'artificial corridor', their lands are sought to be acquired, which is illegal. There is no dispose that the elephant requires large space for movement, without any obstruction and it is the burden of the Government to see that there is no man animal conflict in the area, so as to protect the interest of the protected animal and also the human habitation. When it has been established that the elephants

needed space without any man made obstructions and that the area is famous for its elephant population, but requiring attention from the Government, which is even obliged under Article 51-A (g) of the Constitution, the steps initiated on the part of the Government to preserve the area as 'elephant corridor' cannot be branded as a step to established 'artificial corridor'. In fact, as has been rightly argued on the part of some of the private land owners themselves, there cannot be any such artificial corridors, since the animals cannot adjust to the same. The entire material on record would clinchingly establish that the Government has taken all necessary steps to protect the interest of not only the animals but also the human habitation in the locality and only taking into consideration the need to protect the animal and to provide the required passage for them, the area wherein the animals are already moving, is only sought to be declared as the elephant corridor and no new area has been created or formed for the animals, so as to say that an 'artificial corridor' is being created by the Government. Therefore, this argument advanced on the part of the private land owners cannot be accepted.

49. It is the common knowledge of everyone that the greatest threat that is being faced by many species is the widespread destruction of habitat and hunting. Habitat destruction can force the wildlife extinction. By protecting habitat, entire communities of animals can be protected together and when communities are kept intact, less conservation intervention is required to ensure species survival. The species is targeted by poachers who hunt the elephants for their valuable ivory tusks. Therefore, parks, reserves and other protected lands are too often considered as the only habitats left untouched by habitat destruction. By identifying and nurturing such elephant corridors, deadly confrontations between the elephants and the human being could be avoided, besides protecting the welfare of the animals and to avoid threat to the wildlife in the area by avoiding poaching, most particularly commercial poaching.

50. From the materials placed on record, it is seen that number of Holiday resorts have sprung up in the area without proper approval and in total violation of the provisions of the Tamil Nadu Preservation of Private Forest Act, 1949. These Holiday Resorts are carrying on commercial activities in violation of the Tamil Nadu Preservation of Private Forest Act, 1949; Tamil Nadu Forest Act, 1882; Forest Conservation Act, 1980; Wildlife Protection Act, 1972 etc. It is also seen that because of the location of these Holiday Resorts, large number of tourists along with vehicles are moving frequently in the resort areas, which led to man-animal conflict in the area. It has even been brought to our knowledge by the learned Advocate General arguing on behalf of the State Government that these resorts have originally obtained permission for construction of dwelling houses and therefore, constructed resorts, without obtaining permission from the concerned authorities, which is illegal. Therefore, it is clear that when the very inception of the resorts is by illegal means, they cannot be permitted to take shelter under the ground that they cannot be denied the right to practice any profession ensured under Article 19 (g) of the Constitution.

51. The conclusions of our above discussions are:
    (a) The subject 'forests' and 'protection of wild animals and birds' are in the List-III (concurrent list) of the Constitution and it is also the fundamental duty of every citizen of India under Article 51-A (g) of the Constitution to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures. The Government of India has made it clear before us, by way of an affidavit that at least the corridors identified in the book 'RIGHT OF PASSAGE -ELEPHANT CORRIDORS OF INDIA 'published by Wildlife Trust of India, which was taken into account while drawing the present proposed elephant corridor, needs to be notified, but it did not restrict the State Government to notify the actual elephant corridors. The State Government is

fully empowered to notify the elephant corridor as a management strategy and is also authorized by the Project Elephant of Central Government since there is no impediment in Wild Life Protect, 1972, in declaring the elephant corridor by the State Government. Therefore, the action initiated by the State Government to identify the elephant corridor cannot be found fault with since it has only acted towards implementing its obligation created under Article 5l-A (g) of the Constitution.

(b) This Court, while exercising its extraordinary jurisdiction under Article 226 of the Constitution, after hearing the parties and taking into consideration various factors, has ordered formation of an Expert Committee, by the order dated 3.12.2009, to go into various aspects of the case and the said Committee has also submitted its report. When the said order of this Court dated 3.12.2009 was challenged before the Honourable Apex Court in C.C. Nos. 6342-6348 of 2010, the same was not interfered with by the Honourable Apex Court. But, on the other hand, the Petitioner was given a liberty 'to approach the Committee'. Further, no ill motives could be attributed to the said Committee which has travelled extensively and arrived at its logical conclusions after the well established process of deliberations and consultations and after taking into consideration the various literature available on the subject. Therefore, the challenge made to the formation of the Committee and the report filed by the said Committee cannot be found fault with as though the formation of the Committee by this Court is nothing but intruding into the powers of the State and National Boards formed under the Wild Life (Protection) Act.

(c) Further more, though Section 5 (c) of the Wild Life (Protection) Act states about the functions of the National Board and Section 8 states about the duties of the State Board, the notification of the elephant corridor did not intervene or violate the functions and duties of these Boards and in fact, by this act, the State Government has fulfilled its obligations created under Article 51-A (g) of the Constitution, in which we are unable to find any illegality.

(d) G.O. Ms. No. 125, dated 31.8.2010, has been issued by the State Government after a detailed study of the committee's report and after duly considering the various objections raised by the parties before the Committee and under the scheme of this G.O., the State Government has better protected the interests of the tribal and traditional dwellers.

(e) All the members of the Committee were forestry and wildlife professions, and we are informed that they had carriers in forestry management for 25 to 35 years, besides having personal experience of managing these areas at one point of time or other and had thorough professional knowledge and expertise on the movement of the elephants in this area. The data relating to the movement of elephant over a considerable period which were already available in the form of literature and notifications, research study reports by various research scholars, scientists and agencies were all collected, examined and discussed in detail by the Committee and hence, it cannot be said that in such a short span of time, no material could have been collected by the Committee.

(f) State is the Guardian of the interests of not only the human beings but also the wildlife, under the sacred document/the Constitution of India. Under the scheme of things proposed in G.O. Ms. No. 125, dated 31.8.2010, the considered opinion of this Court, the Government has consciously applied its mind to the interests of various parties and has come out with a more practicable and workable solutions.

On a complete analysis of the entire materials placed on record and upon hearing the parties at length, we are unable to find any illegality or irregularity in the action of the State Government in notifying the elephant corridor.

(g) On a perusal of voluminous materials placed on record, it is clear that on an earlier occasion, two elephants were caught in Hassan (Karnataka) radio collared and released in Bandipur, which found their way to the Sigur Plateau and used all areas including the South of the village of Bokkapuram and that a French lady was attacked and killed in Bokkapuram. Therefore, on a factual analysis of the materials placed on record, we are unable to appreciate the stand taken on the part of the private land owners that never there was any movement of elephants in South of Bokkapuram as the village of Bokkapuram is abutting the steep lopes of the Nilgiris and therefore, the inclusion of this area also in the elephant corridor is illegal. Therefore, this argument advanced on the part of the private land owners is rejected.

(h) The argument advanced on the part of some of the private land owners that the elephants are not coming into their areas also cannot be accepted in view of the established fact that the movement of the elephants in the area was restricted because of the developmental activities of the illegally raised resorts and some of the greedy private land owners. It is also on record that each private holding are bounded by solar electric fencing, (which was subsequently restricted because of the intervention of this Court by way of interim orders in these matters) virtually cutting across the elephant corridor and thus, the people are developing this area for pleasure of individuals at the cost of elephant and wildlife and we are confident that the proposed elephant corridor would better protect the elephants, further avoiding man animal conflicts.

52. For all the above reasons and discussions, W.P. Nos. 10098 of 2008, 2762 of 2009 and 2839 of 2009 are disposed of All other writ petitions and review applications are dismissed. Impleadment petitions filed by some of the parties, to implead them as party Respondents to these writ petitions are allowed, since they are also heard in these matters, being the interested parties and whose rights are also involved in these matters. For the same reasons, Rev. A.S.R. 27427 of 2010 is closed. Other connected miscellaneous petitions are closed.

53. The resort owners and other private land owners are directed to vacate and hand over vacant possession of the lands falling within the notified 'elephant corridor' to the District Collector, Nilgiris within three months from today. In the meanwhile, the Government of Tamil Nadu is permitted to go on with the implementation of the project as has been notified in G.O. Ms. No. 125, dated 31.8.2010, in the best interest of the wildlife, particularly elephants so as to notify and improve the elephant corridor. With regard to the forest dwellers, whose interests are protected under the provisions of Schedule Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, the State Government is directed to strictly adhere to and comply with the provisions of this Act while dealing with the forest dwellers, who fall within the ambit of this Act and in any forest dweller is evicted from and out of the identified elephant corridor, they be provided with the best alternate and suitable accommodation. For the forest dwellers, who deny such alternate and suitable accommodation may be provided with the compensation, as per the procedure contemplated under law. While dealing with the forest dwellers, the State Government is directed to strictly adhere to the various orders passed by this Court in these manners; the terms of G.O. Ms. No. 125, dated 31.8.2010 and the assertions made by them before this Court, as has been narrated by us in the preceding paragraphs.

Ramar vs. Union of India & Ors., etc.

WP (MD) NOS. 8082 OF 2007, ETC.
HIGH COURT OF MADRAS, MADURAI BENCH
17.09.2014
CORAM: S. NAGAMUTHU, J.
CITATION: 2014 SCC ONLINE MAD 7935

SUMMARY

The petitioners filed a batch of writ petitions seeking directions to the forest officials/respondents to stop their eviction from the forest lands, and for grant of pattas under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA). The petitioners alleged that they have been in occupation for generations in the forest land in the Suranagar Forest area which lies on the border of the States of Tamil Nadu and Kerala.

The petitioners argued that since 1992, the forest officials have made several attempts to evict them, and they in turn have approached the Courts for protection through writ petitions in 1993. In one such earlier writ petition, an order was passed in 2000 directing the government and forest officials to conduct joint inspection as per the Tamil Nadu Forest Act, 1882 and also pass orders on the various representations of the petitioners.

The petitioners argued that despite the aforesaid order dated 04.09.2000 passed by the High Court, no joint inspection was conducted, for which they made further representation on 17.08.2007. During the pendency of such representation, the FRA was enacted which provides them certain forest rights.

The District Forest Officer/respondent submitted that the petitioners are encroachers in a reserved forest since 1971, and were evicted as per law in 1994. Thus, they do not fall within the definition of "other traditional forest dwellers" as defined in the FRA and are ineligible.

The Court held that the relief sought by the petitioners cannot be granted as they have failed to show relevant material evidence that they were in possession of the land at the time the FRA came into force, or for the period of three generations (or 75 years) prior to 13.12.2005, as required by the Act.

Although the Court acknowledged that in a writ petition under Art. 226 it is not

expected to go into questions of fact, it was of the view that to direct the Gram Sabha, the SDLC & the DLC to examine the petitioners claims "will only be waste of time of the authorities, as the same would not serve any purpose." (@ para 17).

The Court accordingly, relied upon the District Forest Officer's order dated 03.01.1984, which showed large encroachment of the forest land and eviction drive done by the forest officers. Based on this, the Court concluded that the petitioners have failed to prove that they have been in occupation of the forest land for at least seventy five years, as is necessary under the definition of "other traditional forest dwellers".

The writ petitions were, accordingly, dismissed.

EDITOR'S NOTE

Although few and far between, there are examples of judgments such as this one where the High Court has gone beyond the scope of its jurisdiction under Article 226 (even while acknowledging this, as in the present case) and taken decisions on questions of facts.

Such an approach is a matter of grave concern, since it completely overrides the detailed three-tier mechanism for determination of just such questions of fact provided under FRA. A more rigorous examination of FRA and the FR Rules would have revealed to the Court that previous proceedings for removal of "encroachments", far from being a reason for ineligibility, are one of the evidences under Rule 13 which a claimant may provide in support of his/her application for recognition of forest rights.

COMMON ORDER

1. There are forest lands at West Vali, Gudalur, Suranganar, Kumuli and other areas, in Cumbum Valley, Uthamapalayam Taluk, Theni District. These areas are located in Tamil Nadu & Kerala border. The petitioners claimed that for generations they have been in occupation of the lands in Suranganar forest. Admittedly, the lands, which are stated to be in their occupations, are all Reserved Forest lands. According the petitioners, these lands are not Reserved Forest lands, but, they lie in the fringes of the forest between the State of Kerala and Tamil Nadu border. Like the petitioners, according to them, there were around 300 families living in the said Suranganar Forest, Amravathipuram, Aasaripallam. During the year 1992, according to the petitioners, an attempt was made by the forest officials to dispossess them. On the complaint of a forest official, a criminal case was registered in Crime No.64 of 1992 against 143 such forest dwellers, which resulted in a final report. The said case was tried by the learned Additional District and Sessions Judge, Fast Track Court, Periyakulam, in S.C.No.381 of 2000 and they were all acquitted by the judgment dated 14.03.2005. Their cultivations and the superstructure put up by them were all allegedly destroyed by the forest officials.

2. While so, the petitioners filed a writ petition in W.P.No.19711 of 1993 before the Principal Bench of this Court. Further, 33 similarly placed persons filed similar writ petitions in W.P.Nos.14174 of 1993, 17552 of 1993, 18185 of 1993, and 381 of 1995. The prayer in all those writ petitions was for a Mandamus to forbear the respondents / forest officials from

evicting them from the forest lands and also for a direction to the Government to grant patta for the holdings of the petitioners therein. Initially, while admitting those writ petitions, the Principal Bench granted interim injunction to restrain the forest officials from evicting the petitioners therein. As against the said interim order, the writ appeals in W.A.Nos.209 to 211 of 1996 were also filed by the forest officials. When the said appeals were pending, the writ petitions were disposed of by the Principal Bench, by order dated 04.09.2000, directing the Government and forest officials to conduct joint inspection, as per Section 8 of the Tamil Nadu Forest Act and to pass orders on the representations made by the petitioners and others, in the light of G.O.Ms.No.930, dated 07.08.1984, within a period of three months therefrom. Those writ appeals were therefore closed.

3. According to the petitioners, no such joint inspection was conducted, as directed by this Court, instead, again further attempts were made to evict them. The petitioners have also sent a further representation on 17.08.2007.

4. While so, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (hereinafter referred to as "the Act") came into being on 29.12.2006. According to the petitioners, they are entitled for certain rights, as dealt with in Section 3 of the Act, including the right to hold and live in the forest lands. The grievance of the petitioners now is that without considering their rights conferred under Section 3 of the Act, an attempt is made again to evict them from their respective holdings. With this grievance, the petitioners are before this Court seeking a direction to forbear the respondents from in any manner interfering with their alleged peaceful possession and enjoyment of the lands.

5. A detailed common counter affidavit has been filed in all these writ petitions by the District Forest Officer. The crux of the counter is that the petitioners are not the "other traditional forest dweller" As defined under the Act and therefore, they are not entitled for the benefits of the Act. According to the counter, the petitioners were only encroachers of reserve forest lands from the year 1971. They were all evicted by following the procedure established by law in the year 1994. After 1994, the lands in question are fully under the control of the forest department and the forest department has also raised bamboo clusters on those lands. Thus, according to the counter, the petitioners are not at all in possession of the lands in question. It is also stated in the counter that the petitioners are residing in Gudalur and they are having patta lands. They are residing in their respective own houses. They have also been given family cards by the Revenue Department. Thus, according to the respondents, the petitioners are not traditional forest dwellers at all and therefore, they are not entitled for any protection under the Act. At any rate, since the petitioners are not in possession of the property, the relief sought for in these writ petitions cannot be granted, it is contended.

6. I have heard the learned counsel appearing on either side and perused the materials available on records carefully.

7. The prayer in these writ petitions is as simple as it could be. It is only for a Mandamus to forbear the respondents from interfering with the alleged possession and enjoyment of respective lands of the petitioners. But, in the counter it has been very clearly stated that even in the year 1994, they were all evicted from encroachments and thus, they are not in possession and enjoyment of the lands in question. Though it is claimed by the petitioners that so called eviction was not at all made and they are continued to be in possession of the property even now, there is no material even to make prima facie case in support of the petitioners. At any rate, it is a disputed question of fact, which cannot be gone into in the writ petitions. Therefore, the prayer sought for in these writ petitions cannot be conceded to.

8. Now turning to the provisions of the Act, the Act, which came into being on 29.12.2006, was enacted with the object to recognize and vest the forest rights and occupation in forest lands in "forest dwelling Scheduled Tribes" and "other traditional forest dwellers", who have been residing in such forests for generations, but whose rights could not be recorded; to provide for a frame work for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest lands.

9. As seen from the object of the Act, this is an Act to protect the rights of the two classes of people viz., "forest dwelling Scheduled Tribes" and 'Traditional forest dwellers'. The term "forest dwelling Scheduled Tribes" is defined in Section 2(c) of the Act which states that a forest dwelling Scheduled Tribe means, the members or community of the Scheduled Tribes, who primarily reside in and who depend on the forests or forest lands for bona fide livelihood needs and includes the Scheduled Tribe pastoralist communities. Similarly, the term "other traditional forest dweller" means any member or community, who has, for at least three generations prior to the 13th day of December, 2005, primarily resided in and who depend on the forest or forests land for bona fide livelihood needs. It is also defined that for the purpose of the clause, "generation" means a period comprising of twenty five years.

10. Section 3 of the Act enumerates "forest rights of forest dwelling Scheduled Tribes and other traditional forest dwellers". One such right is the right to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood by a member or members of a forest dwelling Scheduled Tribes or other traditional forest dwellers (vide Section 3(a) of the Act). Section 4 of the Act deals with recognition of, and vesting of, forest rights in forest dwelling Scheduled Tribes and other traditional forest dwellers.

11. Section 6 of the Act deals with the authorities to vest forest rights in forest dwelling Scheduled Tribes and other traditional forest dwellers and procedure thereof. According to this provision, there shall be a Grama Sabha, who shall be the authority to initiate the process for determining the nature and extent of individual or community forest rights or both that may be given to the forest dwelling Scheduled Tribes and other traditional forest dwellers within the local limits of its jurisdiction under this Act by receiving claims. If any person is aggrieved by the decision of the Grama Sabha, under Sub section (2) of Section 6 of the Act, he may make a petition to the Sub Divisional Level Committee. Under Sub-Section (3) of Section 6 of the Act, if any person is aggrieved by the decision of the Sub Divisional Level Committee, he may prefer a petition to the District Level Committee within 60 days from the date of decision of the Sub Divisional Level Committee (vide Sub Section (4) of Section 6 of the Act). Thus, the rights of the forest dwelling Scheduled Tribes and other traditional forest dwellers are protected by the provisions enumerated hereinbefore.

12. Now, in the cases on hand, the petitioners do not claim that they are "forest dwelling Scheduled Tribes", but they claim that they are "other traditional forest dwellers" as defined in Section 2(o) of the Act. As we have read the said provision, to satisfy the requirements of the said provision, one should prove that he and his ancestors have been in occupation of the forest land for at-least 75 years. The question, in the instant cases, is as to whether the petitioners were in occupation of the respective lands for three generations i.e., for 75 years. In this regard, the District Forest Officer, who is present before this Court, has produced G.O.Ms.No.11, Forests & Fisheries Department, dated 03.01.1984.

13. A reading of the above said Government Order would go to show that the Government

was informed that there were large number of agricultural families including tribals and hill tribes who have encroached upon the forest lands in the West Vali, Gudalur, Suranganar, Kumuli and other areas in Cumbum Valley of Uthamapalayam Taluk, in erstwhile Madurai District. There were lot of representations to the Government to evict these encroachers. The Government called for report, including the data from the forest authorities, in respect of the length of the period of such encroachments and soil conservation measures undertaken by the Forest Department in that areas, together with a sketch indicating boundaries of the reserve forest lands. The Chief Conservator of Forests, had submitted such a report, after holding a detailed inspection and enquiry. According to the said report, it was reported to the Government that the petitioners herein were all encroachers only from the year 1971 and there were not forest dwellers. It was also reported that even Kumri cultivation leases given in these areas were not successful, inasmuch as Kumridars went in for cultivation of crops and not for planting trees. It was also reported that they destroyed the tree plantations raised by the Forest Department. The Kumridars refused to vacate the lands even after the expiry of the lease period. All the efforts made by the Forest Department to evict them could not succeed. The total extent of encroachment was 650 hectares. Over an area of 555.50 hectares, the encroachments were gradually removed and the possession was restored to the Forest Department. As on the date there were encroachments only in the rest of the areas, measuring 94.50 hectares. Out of 94.50 hectares, an extent of 55.50 hectares had been encroached upon by the people from this State, while remaining extent of 39 hectares had been encroached by the people from across the border. Having considered the said report and after considering all the other reliable factors, the Government issued G.O.Ms.No.11, Forest and Fisheries Department, dated 03.01.1984, directing the forest officers to evict all these encroachments. The said G.O. has been filed before this Court by way of typed set of papers.

14. It is stated by the District Forest Officer that based on the above Government Order and the directions issued thereunder, the petitioners were all removed from the encroachment in 1994 itself. It is stated by him that the petitioners were in occupation as encroachers only for a short period i.e., from 1971 to 1994, and they were not at all in occupation of the forest lands for more than three generations, as it is claimed by them. Therefore, according to the District Forest Officer, the petitioners are not the traditional forest dwellers.

15. The learned counsel for the petitioners is not in a position to show any material in order to substantiate his contention that the petitioners are "other traditional forest dwellers" as defined in sub Section (o) of Section 2 of the Act. Above all, as on the date of coming into force of the Act, the petitioners were not in occupation of these lands.

16. From the above narration of the facts, it could be seen that absolutely there is no material even to infer that the petitioners satisfy the definition of "other traditional forest dwellers" as defined in Sub section (o) of Section 2 of the Act. Therefore, I have to necessarily hold that the petitioners, who were only encroachers, are not entitled for any benefit under the Act. Above all, the petitioners do not rely on forest lands for their livelihood. No material has been placed to prove the same.

17. Of course it is true that the authority competent to decide as to whether the petitioners are traditional forest dwellers or not is the Grama Sabha, Sub-Divisional Level Committee and ultimately District Level Committee, but I am not inclined to direct these authorities to examine as to whether the petitioners are "other traditional forest dwellers" as defined in Section 2(o) of the Act, in view of the fact that it is a closed chapter, because even in 1994 the Government had issued an order after thorough enquiry that the petitioners were all encroachers from the year 1971. In such view of the

matter, giving liberty to the petitioners to approach the Grama Sabha or the Committee constituted under the Act, will only be a waste of time of the authorities, as the same would not serve any purpose.

18. In such view of the matter, I do not find any merit in any of these writ petitions. These writ petitions have to necessarily fail.

19. In the result, all these writ petitions are dismissed. No costs.

20. Mr. A.S. Marimuthu, District Forest Officer, Theni District, who is present in Court, has, in a dispassionate manner, explained the facts involved in these matters in open Court. It is appreciated.

A. Ponnudurai vs. Government of Tamil Nadu & Ors.

WP NO. 19289 OF 2010
HIGH COURT OF MADRAS
17.06.2015
CORAM: SANJAY KISHAN KAUL, C.J. AND PUSHPA SATHYANARAYANA, J.

SUMMARY

This writ petition was filed as far back as 2010 seeking enforcement of the rights of the petitioner under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA). Although the judgment does not explicate the facts of the case, from the reference to W.P. Nos. 2762 of 2009, 2839 of 2009 and 10098 of 2008[68], and to writ petition W.P. No. 4533 of 2008[69], it is clear the petitioner sought to rely upon the beneficial observations in these orders to buttress his arguments.

The Court however disposed of the petition by stating that the observations made in WP Nos. 2762 and 2839 of 2009 are sufficient, and in any case the enforcement of the FRA has been stayed.

EDITOR'S NOTE

This order of a division bench headed by the Chief Justice is cause for great concern, since it contains multiple errors which have been compounded to deny the petitioner a statutory remedy.

For one thing, the interim order dated 30.4.2008 in WP 4533 of 2008 does not stay the enforcement of FRA; on the contrary the Court issued directions that procedure

[68] In *Defence of Environment & Forests vs. The Principal Chief Conservator of Forest & Ors.* Judgment dated 7.4.2011. This relates to the Elephant Corridor Case. This judgment is extracted elsewhere in this compendium.

[69] *V. Sambasivam vs. State of Tamil Nadu & Ors.* Order dated 30.4.2008. This relates to the challenge to the constitutional validity of FRA. This order has been extracted elsewhere in this compendium.

for verification of claims shall continue, but before granting certificate of title to the claimant, orders of the Court should be obtained. Secondly, such order was not passed by the Supreme Court, as has been wrongly stated multiple times, but by the Madras High Court itself.

It may be pointed out that WP 4533 of 2008, after being transferred to the Supreme Court, is pending as TC (C) 39 of 2015, which information is available readily in the public domain.

ORDER

(the Order of the Court was made by Sanjay Kishan Kaul, C.J.)

1. In pursuance to our last order, the Registry has stated that W.P.Nos.2762 and 2839 of 2009 were disposed of along with W.P.No.10098 of 2008 by a common order dated 07.04.2011 by a Division Bench of this Court granting the relief of enforcement of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, and Rules 2007 framed therein. We had also noticed that W.P. No. 4533 of 2008 stands transferred to the Honourable Supreme Court in terms of the order passed in T.P. (Civil) Nos. 414 to 417 of 2008 dated 27.01.2015 and we had been informed that as per interim orders, enforcement of the Act had been stayed.

2. Learned counsel for the petitioner has not been able to trace out the position of the matter before the Honourable Supreme Court.

3. None from the respondents' side is able to assist us. It is trite to say that if there is stay of the enforcement of the Act by the Honourable Supreme Court, there cannot be simultaneous implementation of the Act in pursuance to the directions of this Court.

4. In our view, no purpose would be served by keeping this matter pending as the Division bench has already opined qua enforcement of the same Act and Rules in W.P.Nos.2762 and 2839 of 2009 covering the subject matter of the present petition, and if the matter is pending before the Honourable Supreme Court and stayed, that implementation in turn would have to await the final verdict of the Honourable Supreme Court.

5. The writ petition accordingly stands disposed of. No costs.

Murugesan vs. The District Collector, Tuticorin & Anr.

WP (MD) NO. 16979 OF 2015
MADRAS HIGH COURT (MADURAI BENCH)
18.09.2015
CORAM: R. SUBBIAH, J.

SUMMARY

The petitioner states that he is in possession of 37 acres 21 cents of agricultural land in Arasur Village, District Tuticorin, which belongs to him along with his mother and brother as joint owners. The land belonged to his forefathers and has demised upon them through succession and will. It appears that sometime in 2003, the State forest officials started interfering in the possession of the petitioner, upon which he filed a civil suit for permanent injunction before the District Munsif Court. While he lost this case, he succeeded in first appeal. However, the revenue official approached the District Court in a second appeal which is pending.

During the pendency of the appeal, the respondent State claimed that the land in the petitioner's possession has been declared as a Reserve Forest under the Tamil Nadu Forest Act, 1882.

Upon receiving this information, the petitioner submitted a claim for recognition of his forest right as an 'other traditional forest dweller' within the meaning of Section 2(o) of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA). This representation is still pending disposal, and therefore the petitioner approached the High Court by way of the present writ petition.

Disposing the writ petition, the Court passed an order directing the respondent authorities to consider the representation under FRA filed by the petitioner and take a decision within eight weeks, after affording the petitioner an opportunity to be heard.

EDITOR'S COMMENT

This is an interesting situation where during the pendency of civil suit proceedings, the High Court has used its powers under Article 226 of the Constitution to mould the relief in such a way that the petitioner is able to benefit from the procedure under FRA before the civil suit proceedings reach a conclusion. It is a different matter that the direction to dispose of the claim under the FRA is issued to the District Collector, Tuticorin, who is not an authority under the FRA, rather than to the Gram Sabha.

ORDER

1. The writ petition has been filed praying this Court for issuance of a Writ of Mandamus directing the respondents herein to consider the petitioner's representation dated 03.07.2015 and pass necessary orders with regard to the petitioner's right in Survey No.203/2 to an extent of 37 acres 21 Cents Arasur Village, Sathankulam Taluk, Tuticorin District, as per the provisions of Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and Rules 2007, within a stipulated time fixed by this Court.

2. The case of the petitioner is that the land in Sy.No.203/2 to an extent of 37 acres 21 cents, Arasur Village, Santhankulam Taluk, Tuticorin District belongs to the petitioner, his mother Rajakiliammal and his brother Ganesan. They are the joint co-owners of the said agricultural land. Originally, the said land belongs to his forefathers by name Sudalaimada Nadar, Valliammai Nadachi, Manickamuthu Ammal and Kathirvel Nadar. After the demise of the said Sudalaimada Nadar, petitioner's grandfather Thangaiah Nadar (who is the legal heir of the above said Sudalaimada Nadar) inherited 28 acres 21 cents and he purchased the remaining 9 acres in the above said land from Valliammai Nadachi, Manickamuthu Nadar and Kathirvel Nadar through registered sale deeds dated 06.11.1950 and 07.11.1950. Hence, the petitioner's grandfather Thangaiah Nadar was the absolute owner of the above said land by way of inheritance and purchase. In such circumstances, petitioner's grandfather executed a Will dated 17.04.1975, in favour of the petitioner's mother Rajakiliammal, petitioner's brother Ganesan and also in favour of the petitioner. After his demise, in the year 1984, the said Will came into effect. Now, the petitioner and his brother are enjoying the lands in Sy.No.203/2 by doing agricultural operations. While so, the District Administration, started to interfere with the possession of Sy.No.203/2. Hence, a suit was filed by the petitioner as against the District Administration in O.S.No.13 of 2002, before the District Munsif Court, Sathankulam, for the relief of permanent injunction. The said suit was dismissed on 31.01.2003. As against the same, the petitioner preferred an appeal and the said appeal was allowed on 16.02.2006 in favour of the petitioner. As against the said decree, the Tahsildar, Sathankulam also preferred a second appeal in S.A.(MD).No.806 of 2008 before this Court and the same is pending, without any interim order.

3. While the above said civil dispute is pending, the second respondent claimed that the above said Sy.No.203/2 to an extent of 37 acres 21 cents, Arasur Village, Sathankulam Taluk, Tuticorin District along with other survey numbers were declared as "State Reserve Forest" in the year 2003, as per the Tamil Nadu Forest Act, 1982. Hence, the petitioner made a representation to the respondents on 03.07.2015 stating that as per the definition clause Section 2(o), "Other Traditional Forest Dwellers" means any member of community, who has for at least three generations prior to 13th day of December, 2005, primarily resided in and who depend on the forest or forests lands for bonafide

livelihood needs. As per the provisions, the petitioner is entitled to get the benefit from the agricultural activities carried out in the above said land for their livelihood. But, the representation give by the petitioner is pending consideration till date. Hence, he has come forward with the present writ petition.

4. Heard the submissions made on either side and carefully perused the materials available on record.

5. Considering the submissions made on either side, this Court is constrained to pass the following order:

    Without going into the merits of the averments made in the writ petition, this Court directs the respondents to consider the representation, filed by the petitioner, on 03.07.2015 and pass appropriate orders within a period of eight weeks from the date of receipt of a copy of this order, after affording an opportunity of personal hearing. The first respondent is further directed to dispose of the main revision, within a period of three weeks thereafter.

6. The writ petition is disposed of with the above directions. No costs.

ORISSA HIGH COURT

TABLE OF JUDGMENTS AND ORDERS

Digee Murmu & Anr. vs. Union of India

WP(C) NO. 7403 OF 2008
HIGH COURT OF ORISSA
23.07.2008
CORAM: B.S. CHAUHAN, C.J. AND B.N. MAHAPATRA, J.

SUMMARY

This public interest litigation, one of the first to be filed under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) sought directions to the respondent State government to extend the benefits under the FRA to all eligible people. The petitioners submitted that "in spite of the fact that the present petitioners, who represent the community, have made representations that the provisions of the said Act are not being enforced by the statutory authorities, same have not been considered and disposed of so far."

The Court directed that the authorities under FRA are to consider the applications, in case they meet the requirements of procedural law required either under the FRA or FR Rules or notification. Directing that the orders were to be passed within three months in each individual case, the Court further directed that "(e)very application shall be disposed by a speaking order giving reasons therein and the order so passed shall be communicated to the applicant immediately after passing of the order".

EDITOR'S NOTE

This order, directing proper implementation of the FRA following procedure as laid down in the Act and FR Rules, is one of the first recorded orders passed by a constitutional Court, less than seven months after the statute came into force. Recognising the importance of processual rights in a statute which shifts the balance of power, this decision presages the problems which have beset the implementation of the FRA since, and the numerous aspects of procedural rights

which have been violated in varying degrees.

ORDER

1. This writ petition has been filed in the shape of a Public Interest Litigation seeking a direction to the opposite parties to extend the benefit of the provisions of the Scheduled Tribe and other Forest Dwellers (Recognition of Forest Rights) Act,2006 (hereinafter called the "Act").

2. Learned counsel for the petitioners has submitted that in spite of the fact that the present petitioners, who represent the community, have made representations that the provisions of the said Act are not being enforced by the statutory authorities, same have not been considered and disposed of so far.

3. After going through the provisions of the Act and the modalities provided under the notification dated 1.1.2008 issued by the Government of India, Ministry of Tribal Affairs and after hearing the learned Standing Counsel for the opposite parties, we dispose of this petition requesting the authorities under the said Act to consider the applications in case they meet the requirements of procedural law and by annexing the documents required either under the Act or the Rules or the Notification. Appropriate order shall be passed within a period of three months in each individual case. It is further made clear that every application shall be disposed of by a speaking order giving reasons therein and the order so passed shall be communicated to the applicant immediately after passing of the order.

4. Misc. Case No. 6632 of 2008 is also disposed of.

5. Urgent certified copy of the order be granted on proper application.

Retired Forest Officers Association vs. Union of India & Ors.

WP (C) NO. 4933 OF 2008
HIGH COURT OF ORISSA
12.08.2009 (INTERIM ORDER)
CORAM: I.M. QUDDUSI, ACTING C.J. AND SANJU PANDA, J.

SUMMARY

This writ petition was filed by the Retired Forest Officers Association of Orissa, in the nature of a public interest litigation, seeking a declaration that the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA), particularly Chapters II, III, and IV are ultra vires the Constitution of India. In addition, the petitioners sought a stay on the operation of the FRA, which had been granted vide interim order dated 23.07.2008.

The petitioners argued that having regard to the National Forest Policy which contemplates maintenance of forestry to the extent of one-third of the total land area in the country, the provisions of the FRA, and the conferment or recognition of the certificates for those alleged to be in possession of forests, defeats the policy. It was further argued that the provisions of the FRA run counter to various other enactments, such as the Wild Life Protection Act, 1972, and the Forest Conservation Act, 1980.

The respondents (including Union Ministry of Tribal Affairs, State government, and impleaded tribals and forest dwellers) argued that the FRA is a beneficial legislation, and the apprehension that it will lead to widespread felling of trees is baseless. Accordingly, they urged the Court to vacate the interim order dt. 23.07.2008 whereby the operation of the FRA had been restricted.

FINDINGS OF THE COURT

The Court held that fool-proof safeguards have been made in the FRA to check any kind of illegal vesting. If any deviation is noticed, the petitioner can very well raise an objection. Since a petition for transfer of the instant writ petition was pending before the Supreme Court, the Court refrained from going into the merits of the case. However, since according to the affidavit filed by the State government (through the Scheduled Caste and Scheduled Tribe Development Department), 9,337

cases had become ready for issue of certificate of title, there is no necessity that the previous interim order, directing that the pattas would not be granted without permission of the Court, should not be vacated. All applications were accordingly disposed of with a detailed order.

EDITOR'S NOTE

This writ petition has since been transferred to the Supreme Court[70], and is pending adjudication. This interim order, however, continues to stand and accordingly the implementation of the FRA in the State of Odisha, after the initial hiccup, has been rapid.

ORDER

1. Heard Learned counsel for the parties.

2. In order to recognize and vest the forest rights and occupation in forest land in forest dwelling Scheduled Tribes and other traditional forest dwellers who have been residing in such forests for generations but whose rights could not be recorded and to provide for a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land, the Government of India enacted the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights)Act, 2006. The said Act conferred on the members or community of the Scheduled Tribe who primarily reside in and who depend on the forests or forest lands for bona fide livelihood needs and include the pastoralist communities, certain forest rights as mentioned in Section 3 thereof. The forest rights granted by the said Act, inter alia, included right to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood by a member or members of a forest dwelling Scheduled tribe or other traditional forest dwellers, right of ownership, access to collect, use, and dispose of minor forest produce which has been traditionally collected within or outside village boundaries, rights including community tenures of habitat and habitation for primitive tribal groups and pre-agricultural communities; rights for conversion of pattas or leases or grants issued by any local authority or any state Government on forest lands to titles: rights of settlement and conversion of all forest villages, old habitation, unsurveyed villages and other villages in forests, whether recorded, notified or not into revenue villages; right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use: right to access to biodiversity and community right to intellectual property and traditional knowledge related to biodiversity and cultural diversity; diversity; any other traditional right customarily enjoyed by the forest dwelling Scheduled tribes or other traditional forest dwellers, as the case may be, which are not mentioned in clauses (a) to (k) of Chapter II but excluding the traditional right of hunting or trapping or extracting a part of the body of any species of wild animal. Chapter III of the Act contains provisions relating to recognition, restoration and vesting of forest rights in forest dwelling Scheduled Tribes and other traditional forest dwellers. Section 5 of Chapter Ill deals with the duties of holders of forest rights. It empowers the Gram Sabha and village level institutions in

[70] Vide order dt. 17.9.2015 in TP (C) Nos. 179-180 of 2009, Supreme Court of India.

areas where there are holders of any forest right under the Act to (a) protect the wild life, forest and biodiversity; (b) ensure that adjoining catchments area, water sources and other ecological sensitive areas are adequately protected; (c) ensure that the habitat of forest dwelling Scheduled Tribes and other traditional forest dwellers is preserved from any form of destructive practices affecting their cultural and natural heritage and also (d) ensure that the decisions taken in the Gram Sabha to regulate access to community forest resources and stop any activity which adversely affects the wild animals, forest and the biodiversity are complied with. Chapter IV provides for the authorities to vest forest rights in forest dwelling Scheduled Tribes and other traditional forest dwellers and the procedure for such vesting. It has provided a three-tier system. The Gram Sabha has been conferred with the authority to initiate the process for determining the nature and extent of individual or community forest rights or both that may be given to the forest dwelling Scheduled tribes and other traditional forest dwellers within the local limits of its jurisdiction by receiving claims and after undertaking such exercise pass a resolution and forward a copy of the same to the Sub-Divisional Level Committee. Person aggrieved by the resolution of the Gram Sabha may prefer a petition to the Sub-Divisional Level Committee and thereafter to the District Level Committee if aggrieved by the resolution of the Sub-Divisional Level Committee. Chapter V deals with the offences and penalties and Chapter VI contains miscellaneous provisions.

3. The present writ petition was filed by the Society of Retired Officers, Orissa, in the shape of public interest litigation, praying to declare the aforesaid Act, i.e. the Scheduled Tribe and other Tribal Forest Dwellers (Recognition of Forest Right) Act, 2006 (Act 2 of 2007), more particularly Chapters II, III and IV thereof, as ultra vires the Constitution of India. The ground urged in the writ petition is that having regard to the National Forest Policy which contemplates maintenance of forestry to the extent of 1/3rd of the total land are in the country, the provisions of the Act and the conferment or recognition of the certificates for those alleged to be in possession of forest defeats the very policy. Further the provisions also run counter to various other enactments like Wild Life Protection Act, 1972, Forest Conservation Act, 1980.

4. On 1.7.2008 while directing for service of extra copies of the writ petition on the Assistant Solicitor General and the learned Additional Government Advocate, this Court dismissed the stay application as it was not inclined to pass any interim order. Again the matter was listed on 23.7.2008 when the Court directed for issue of notice to the Advocate General as well as the learned Solicitor General and adjourned the matter to the week commencing 1st of September, 2008 for final disposal requiring the opposite parties to file counter within three weeks. The applications filed by one Kui Samaj Seba Samiti and some tribal forest dwellers to be impleaded as parties to the writ petition were allowed and they were impleaded as opposite parties 7 to 11. On that day Misc. Case No. 10825 of 2008 praying to direct the opposite parties not to undertake any felling of trees and not to alienate any forest land by issuing patta or by any other manner pursuant to the provision of the Act from out of the sanctuaries, National Parks and Biospheres (Reserve area) on the ground that unless the same is stayed, the writ petition will become infructuous and irreparable loss and injury would be caused to the public at large, was filed on behalf of the petition in Court. The said application was taken up that day and this Court after hearing, passed following order:

> "ln the meantime, the opposite parties are directed not undertake any felling of trees and not to alienate any land by issuing patta or by any other manner pursuant to the provisions of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (Act 2 of 2007) particularly from out of the sanctuaries, National Parks and Biospheres (Reserve Areas) until further orders".

5. On 2.9.2008, the matter again came up when this Court clarified that above order

does not include the process of identity and recognition of the persons etc. which are not covered in the interim order. Accordingly, the Court directed that the process regarding identity and recognition may go on but the final decision shall not be taken without leave of this Court. Thereafter the matter underwent adjournments either for the purpose of filing counter or on the request of the learned counsel and ultimately came to be listed on l8.3.2009 when it was ordered that since counter and rejoinder have been exchanged the matter should be listed in the first week of May, 2009 for final disposal. In the meantime Transfer Petition (Civil) Nos. 179-180 of 2009 were filed by the Union of India before the Hon'ble Supreme Court for transfer of this writ petition to the Supreme Court to decide on merit with T.P. (c) No. 414-417 of 2008 already pending before the Supreme Court. In view of the aforesaid, this Court on 1.7.2009 directed this writ petition to be listed in the week commencing 17.8.2009. The present misc. case was filed on 1.5.2009 with a prayer to vacate the interim order passed on 23.7.2008 in Misc. Case No. 10825 of 2008 as the said order tends to cause unnecessary _ delay affecting the interest of a large number of marginalized forest dwellers like the petitioner who are waiting to get the benefit under the Act with high expectation. It is the further case of the petitioner that as per the statement released by the Ministry of Tribal Affairs many of the States like Andhra Pradesh. Chhattisgarh. Madhya Pradesh and West Bengal have already issued titles to the forest communities, whereas the Government of Orissa has expressed its inability to extend similar benefits because of the stay order although the District Level Committees have approved 29,816 number of claims. It is contended by the applicant that the apprehension of the writ petitioner that the implementation of the Act would lead to felling of trees or destruction of forests is baseless and imaginary. In support of such contention, the applicant has taken aid of the letter dated 21.11.2008 of ST & SC Development Department of Govt. of Orissa in which while answering the frequently asked question: Does the Act not have the danger of destroying our forests and environment?, the State answered as under:

> "Definitely not. We need to see that even in the earlier framework of Forest conservation Act, there were provisions and procedures for regularizing old habitations. The earlier framework did not have express scope for participation of the people. The present Act mandates that Gram Sabha (i.e. Palli Sabha in Orissa context) is the authority to initiate and decide the claims. The cut-off date was earlier fixed as 25.10.1980. It is now 13.l2.2005 for members of the Scheduled Tribes and l3.l2.l920 for other traditional forest dwellers. The Act only recognizes existing occupations; it does not envisage fresh destruction of forest. It seeks basically to recognize de jure the already existing dc facto position on the ground. Therefore, there A is no danger really to the forests. Deforestation is mostly due to commercial interests and not due to bona fide livelihood requirements of the poor people. We must see that by having the ordinary people living legitimately in the forest areas on our side, the forest machinery can do a better enforcement work. They can get better intelligence about the movement and activities of the timber mafia: Therefore, sincere implementation of the Act will protect the forests and our environment."

6. The applicant of Misc. Case No. 5192 of 2009 has also brought to the notice of this Court the fact that the validity of the impugned Act has been challenged before the Hon'ble Supreme Court in W.P. (C) No. 50 of 2008 (Bombay Natural History sty. & others v. Union of India and others) and in W.P. (C) No. 109 of 2008 and although stay of implementation of the impugned Act has been sought in the aforesaid writ petitions, the Hon'ble apex Court has not passed any interim order so far. By way of an additional affidavit the applicant has sought to bring certain facts to the notice of the Court which has bearing on the prayer of the applicant. Enclosing some newspaper clippings to the additional affidavit, the applicant has brought to the notice of the Court that the recent unrest in the areas of Narayanpatna and Bandhugaon in Koraput has been attributed to the callousness of the Govt. towards settlement of the rights of the forest dwellers. Such

unrest, according to the newspaper reports, occurred due to the tardy progress in giving land rights to forest-dwellers, mostly tribals under Forest Rights Act is fuelling disturbance in tribal dominated districts, which are subsequently turning into fertile ground for left-wing extremists. The applicant has further stated that the Ministry of Tribal Affairs, Government of India, in its notification dated l8.5.2009 has laid out a detail procedure for seeking prior approval for diversion of forest land under sub-section (2) of Section 3 of the Act thereby imposing reasonable restrictions before diversion of Forest land. Therefore, the apprehension of the petitioner that the implementation of the provisions of the Act will result in felling of trees and destruction of large forest has no leg to stand on. The applicant has also brought-to our notice that the validity of the impugned Act was challenged before the Andhra Pradesh High Court in W.P. No. 21479 of 2007 (J.V. Sharma and others v. Government of India and others) in which an interim order had been passed on 19.8.2008 directing that if claims are made for community rights or rights to forest land and applications are submitted as per Sections 3 and 4 of the Act read with Rules 11 and 12 of the Rules, then the process of verification of the claim after intimation to' the concerned claimant shall go on but before the certificate of title is actually issued, orders shall be obtained from that Court. The A.P. High Court further directed that during the pendency of the litigation no member of a forest dwelling scheduled tribe or other traditional forest dweller shall be evicted or removed from forest land under his occupation till the recognition and verification procedure is completed. The aforesaid order was modified by order dated 1.5.2009 the Court inter alia permitted the authorities to issue certificate of title to the eligible forest dwelling Scheduled Tribes and other traditional forest dwellers under the Act with the condition that the same will be subject to the result in main writ proceedings challenging the legislation.

7. While modifying/vacating the interim order, the High Court took note of the following:

> "...Even the provisions of the act do specifically provide for such exercise with the assistance and participation by all the authorities like Revenue, Forest etc. However, even through entire such exercise was done at several district places, there appears to be no attempt on the part of the writ petitioner to put their claims / objections of whatsoever nature in the entire process be that as it may, since the petitioners themselves are not claiming any such rights or certificates of title under the provisions or much less denial thereof, we are of the view that in the entire process as stated on oath by the authorities, there is no reason, at this stage to doubt the same. Further it is found there have been several claims running into thousands at different parts of 22 districts and Particulars of those claims have been verified and processed through and ultimately restricted to those who are found to be eligible."
>
> ".....We also take note of the fact that entire exercise as per the provisions of the act is a basis. i.e.. a three tier system primarily at Grama Sabha, secondly at Sub-divisional Level Committee and ultimately at District Level Committee consisting of various authorities and it is always open for the writ petitioners to seek for information and particulars, if any ineligible person or individual is sought to be given any such certificate, it can raise all objections, which, we are sure the concerned authorities before whom such objections are filed, be it Grama Sabha, Sub-Divisional Level Committee or District Level Committee, would certainly enquire into and would pass appropriate orders in according with law.
>
> However, having regard to the very laudable object to protect the possession of such individuals which law tries to take care of, any denial thereof, would only prejudice them, therefore we are of the opinion that there is no basis, as such for any petitioner to assail that the entire exercise is farce one or certificate of identity by the authorities are false or in any way tainted, unless and until such thing has

been specifically pointed out."

The Court further observed:

"Further we reiterate that in view of the safeguards provisions and also interim orders granted earlier protecting those who are in possession, it is needless to make any further apprehension for causing any inconvenience or loss, as such."

8. It may be mentioned here that the S.T. & S.C. Development Department of the Government of Orissa has filed a petition numbered as Misc. Case No. 1902 of 2009 stating that the District Level Committees have finalized and identified 9337 number of Persons to be awarded for issue of title and the State Government may be permitted to issue the certificate of title.

9. After hearing learned counsel for the parties, we are of prima facie opinion that fool-proof safeguards have been made in the Act to check any kind of illegal vesting'? The procedure prescribed for vesting involves consideration of the claim at various levels as mentioned in Section 6 (Chapter IV). There is provision to constitute Sub-divisional Level, District Level and State Level Monitoring Committee. Various penalties have been prescribed for contravention of the provisions of the Act. If any deviation is noticed, the petitioner can very well raise objection. Be that as it may, it has been brought to our notice that matters challenging the validity of the Act is pending before the Hon'ble apex Court. Judicial discipline requires that the High Court should not entertain a writ petition in respect of the subject matter that is pending before the Supreme Court. Application for transfer of the instant writ petition is pending before the Hon'ble Supreme Court which stood posted to 4.8.2008. Therefore, we refrain from going into the merits of the writ petition at this stage. But since according to the petition filed by the S.C. & S.T. Development Department 9337 number of cases have become ready for issue of certificate of title, there is no necessity that the interim order should remain in operation. We, therefore, following the order passed by the Andhra Pradesh High Court vacate the interim order dated 23.7.2008 and permit the authorities to issue certificate of title to the eligible forest dwelling scheduled tribes and other traditional forest dwellers under the Act which shall be subject to the result of the main writ petition.

10. All the aforesaid three misc. cases are accordingly disposed of.

Issue urgent certified copy.

Copy of the order be handed over to Mr. C.A. Rao, learned counsel appearing for the Forest Department of the State Government.

Nishakar Khatua & Ors. vs. Union of India & Ors.

MISC. CASE NO. 8145 IN WP(C) NO. 14885 OF 2011
HIGH COURT OF ORISSA,CUTTACK BENCH
09.09.2011 (INTERIM ORDER)
CORAM: V. GOPALA GOWDA, C.J. AND B.N. MAHAPATRA, J.

SUMMARY

This writ petition challenged the forest clearance granted to the Pohang Steel Plant (POSCO) project by the Ministry of Environment and Forests (MoEF) through a series of orders culminating in an order dated 2.5.2011. The petitioners, who are other traditional forest dwellers (OTFDs), have been residing in and cultivating lands in the project area, part of which is on forest land, for generations. They argued that they are right-holders under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA).

The present order was passed in an application for interim directions filed by the same petitioners, who were apprehensive as efforts were underway to dispossess them of the lands in question. The petitioners sought directions to the State government and the project proponent not to proceed with any steps pursuant to the impugned forest clearance, and for maintenance of status quo until the disposal of the writ petition.

SUMMARY OF THE ARGUMENTS

The petitioners argued that under the FRA, forest dwellers cannot be removed from the forest lands under their possession until the process of recognition of rights under the Act is complete. The State government, contrary to the law, had been actively obstructing the implementation of the FRA in the project area, and the forest clearance was granted based upon false statements made by the State government that there are no forest dwellers in the area. They also placed materials on record to demonstrate the apprehension that evictions are imminent, and the need for interim protection till the dispute is adjudicated.

The State government and the project proponent opposed the grant of interim protection to the petitioners on a variety of grounds, including their failure to demonstrate their locus standi, and the fact that the same petitioners had also filed a

writ petition claiming rights under the Land Acquisition Act, 1927, which according to them was contradictory[71]. They reiterated their submission made before the MoEF that the project area is not a Scheduled Area, that there are only a handful of tribals in the area, and that there are no OTFDs either because no individual claims were never submitted, or the claim for community forest resource rights is defective.

FINDINGS OF COURT

The Court examined a number of judgments of the Supreme Court where it has been stated that the writ courts should not interfere in matters of economic policy of the state. It further stated that the proposed POSCO steel plant will provide employment to 30,000 people and will result in huge generation of revenue, which is in the public interest. On the other hand the rights, if any, of persons under the FRA are "minimal" and have not been determined and conferred under the Act and Rules.

While reaching a finding of fact that the process of determination of rights under Section 6 of FRA has not taken place, the Court arrived at the conclusion that the grant of forest clearance is in exercise of statutory powers by the Central government. It was of the view that the rights of the few OTFDs, if found to be existing in the final disposal of the case, can be addressed by moulding the relief and granting monetary compensation. The balance of convenience, therefore, was found to be in favour of allowing the project to proceed.

The interim application was, accordingly, dismissed. It may be noted that the main writ petition continues to remain pending before the High Court.

EDITOR'S NOTE

Although this decision contains numerous errors in law, primarily on interpretation of the FRA, it may be noted that these observations would not operate as binding precedent having been made in the specific facts of the case and also being in the nature of an interim order. This is also demonstrated by the subsequent judgments passed by the same High Court. Therefore these issues remain open till finally decided by the court.

It is important to state that no appeal against this order was filed before the Supreme Court. It must also be pointed out that in the parallel writ petition challenging the validity of the proceedings under the Land Acquisition Act, 1927, the High Court found in favour of the petitioners[72].

ORDER

09.09.2011

1. Judgment is delivered in open court rejecting the Misc. Case No. 8145 of 2011 praying for stay of the forest clearance granted, vide separate sheet.

[71] *Nishakar Khatua & Ors. vs.State of Orissa & Ors.* WP (C) No.14884 of 2011, High Court of Odisha.

[72] *Nishakar Khatua & Ors. vs. State of Orissa & Ors.* 2012 (I) ILR- CUT- 19 (decided on 09.09.2011).

2. Learned counsel for the opposite parties are directed to file counter affidavit in the main petition after serving a copy of the same upon the learned counsel appearing for the petitioners Learned Government Advocate is also directed to produce the relevant record within two weeks from today.

3. List this matter for hearing after two weeks.

Sd/-
Mr. V. Gopala Gowda, CJ.

Sd/-
B.N. Mahapatra, J.

(the Order of the Court was pronounced by V. Gopala Gowda, C.J.)

The petitioners, who are claiming to be the directly affected persons by the grant of clearance for forest land diversion for the POSCO Project, have filed the aforesaid writ petition challenging the Forest Clearance granted vide orders dated 19th September 2008, 29th December, 2009, 31st January 2011 and 2nd May, 2011 by the Ministry of Environment and Forest (hereinafter called MoEF) in favour of Pohang Steel Corporation India Private Ltd. (hereinafter called 'POSCO') for its project. The main grievance of the petitioners is that the aforesaid clearance is granted in utter violation of Constitutional rights guaranteed on the petitioners and in violation of Section 2 of the Forest (Conservation Act, 1980 (hereinafter called the 'Act of 1980'), Sections 3 and 4 of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (hereinafter called the Forest Rights Act') and Rules 2008 and also in violation of the various government orders and circulars.

2. This Misc. Case has been filed seeking the following interim prayers:

"(i) Admit and allow this Misc. application and

(ii) direct/ order that no pursuant and consequential actions/ steps shall be taken pursuant to the impugned order as at Annexure-24) read with Annexure-9 and 19 to the writ application, pending disposal of the writ application;

(iii) direct / order that further operation of the orders/ Notifications as at Annexure 24 read with Annexures-9 and 19 shall remain halted pursuant to an order of stay against the said orders/ notifications, pending disposal of the writ petition; and

(iv) direct/ order that status quo as on date shall be maintained regarding possession right, title, interest, nature, character and use of the lands covered by the order/ notifications as at Annexure-24 read with Annexures-9 and 19 to the writ petition, pending disposal of the writ petition."

3. For better consideration of the interim prayer made in this Misc. Case, it is necessary to narrate the brief facts giving rise to the writ petition.

The Government of Orissa signed a Memorandum of Understanding (MoU) with the POSCO a registered company in South Korea. The MoU inter alia contemplated an integrated steel project with a capacity of 12 million tones per annum to be contructed in four modules of 3 million tones per annum each and further provided for the construction of linked mining, transport and water projects including a private port and captive iron ore mines, manganese ore mines and coal mines and for numerous other components related to these projects. The said steel plant of 12 million tones per annum

along with private port is proposed to be established in 1620,496 hectares of land in three panchayats, namely, Dhinkia, Nuagaon and Gadakujanga in Erasama Tehsil of Jagatsinghpur district, which includes 1253.225 hectares of forest land comprising Jatadhar Reserve Forest of 68.98 hectares. Dhinkra Nuagaon Protected Forest of 1106.877 hectares, Noliasahi Protected Forest of 27.68 hectares and a Revenue Forest of 49.688 hectares of forest around 74% of total land comes under 'forest category' and there are about 3578 families, including the present petitioners who will be affected and lose their livelihood. On 26th June, 2007 the Government of Orissa recommended an application to opposite party No.1 for forest clearance under Section 2 of the Act of 1980 for diversion of the said 1253.225 hectares of forest land for purposes of the POSCO project. Pursuant to that on 9th August, 2007 the Forest Advisory Committee, made a recommendation that the POSCO project be granted "in principle" forest clearance for diversion of forest land as sought for. In accordance with the directions of the Hon'ble Supreme Court the aforesaid recommendation of the Committee was examined by the Central Empowered Committee (CEC) and vide its report dated 14th November, 2007 the Central Empowered Committee made the recommendation to the Hon'ble Supreme Court as follows:

> "7. The present proposal is diversion of 1253.225 hectares of forest land and will require felling of about 2.8 lakhs trees. The present proposal convers forest land required for the integrated steel plant and captive minor port. The proposal for requirement of forest land for other linkages such as mines, railways, road, corridor etc. are yet to be finalised.
>
> 8. The CEC is of the view that instead of piecemeal diversion of forest land for the project, it would be appropriate that the total forest land required for the project including for mining is assessed and a decision for diversion of forest land is taken for the entire forest land after considering the ecological importance of the area, number of trees required to be felled, adequacy and effectiveness of the R & R plan for the project affected persons and benefits accruing to the State. The diversion of forest land for the plant, without taking a decision for the linked uses particularly the mining project may not be in order.
>
> 9. Since the number of trees involved is about 2.8 lakhs, it would be in order that an independent expert committee including representatives of the NGOs should undertake a site visit in order to assess the impact of the cutting of such a large number of trees and suggest mitigative measures for the area specially since there is a large dependence of local population on these forests. Subject to the compliance of the above observations the proposed diversion of forest land may be permitted."

4. It is stated that in this regard petitioners and other villagers of that area are carrying on peaceful protests in the area and have made several representations to the State as well as Central Government expressing their dissatisfaction with the manner in which the project is being promoted by the opposite parties, but in vain. For this purpose various Palli Sabha meetings were also held at Dhinkia, Nuagaon, Gobindapur and Polanga villages and Forest Rights Committees were appointed. It is submitted that till August 2008 no steps had been taken in the area to implement the Forest Rights Act, apart from the Palli Sabha meetings held on March 23, 2008. In spite of this, opposite party No.1 on 18th September, 2008 accorded impugned forest clearance for diversion of the forest land in favour of POSCO project, however no steps were taken by the opposite party -State Government to implement the provisions of the Forest Rights Act in the area.

5. On 30th July, 2009, opposite party No.1 issued further circular to all State Government directing as follows:

> "to formulate unconditional proposals under the Forest (Conservation) Act the

State/ UT governments are, wherever the process of settlement or Rights under the FRA has been completed or currently under process, required to enclose evidences for having initiated and completed the above process, especially among other sections, Sections 3 (1) (i), 3 (1) (e) and 4 (5)."

6. The direction further states that the evidences in question must inter alia, include:
"a. A letter from the State Government certifying that the complete process for identification and settlement of rights under the FRA has been carried out for the entire forest area proposed for diversion, with a record of all consultations and meetings held;

b. A letter from the State Government certifying that proposals for such diversion (with full details of the project and its implications, in vernacular / local languages) have been placed before each concerned Gram Sabha of forest dwellers, who are eligible under the FRA;

c. A letter from each of the concerned Gram Sabhas indicating that all formalities/ processes under the FRA have been carried out, and that they have given their consent to the proposed diversion and the compensatory and ameliorative measures if any, having understood the purposes and details of proposed diversion;

d. A letter from the State Government certifying that discussions and decisions on such proposals had taken place only when there was a quorum of minimum 50% of members of the Gram Sabha present.

e. Obtaining the written consent or rejection of the Gram Sabha to the proposal."

7. Pursuant to the aforesaid Circular, opposite party No. 2 on 24th October, 2009 further issued a circular to all the Collectors in the State of Orissa requesting them to issue certificates as per its requirements "whenever any User Agency applies for diversion of land for projects". On 29th December, 2009, opposite party No.1 granted the final forest clearance for the diversion of forest land for the POSCO project. However, on a plain reading of the document released in the public domain subsequently it is apparent on the face of the record that at this point of time there was no material on record demonstrating the completed implementation of the Forest Rights Act in respect of the beneficiaries in this area and in particular there were no certificates placed before the opposite party No.1 by the State Government in compliance with the statute and various circulars as mentioned above. No evidence whatsoever was on record before the opposite party No.1 to the effect that the rights of the forest dwellers of the area in question including the present petitioners had been recognized by the Sub-Divisional Level Committee as per law at the time of grant of impugned forest clearance.

8. The present petitioners belong to family that have resided in the villages, Gobindapur, Dhinkia and Nuagao in the district of Jagatsinghpur and are engaged in cultivation for their livelihood for several generations. The people of these villages are cultivating land within the forests and have been dependent on different forest produces from these forests for more than a century. In this regard petitioners have annexed a map of the year 1928-1929 illustrating the fact that the villages of the area bordering dense miscellaneous jungle with cultivated plots and betel vine sheds. It is stated that the petitioners are "Osther Traditional Forest Dwellers (OTFD)" as define under Section 2 (o) of the Forest Rights Act, which is ascertained and found by the Enquiry Committee

appointed by the MoEF to verify the implementation of Forest Rights Act and other

issues in the POSCO project are. People of that area are also used to collect various illegible produces like berries, fruits, tubers, green leaf etc., wild vegetable or uarina leaves, fuel wood etc. for their livelihood. It is also stated that present petitioners belong to a community called "Vana Suraksha Samiti" that has voluntarily protected the trees, forests and plantations. The petitioners have also filed claim under Section 3 (1) (a) of the Forest Rights Act before the Forest Rights Committee of Dhinkia and Govindpur village on 20th April, 2011.

9. It is the case of the petitioners that pursuant to the impugned purported Forest Clearance to the POSCO project, the petitioners are realiably informed that the opposite party-State Government through district Administration is preparing to evict the forest dwellers from the forest land which forms the subject matter of the forest clearance and announcements to this effect have also been made in several leading newspapers in the State, which would be in the teeth of the fundamental, constitutional and statutory rights of the petitioners and other beneficiaries of the Forest Rights Act of the area in question. It is submitted that opposite party No.1 was fully aware of this glaring lacunae in the grant of impugned forest clearance, which is apparent from the condition No. 14 of the forest clearance itself, which speaks that the rights of the tribal people will be settled as per the provisions of the Forest Rights Act before implementation of the project.

10. It is submitted that the State Government vide its letter dated 16th March, 2010 forwarded the information to the opposite party No.1 that there are "no tribal people either cultivating or residing in the forest land and there are no other traditional forest dwellers in the forest land covering the POSCO project area who are cultivating and in possession of the land since three generations i.e. last 75 years". The said information is sheer falsehood. It is further stated that the State Government completely ignored the meetings of the Palli Sabhas which had been called as per its own order and instead a patently false certificate was submitted before the opposite party No.1 in complete violation of the existing law and the rights of the petitioners and other villagers. It is also stated that meanwhile, opposite party No.1 along with Ministry of Tribal Affairs, Government of India constituted a Joint Committee on the Forest Rights Act headed by Shri N. C. Saxena called as Saxena Committee. Some members of the Committee on 24th July, 2010 visited the proposed POSCO project area to ascertain the status of the implementation of the forest Right Act and also conducted public consultation and held discussions with senior official of the State Government and the Committee submitted its report on 4th August, 2010 indicating various lacunae of the State Government in the POSCO project violating the rights of the people and without following due process of law and recommended the opposite party No.1 to direct the State Government to stop any land taken over for the project and further to withdraw the forest clearance granted to the POSCO project.

11. It is submitted by the learned Sr. Counsel Mr. Jayant Das for the petitioners that the action of the opposite parties is purely by force and is in sheer violation of the constitutional and statutory rights guaranteed on the petitioners as well as villagers of that area and are also in violation of the mandatory procedures prescribed & established by law. The impugned orders/ notification sought to be implemented and action to be taken thereon are manifestly and ex-facie ab initio void and non-est in the eye of law and it is submitted that foundation for grant of forest clearance being fatally vitiated, all pursuant and consequential actions are also non-est in the eye of law. It is submitted that in the manner the opposite parties are taking action pursuant to the void forest clearances, which is determined and prejudicial to the petitioners and the villagers of the area who are the beneficiaries of the Forest Rights Act & Rules, if it is not stopped by granting the interim relief as prayed for in this Misc. Case pending consideration of

the writ petition, the writ application shall be rendered infructuous and constitutional and statutory rights of the people at large will be affected and great injustice would be caused to them. Therefore, it is prayed that the Misc. Case is required to allowed.

12. One counter affidavit has been filed on behalf of the opposite party No.1 annexing some relevant documents opposing the averments and prayer made by the petitioners in the writ petition and Misc. Case. It is stated that after due consideration of the report of the CEC, the Supreme Court in its order dated 8th August 2008 in W.P. (C) No. 202 of 1995 directed that the MoEF may take an appropriate decision in this regard and subject to the decision of the MoEF, the project is cleared. After careful examination of the matter, the MoEF accorded the approval for diversion of the said forest land with a stipulation that no forest land shall be handed over to the User Agency before settlement of rights under the Forest Right Act. The State Government vide letter dated 16th March, 2010 provisions of Forest Rights Act. When the MoEF received complaints on violations of the provisions of the Act, MoEF vide its order dated 28th July, 2010 constituted a Committee consisting of four members called, Meena Gupta Committee. Before forming of Meena Gupta committee, a Committee called" Saxena Committee" had been constituted under the Ministry of Tribal Affairs and the MoEF to study and asssess the impacts of the FRA with regard to the sustainable management. The Committee submitted its report. After due examination of the reports of the said Committee, the Forest Advisory Committee (FAC) in its meeting convened on 25th October, 2010 recommended temporary withdrawal of the final stage approval under the Act of 1980 for diversion of 1253.225 hectares of land for the project and recommended the State Government for fulfilment of certain terms and conditions. It is stated that the MoEF at that time had no option but to ask the Government of Orissa to furnish the particulars regarding the claim of the villagers of the forest land in question, who has the primary responsibility for ensuring and guaranteeing compliance with the Forest Rights Act to the beneficiaries & to give a categorical assurance that at least one of the said three conditions to be fulfilled by a person before his claim as OTFD under the Forest Rights Act are recognized. The Government of Orissa vide their letter dated 8.4.2011 inter alia informed the MoEF as follows:

> "After necessary examination of the matter, the Commissioner cum Secretary to Government, ST & SC Development Department in his letter No. 9770 dated 7.3.2010 based on the report of Collector, Jagatsinghpur has confirmed that no one satisfies the conditions laid down under Section 2 (0) of the Forest Rights Act to be treated as OTFD in the forest land involved in the POSCO project area who has for at least three generations prior to 13th day of December, 2005 primarily resided in and who depend on the forest land for bonafide livelihood needs."

Further, the MoEF after going through various provisions of the Orissa Grama Panchayat Act, 1964 (hereinafter called 'OGP Act'), Forest Rights Act and Forest Rights Rules and the information provided by the State Government came to the conclusion that there has been no legally valid resolution of the Grama Sabha claiming recognition of forest rights by the villagers of the forest land area in question as required under Section 6 (1) of the Forest Rights Act. The competent authority in the Central Government after examination of all possible options came to the conclusion that faith and trust in what the State Government says is an essential pillar of cooperative federalism. Having observed so, the competent Authority in the Central Government in the MoEF, after full application of mind to the facts and record before it, has decided to repose trust in what the state government has so categorically asserted and passed a self-speaking order on 2nd May, 2011 to accord final approval to the State Government for diversion of 1253.225 hectares of forest land in favour of POSCO. It is submitted that the contention of the petitioners that the order has been passed in haste and perfunctory manner and reveals total non-application of mind, lack of due diligence, non-consideration of relevant and

germane materials is totally baseless and malicious and the allegations are baseless without any factual matrix. It is stated that the impugned orders have been passed by the MoEF with due diligence and after proper and thorough verification of the material before it and are in full conformity with the relevant laws. Therefore, it is prayed that the writ petition as well as the Misc. Case is liable to be dismissed.

13. The State Government has also filed one preliminary counter affidavit to the Misc. Case vehemently opposing the prayer as sought for by the petitioners. It is submitted that the writ petition as well as the Misc. Case is not at all maintainable either in fact or in law for the reason that petitioners have no locus standi to file this writ petition either personally or in the representative capacity as the petitioners have not disclosed any fact leading to prove the rights, if any. It is stated that the self-same petitioners have filed another writ petition being W.P. (C) No. 14884 of 2011 wherein they have claimed that they are owners and persons interested in acquisition of their respective piece of land and have further averred that they depend on their land for their livelihood and shall be deprived of the same by the impugned acquisition where as in the present writ petition they have also claimed that the individuals and members of the community of village Gobindpur are exercising their rights under the Forest Rights Act which are mutually contradictory and self-destructive. Further it is specifically denied that the petitioners have any cultivated land within the forest around Gobindpur or that they are dependent on forest produce for more than a century. The claim of the petitioners that they are OTFD is also not tenable either in fact or in law in as much as they do not fall either under the definition of the Scheduled Tribe or OTFD under the Forest Rights Act. There is no material particulars disclosed either in the writ petition or in the Misc. Case to show that the petitioners or their ancestors were living inside the forest and / or they have been depending upon any forest produce for bonafide livelihood for last 75 years as required under the provisions of the Forest Rights Act. At no point of time petitioners were in cultivating possession of any forest land as claimed by them and there is no iota of evidence that they are in possession of any such land / and or they are residing inside the Forest. Further no "Palli Sabha" meeting in accordance with the Gram Panchayat Act has been held in respect of Nuagaon, Dhinkia and Gobindpur villages as stated by the petitioners to examine their claim under the provisions of the Forest Rights Act & Rules in respect of the forest land in question.

14. It is submitted that as per the orders of the Hon'ble supreme Court the Government of India MoEF vide their letter dated 19.9.2008 accorded in principle (Stage-I) approval for diversion of 1253.225 hectares of forest land for the POSCO project subject to compliance of certain conditions. The State Government submitted its compliance of all the stipulations. Thereafter the MoEF granted final approval for the project under Section-2 of the Act of 1980 with 15 numbers of stipulations. After scrutiny of all proceedings and documents, the Government of India have granted final (Stage-II) approval vide their letter dated 4.5.2011 for diversion of 1253.225 hectares of forest land for the aforesaid project. It is clear that POSCO project area is located in the coastal district of Jagatsinghpur, which is not a part of the Fifth Schedule Area. In fact, the project site is far away from the nearest Vth Schedule area. More specifically there is no tribal population living in the POSCO project area. Further the State Government stands committed to proper implementation of the provision of the Forest Rights Act.

15. It is further submitted that after due consideration of the proposal by the High Level Clearance Authority under the Chairmanship of the Chief Minister of the State constituted as per the Orissa Industries (Facilitation) Act, 2004, the State Government recommended the proposal for diversion of the forest land in question for approval to the Central Government. The Forest Advisory Committee made recommendation for grant of forest clearance. Thereafter, on the direction of the Hon'ble Supreme

Court, the recommendation of the Forest Advisory Committee was sent to the CEC for examination. The CEC after thorough examination recommended for grant of approval and basing on the recommendation of the CEC, the Hon'ble Supreme Court vide order dated 8.8.2008 cleared the project. It is further submitted that various 'Palli Sabha' were conducted on 16.03.2008 and 23.03.2008 in the villages covering the POSCO project area and no claim for settlement of rights from the tribals and traditional dwellers were received. In view of the above background of orders of Hon'ble Supreme Court and final forest clearance accorded by Govt. of India, MoEF dated 4.5.2011 under provisions of the Forest (Conservation) Act, 1980 after prolonged deliberations and scrutiny under Forest Rights Act, the averments made by the petitioners in the writ petition in support of their and other villagers claim has no basis. The writ petition as well as Misc. Case is devoid of any merit, rather the petitioners intended to block the developmental prospects of the people of the district and the State as a whole. The petitioners are not entitled to any interim relief which will cause irreparable loss and injury to the interest of the State. Therefore, it is prayed that the Misc. Case is liable to be dismissed.

16. On the other hand one objection petition to the Misc. Case has also been filed by opposite party No.7 vehemently opposing the averments made in the writ petition and prayer made the Misc. Case. It is submitted that Misc. Case is liable to be dismissed on the ground of delay and latches as the petitioners have never raised any objection prior to the grant of Final/ Stage-II Forest Clearance under Section-2 of the Act of 1980 by the MoEF vide order dated 4.5.2011. Further the Central Government vide order dated 4.5.2011 has already accorded Final approval in accordance with the provisions of the Act of 1980. The assertion that the present petitioners have filed claim under Section 3 (1) (a) of the Forest Rights Act before Forest Rights Committee of Dhinkia and Govindpur on 20.4.2011 and the same is awaiting further action by the Palli Sabha is disputed and denied as completely vague. Reiterating the averments made and stands taken by the State Government and the Central Government in their counter affidaits, learned Sr. Counsel Mr. Sanjeet Mohanty on behalf of opposite party No.7 also submitted that no relief can be granted to the petitioners & other beneficiaries by this Court in the Misc. Case and the same is liable to be rejected.

17. Mr. Jayant Das, learned Sr. Counsel on behalf of the petitioners submitted that petitioners in the two writ petitions are no doubt same, but in this writ petition they claim rights as OTFD, whereas four of them claim rights on land under acquisition. One of the other two petitioners is a 'fisherman' and another is otherwise dependent on forest produces. Four writ petitioners who assert rights on land under acquisition are inheritors of part of ancestral rights of more than 75 years on land which was originally owned by their ancestors. The bonafide dependence of livelihood on forest produce, fish, water source, grazing grounds etc. is not as per the Forest Rights Act to be exclusive. As marginal farmers, they also depend for their bonafide livelihood on the forest produce, fish, water etc. that are inside the forest, to which they have traditional access to fishing rights and dependence wholly on forest. Further,the very grant of access and fishing rights which is clear from condition No.XII in Annexure H/2 of the counter affidavit of the State Government. Therefore, it is submitted that all the petitioners are OTFDs. An OTFD need not necessarily reside inside the forest in ancestral residence of 75 years and current dependency on forest qualifies them as OTFDs as stated by the opposite party No.1 in its counter & the correspondence made with the State Government.

18. In support of the aforesaid contentions, learned Sr. Counsel Mr. Das placed reliance upon the decisions of the Supreme Court in the cases of *Chitanya Kumar & Ors. vs. State of Karnataka* (1986) 2 SCC 594; *Guruvayoor Devasworm Managing Committee vs. C.K. Rajan* (2003) 7 SCC 546; *Ashok Lanka vs. Rishi Dixit* (2005) 5 SCC 598; *Indian bank vs. Godhara Nagrik*, (2008) 12 SCC 541 and a recent judgment of the Supreme Court in

the case of *Delhi Jal Board vs. national Campaign for Dignity & Rights of Swerage and Allied Workers & Ors.* (In C.A. No. 5322 of 2011 dated 12.7.2011 and submitted that the petitioners have got locus standi to file this writ petition on behalf of the villagers also for the reason that the rights of the villagers concerned in respect of the forest land, who are semi- literate or illiterate and are unaware of their rights under intricate laws could be agitated by any person and therefore this writ petition is maintainable in law.

19. In support of the contention with regard to rights of OTFD, Mr. Das, learned Sr. Counsel submitted that conditionality to qualify as OTFDs cannot be fixed, as the forests are 75 years old. The petitioners have produced the relevant documents and it is submitted that forests exist from at least 1846 as per the report of Sterling, Hota's Survey & Settlement Report quotes report of Derry (the DFO, Puri) of 1930 authenticating the existence of these forests. The forests have undergone denudation and have been reduced to 3600 acres i.e. 1253 hectares as on today and were declared protected forest" in 1961. In terms of Section 29 of the Indian Forest Act 1927, what is pre-existing 'forest' can only be 'protected'. Therefore, the Notification of 1961 declaring the above forest as "protected forest" expressly states "without prejudice to the pre-existing rights of persons of the villagers living in the vicinity of the forest". It is stated that the Voter's List recognizes 21 families of STs, who have been living in and around the forest areas which is one of the points prescribed under Rule 13 of the Forest Rights Rules as evidence for determination of forest rights. OTFDs are not necessarily those who live inside the forest, but round the forests or in the villages in the vicinity of the villages adjoining the forest areas, which is affirmed by the Ministry of Tribal Affairs vide order dated 9.6.2008, which is binding on all authorities as per Sections 11 and 12 of the Forest Rights Act. Therefore, any inference by State Government accepted by the opposite party No.1 there is no OTFDs is baseless and contrary to the categorical findings of the Saxena Committee appointed jointly by the MoEF and Tribal Affairs in this regard. It is also affirmed by the Meena Gupta Committee appointed by the MoEF.

20. It is further submitted that no Forest Rights Committee has been constituted in two areas Bhayanpal and Nolia Sahi, thereby, the statutory obligation imposed on the State Government under Section 6 (1) read with Rules have not been discharged by the State Government. If the assertion of the Collector to the effect that Grama Sabha meetings were not held in the area in question in accordance with law will be taken as valid, then there is no material foundation to arrive at the conclusion that there are no OTFDs, as the Grama Sabha resolutions alone could provide the foundation for any conclusion in this regard in view of the mandatory provisions of Section 6(1) of the Forest Rights Act. Further, if the Collector felt that the Grama Sabha meetings were not validly held, the compulsions of the provisions of the Forest Rights Act cast a duty on them to cause such meeting to be held in conformity with law and pass the requisite resolutions as the same are mandatorily required under the Forest Rights Act and the Rules read with instructions of the Ministry of Tribal Affairs issued under Sections 11 and 12 of the Act.

21. Placing reliance upon the judgment of the Supreme Court in *Solidaire India Ltd. vs. Fair growth Financial Services Ltd. & Ors.* (2001) 3 SCC 71 it is submitted by the learned Sr. Council on behalf of the petitioners that Section 4 of the Forest Rights Act, over rides all existing laws. The requisite meetings and constitution of Forest Rights Committee as provided under Section 6 read with Rule 3 and considering the same by Grama Sabhas and passing the resolution about the claims of the beneficiaries is a condition precedent to enable the Government to proceed further in the matter.

22. The above said statutory and mandatory procedure has not been followed. The bald certification by the State Government without any valid material particulars as per

the mandates of the Forest Rights Act & Rules is ab initio void. It is submitted that the exclusive reliance by the MoEF, Government of India on such certification also renders the order ab-initio void and non-est in the eye of law. In this regard he has placed reliance in the case of Tata Cellular vs. Union of India (1994) 6 SCC 651 to show the decision of the opposite party No. 1 is an irrationality and perverse which is a ground for this Court to enlarge its judicial review power to quash the impugned orders.

23. As could be seen from the order of the MoEF, the three conditions incorporated therein are contrary to the stipulations of Forest Rights Act and the binding directions of the Ministry of Tribal Affairs under Sections 11 and 12 of the Forest Rights Act. The stipulation that an OTFD must have been living for 75 years inside the forest is contrary to the provisions of the FRA as well as the binding directions of Ministry to Tribal Affairs. Therefore, the orders of MoEF are based on wrong interpretation of the provisions of the Forest Rights Act & Rules and circular / instructions issued by the Ministry of Tribal Affairs and it has drawn erroneous conclusions on the basis of certificates said to have been furnished by the District Collector to the State Government that are ab-initio void and non-est in law.

24. Mr. Jayant Das, learned Sr. Counsel placing reliance upon the recent judgment of the Supreme Court in the case of Jagpal Singh vs. State of Punjab (C.A. No. 1132/2011 dated 5.07.2011) submitted that grazing grounds and other common lands cannot be alienated. Further placing reliance upon the judgment of the Supreme Court in the case of Solidaire India Ltd. (supra) it is submitted that non-obstante clause in the Forrest Rights Act and non obstante clauses in two different special Acts of the Parliament have different implications. In the former it may operate in its respective field and in the latter case, the later enactment over rides the earlier one. Therefore the MoEF is not competent to take a final decision in respect of the forest land in respect of which rights are conferred on STs/OTFDs and therefore the prior concurrence of the Ministry of Tribal Affairs as required under Sections 11 and 12 of the FRA is required as the said provisions are applicable to the fact situation under the Forest Rights Act. This has manifestly not been done by the MoEF at the time of passing the impugned order granting final clearance in favour of POSCO under Section 2 (1) (b) of the F.C. Act. The impugned orders are therefore, ab into void, vitiated and also non-est in the eye of law. In support of this contention he has also placed reliance upon that the Government of India (Allocation of Business) Rules 1961 and Government of India (Transaction of Business) Rules, 1961. It is further contended that the subject matter was required to be dealt with by the Union of India and hence the cabinet approval was required for granting final clearance.

25. It is further submitted that the allegations regarding the Minister, MoEF acting under extraneous pressures are not denied in the counter affidavit of the opposite party No. 2, therefore, it is clear that the allegation is admitted is also relevant consideration for this Court for grant of interim order as prayed by the petitioner.

26. Learned Sr. Counsel placed reliance upon the judgment of the Supreme Court in the case of *Nandini Sundar vs. State of Chhatisgarh & Ors.*, decided on 5.7.2011 in W.P. (Civil) No. 250 of 2007, particularly to paragraphs 5, 6, 7, 8, 10, 11, 12, 13, 14 15, 16, 17, 18 and 20 wherein the Supreme Court came to the conclusion & categorical findings of the malafides in enforcement of the concerned laws leading to blatant violation of rights under the Constitution of India are recorded. The findings in the said case are also based on reports of the Planning Commission of India and other authoritative publications. It is submitted that in the present fact and circumstances of the case in view of two Committee reports referred to supra and the pleadings of the State Government, the balance of the convenience leans in favour of the petitioners and

irreparable loss and injury would be caused by cutting lakhs of trees, altering the possession, nature, character of the land by implementing the impugned orders by the POSCO with active co-operation and support of the State Machinery. Therefore, the action of the opposite parties coupled with flagrant violation and denial of vested rights, failure of public trust, necessitates interference by this Court at the interim stage in exercise of its discretionary and extraordinary jurisdiction as the various legal grounds and contentions urged are required to be considered and answered by this Court in exercise of its Judicial Review power with reference to the documents and pleadings of the parties.

27. Learned Sr. Counsel for the petitioners further submitted that the reliance placed by the learned Sr. Counsel on behalf of POSCO as well as Union of India in the cases of *State of Bihar & Ors. vs. Bihar Rajya M.S.E.S.K.K. Mahasangh & Ors.*, AIR 2005 SC 1605, *Sarwan Singh & Anr. vs. Shri Kasturi Lal*, AIR 1977 SC 265, *Sanwarmal Kejriwal vs. Viswa Cooperative Housing Society Ltd. & Ors.*,1990 SC 1563; and *Nature Lovers Movement vs. State of Kerala & Ors.* (2009) 5 SCC 373 with regard to the non obstante clause contained in Section 3 (2) of the FRA Act, which means in addition to the power, conferred upon the Union of India under Section 2 of the FC Act are totally inapplicable to the facts situation of the present case. In this view of the matter, it is requested that the interim prayer as prayed for in the Misc. Case is required to be granted.

28. On the other hand Mr. Ashok Mohanty Learned Advocate General very strongly rebutted the contentions urged by the learned Sr. Advocate Mr. Jayant Das on behalf of the petitioners and it is submitted by him that the writ petitioners have also filed another writ petition challenging the acquisition of the forest land without having any locus standi, therefore, these petitions are not at all maintainable in law. Petitioners are neither Scheduled Tribe nor the OTFDs in terms of Section 2 (o) of the Forest Rights Act and neither they have any rights under Section 3 (1) of the FRA Act. Therefore the legal contentions urged on behalf of the petitioners are without factual aspects and without any supportive documents. Further the reliance placed by the learned Sr. Counsel for the petitioners on the reports of the Saxena Committee and Meena Gupta Committee cannot be accepted for the reason that they have no statutory force. On the other hand the Forest Advisory Committee which is a statutory body constituted under Section 3 of the F.C. Act recommended to the Union of India for diversion of forest land in favour of the POSCO and basing on the said recommendation the MoEF passed the impugned orders in favour of the POSCO after considering the report of the State Government with regard to rights of ST/OTFD persons under the provisions of the FRA Act and Rules, therefore, it cannot be termed as either erroneous or non-est in the eye of law as urged by the learned Sr. Advocate on behalf of the petitioners. Further petitioners have filed the other writ petitions questioning the land acquisition proceedings claiming the ownership of the land acquired and at the same time they are also claiming that they are OTFDs upon the forest land in respect of which diversion approval has been granted by MoEF. Apart from that petitioners are claiming that they are nomadic and prosthetic. They are cultivating cashew and depending upon the prawn cultivation on the water bodies and different forest produces, which are not at all true and correct as their claim is without any basis. It is further contended that no claim is made by anybody by giving necessary particulars as mentioned in the Forest Rights Rules, 2007 in the prescribed forms and Annexure-I under Rule 6 (1) of the Rules. The resolutions stated to have been passed by the Grama Sabha upon which reliance is placed by the petitioners are also not valid for the reason that those are not as per the Gram Panchayat Act. Hence, the impugned notification was issued on the basis of the report of the District Collector stating that the resolutions of the Gram Panchayat are not valid as the same were convened by the Sarpanch but not the Executive officer who is authorized in law. Therefore, the reliance placed upon by the MoEF on the records and

findings recorded by the State Government is legal and valid and same does not call for interference in this writ petition. Further it is contended by him that prima facie the other individual rights or interests on behalf of the persons who have no access to the Court claiming that they are marginal sections of the society is without any substance and not sustainable in the eye of law. It is urged that the petitioners have neither made out a prima facie case nor balance of convenience is in their favour.

29. Mr. S.D. Das, learned Asst. Solicitor General sought to justify the impugned orders placing reliance upon the State Government's certification stating that the right claimed by the petitioners individually as ST and OPFD is not supported by the State Government's report. The report discloses that they are not residing in the forest area and further they have not disclosed anything in support of their land which is leased out to POSCO. The impugned orders need not be interfered with by this Court at this stage for the reason that the CEC and the Hon'ble Supreme Court of India after examination of the proposal directed that the MoEF may take an appropriate decision in this regard and clear the project. After careful examination of the matter, the MoEF vide it letter dated 19th September, 2008 accorded Stage-I approval and thereafter on receipt of a report from the State Government on compliance the conditions stipulated in the Stage-I approval, the MoEF further vide its letter dated 29th September, 2009 accorded final / Stage-II approval for diversion of the forest land. He has further placed reliance upon Section 3 (2) of the Forest Rights Act and submitted that notwithstanding the above said provision Section 3 (2) must be read along with Section 4 (2) interpreting the correct meaning in addition to what is provided under Sections 2 (1) of F.C. Act. The said provisions must be harmoniously interpreted adding each in terms of the both Act which is purposive interpretation according to Interpretation of Statute of G.P. Singh 4th Edition. In support of the said contention he has placed reliance upon the decision of the Supreme Court in the case of *State of Bihar & Ors. vs. Bihar Rajya M.S.E.S.K.K. Mahasangh & Ors.*; AIR 2005 SC 1605. Therefore, he submitted that the orders do not call for any interference and the question of staying the same as prayed for in the Misc. Case does not arise at all.

30. Mr. Sanjit Mohanty, learned Sr. Counsel for the opposite party No.7 reiterating the submissions made by the learned Advocate General and learned Asst. Solicitor General placed reliance upon the judgment of the Supreme Court in the cases of Nature Lovers Movement vs. State of Kerala & Ors., (2009) 5 SCC 373; *TN Godavarman Thirumukpad vs. union of India*, AIR 1997 SC 1228 and submitted that for the use of forest land for non-forest purpose prior approval of the Central Government U/s. 2 of the FC act is required. It is further submitted that as per Rule 3 of the FR Rules, Forest Rights Committees have to be formed. For all other purposes including Government facilities requiring more than one hectares of Forest Land, forest clearance under Section 2 of the FC Act is a mandatory condition for obtaining diversion of Forest land as well as conditions imposed by the Hon'ble Apex Court such as NPV and Compensatory Afforestation, which has been done in the instant case. Further FC Act, 1980 and Forest Rights Act, 2006 were special statutes. It is settled law that the later special act will prevail over the earlier special Act. Forest Rights, Act, 2006 being the later act will prevail over FC Act, 1980. It is stated that Guideline dated 18.5.2009 would show that the rigor of Forest Advisory Committee/ CEC / NPV/ Compensatory Afforestation under FC Act would not be applicable to the projects only to the extent explained in Section 3 (2) of the FR Act, such as (i) less than one hectare land, (ii) for the facilities managed by the Government (iii) felling of trees not exceeding 75 per hectares, (iv) Recommended by the Gram Sabha. In terms of Rule 11 of FR Rules the Grama Sabha will call for claims and authorize the Forest Right Committee to accept the claims and the claims have to be made within a period of 3 months from the date of such calling of claim in Form A or Form B as provided in Annexure 1 other Rule 6 (1) of the Rules with at least two of the

evidences mentioned in Rule 13 of FR Rules. Rule 4 (2) of the FR Rules stipulates that the quorum of the Grama Sabha meeting shall not be less than two third of all members of such Grama Sabha. Section 6 (2) provides that any person aggrieved by the resolution of the Grama Sabha may prefer a petition to the Sub-Divisional Level Committee and under Section 4 (5) of the FR Act it is made clear that the encroachers are liable to be evicted.

31. Mr. Mohanty learned Sr. Counsel for the opposite party No.7 further submitted that after careful consideration of all the aspects, the MoEF in its order dated 2.5.2011 arrived at the conclusion that there has been no legally valid resolution of the Gram Sabha claiming recognition of forest rights as required U/s 6(1) of FR Act. Further there has been no valid claim for recognition of forest rights in Dhinkia & Govindpur as required under the FR Act, 2006. It is relevant to mention that MoEF granted the final approval under Section 2 of the FC Act vide its letter dated 29.12.2009, however on 5.8.2010 on receipt of certain complaints MoEF directed the State Government to stop work. On 25.10.2010 the Forest Advisory Committee recommended for withdrawal of the final approval temporarily in view of the Committee's report. Thereafter on 31.1.2011 the MoEF after considering the reports of the two Committees, namely, Saxena Committee and Meena Gupta Committee passed order directing that final approval for diversion would be granted as soon as the assurance from the State Government is received. Upon receipt of the said order dated 31.1.2011, the State Government on 8.4.2011 submitted its reply, which was received by the Central Government on 14.4.2011. Central Government again referred the matter to State Government in view of the representation of POSCO Pratirodh Sangram Samiti along with two alleged Palli Sabha resolutions of village Dhinkia and Gobindpur held on 21.2.2011 and 23.2.2011. Therefore, the Government of Orissa submitted report dated 29.4.2011 basing upon the enquiry report dated 25.4.2011 of the Sub-Collector, letter dated 27.4.2011 of the Collector and letter dated 28.4.2011 of SC & ST Department. Considering the said reply dated 29.4.2011 of the State Government, the MoEF passed order dated 2.5.2011 granting Forest Clearance to POSCO for diversion of 1253.225 hectares of forest land. Therefore, it is submitted that the impugned order dated 2.5.2011 is valid and justified.

32. It is further submitted that no individual claim of the Scheduled Tribe persons has been filed by the petitioners however a claim that has been made as Community Forest Right is not in accordance with statutory requirement and without the signatures of the claimants. Therefore, the Collector in its report dated 8.4.2011 has rightly stated that no claims have been received from either ST or OTFD persons. Further it is clearly stated in the letter dated 29.4.2011 of the State Government that the two Palli Sabhas dated 21.2.2011 and 23.2.2011 were held fraudulently. The said resolutions are invalid for the reason that the same have been passed under Section 5 (1) of the FR Act and not under Section 6 of the FR Act. It is also stated that the Saxena Committee in its report dated 4.8.2010 has not considered the Constitution of Forest right Committees on 23.3.2008 and filing of claim for Community Forest on 29.7.2010, therefore, the report of the Committee cannot be taken into consideration. That POSCO has already deposited Rs. 106.00 crores towards NPV as directed and the State Government is also paying compensation even to the illegal encroachers of the forest lands under the Rehabilitation and Resettlement package even though they are not entitled in law for the same. In view of the above mentioned facts it cannot be said that the order dated 2.5.2011 of the MoEF is illegal, irrational and suffers from procedural impropriety, rather, petitioners having failed to establish that they have filed any claim either individually of for community have altered their stand to that of espousing the cause of the villagers, who are encroachers, in the garb of a public interest litigation, therefore, it is prayed that no interim relief whatsoever can be granted as prayed for by the petitioners in these proceedings and the writ petition as well as Misc. Case is liable to be dismissed

with costs as the same are devoid of merit.

33. The various contentions raised by the parties relate to the merit of the case and can only be addressed at the time of final hearing of the writ petition. At present we are only concerned with the question whether the petitioners have made out a case for maintaining this writ petition and grant of interim order.

34. As regards maintainability of the writ petition, learned Senior Counsel, Mr. Jayant Das has rightly placed reliance upon the decisions of the Supreme Court in the case of *SP Gupta vs. Union of India*, reported in AIR 1982 SC 149, *People's Union for Democratic Rights & Ors. vs. Union of India & Ors.*, reported in (1982) 3 SCC 235, *Chaitanya Kumar & Ors. vs. State of Karnataka & Ors.*, reported in (1986) 2 SCC 594; *Guruvayoor Devasworm Managing Committee & Anr. vs. CK Rajan & Ors.*, reported in (2003) 7 SCC 546; *Ashok Lanka & Anr. vs. Rishi Dixit & Ors.*, reported in (2005) 5 SCC 598; and *Indian Bank vs. Godhara Nagrik Co-operative Credit Society Ltd & Anr.*, reported in (2008) 12 SCC 541. We may state that in view of the legal propositions laid down by the Supreme Court, elaborating the concept of locus standi, holding that the Public Interest Litigation on behalf of marginalized section and disadvantageous people of the society, who are not in a position to approach the Court seeking redressal of their infringement of fundamental rights or human rights, the writ petition filed on behalf of such people as Public Interest Litigation or social interest litigation is maintainable. Therefore, prima facie we are of the view that the writ petition filed by the petitioners on their behalf and on behalf of deprived/ disadvantageous persons, who belong to ST and OTFDs, who are claiming their rights under the Forest Rights Act is maintainable.

35. It is the case of the State that with a view to utilizing its natural resources and rapidly industrializing the State so as to bring prosperity and well being to its people, the State has been making determined efforts to establish new industries in different locations. This has been the industrial policy of the State. As a step for fulfilment of such policy, the State Government signed a Memorandum of Understanding with POSCO to establish an Integrated Steel Plant and Captive Minor Port in Jagatsinghpur district. This is also said to be in furtherance of the National Steel Policy which is of immense importance to the National economy and state economy. The National Council of Applied Economic Research is said to have conducted a survey and prepared a report on social cost benefit analysis of the POSCO steel project. Some of the salient features of the report are that the POSCO intends to set up a Special Economic Zone (SEZ) in Orissa to manufacture superior steel and export 6.3 million tons of its production which would help in achieving the target for exports set by NSP 2005 annually 26 million tonnes by 2019. Its iron project would create an additional employment of 50,000 person year annually for the next 30 years. If the project is set up in an SEZ area, it will contribute cumulative tax revenue (indirect taxes on domestic sales and capital goods, corporate tax etc) of Rs. 174,920 crores, in nominal terms, to the Government of Orissa and the Government of India over the useful life of thirty five operating years as or per the report of the Economic Law Practice Firm Das and associates prepared for NCEAR. The Government of Orissa cumulative share would be Rs. 77,870 crore on account of VAT inflow on domestic sales and the share accruing to the state government from the Government of India on the tax revenue collected from the project. Prima facie, therefore, the project would help in improving the economy of the State as well as the Country and would therefore be in public interest.

36. It would be profitable to know what the apex Court said with regard to judicial interference with policy matters:

    In *Narmada Bachao Andolan vs. Union of India*, AIR 2000 SC 3751, there was a challenge to the validity of the establishment of a large dam. It was held by the

majority as follows:

"229. It is now well settled that the Courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy making process and the courts are ill-equipped to adjudicate on a policy decision so undertaken. The court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution."

In the said case, the majority decision outlined what should be the role of the Court in respect of public projects and policies which are initiated by the Government vis-à-vis rights of the people as under:

"232. While protecting the rights of the people from being violated in any manner utmost care has to be taken that the Court does not transgress its jurisdiction. There is, in our constitutional framework a fairly clear demarcation of powers. The court has come down heavily whenever the executive has ought to impinge upon the court's jurisdiction.

233. At the same time, in exercise of its enormous power the court should not be called upon to or undertake governmental duties or functions. The courts cannot run the Government nor can the administration indulge in abuse of or non-use of power and get away with it. The essence of judicial review is a constitutional fundamental. The role of the higher judiciary under the Constitution cast on it a great obligation as the sentinel to defend the values of the Constitution and the rights of Indian. The Courts must, therefore, act within their judicially permissible limitations to uphold the rule of law and harness their power in public interest. It is precisely for this reasons that it has been consistently held by this Court that in matters of policy the court will not interfere. When there is a valid law requiring the Government to act in a particular manner the court ought not to, without striking down the law, give any direction which is not in accordance with law. In other words, the court itself is not above the law.

234. In respect of public projects and policies which are initiated by the Government the courts should not become an approval authority. Normally such decisions are taken by the Government after due care and consideration. In a democracy welfare of the people of large, and not merely of a small section of the society, has to be the concern of a responsible Government. If a considered policy decision has been taken, which is not in conflict with any law or is not mala fide, it will not be in public interest to require the court to go into and investigate those areas which are the function of the executive. For any project which is approved after due deliberation the court should refrain from being asked to review the decision just because a petitioner in filing a PIL alleges that such a decision should not have been taken because an opposite view against the undertaking of the project, which view may have been considered by the Government, is possible. When two ors more options or views are possible and after considering them the Government takes a policy decision it is then not the function of the court to go into the matter afresh and, in a way, sit in appeal over such a policy decision."

In the case of *Delhi Science Forum and Ors vs. Union of India* and another (1996) 2 SCC 405, the Apex Court held as follows:

"What has been said in respect of legislations is applicable even in respect of

policies which have been adopted by the Parliament. They cannot be tested in Court of Law. The courts cannot express their opinion as to whether at a particular juncture or under a particular situation prevailing in the country any such national policy should have been adopted or not. There may be views and views, opinions and opinions which may be shared and believed by citizens of the country including the representatives of the people in Parliament. But that has to be sorted out in the Parliament which has to approve such policies. Privatization is a fundamental concept underlying the questions about the power to make economic decisions. What should be the role of the State in the economic development of the nation? How the resources of the country shall be used? How the goals fixed shall be attained? What are to be the safeguards to prevent the abuse of the economic power? What is the mechanism of accountability to ensure that the decision regarding privatization is in public interest? All these questions have to be answered by a vigilant Parliament. Courts have their limitations because these issues rest with the policy makers for the nation. No direction can be given or is expected from the courts unless while implementing such policies, there is violation or infringement of any of the Constitutional or statutory provision. The new Telecom Policy was placed before Parliament and it shall be deemed that Parliament has approved the same. This Court cannot review and examine as to whether said policy should have been adopted. Of course, whether there is any legal or Constitutional bar in adopting such policy can certainly be examined by the court."

37. A policy decision of the Government whereby validity of contract entered into by Municipal Council with the private developer for construction of a commercial complex was impugned came up for consideration before the Apex Court in *G.B. Mahajan vs. Jalgaon, Municipal Council*, AIR 1991 SC 1153, in which the land observed as follows:

"The criticism of the project being 'unconventional' does not add to or advance the legal contention any further. The question is not whether it is un-conventional by the standard of the extant practices, but whether there was something in the law rendering it impermissible. There is no doubt, a degree of public accountability in all governmental enterprises. But, the present question is one of the extent and scope of judicial review over such matters. With the expansion of the State's presence in. the field of trade and commerce and of the range of economic and commercial enterprises of Government and its instrumentalities there is an increasing dimension to governmental concern for stimulating efficiency, keeping costs down, im- proved management methods, prevention of time and cost over-runs in projects, balancing of costs against timescales, quality-control, cost-benefit ratios etc. In search of these values it might become necessary to adopt appropriate techniques of management of projects with concomitant economic expediencies. These are essentially matters of economic policy which lack adjudicative disposition, unless they violate constitutional or legal limits on power or have demonstrable pejorative environmental implications, or amount to clear abuse of power. This again is the judicial recognition of administrator's right to trial and error, as long as both trial and error are bona fide and within the limits of authority."

38. Further in the case of *BALCO Employees Union (Regd.) vs. Union of India & Ors*. reported in AIR 2002 SC 250, the Supreme Court held as under:

"96. Judicial interference by way of PIL is available if there is injury to public because of dereliction of constitutional or statutory obligations on the part of the Government. Here it is not so and in the sphere of economic policy or reform the Court is not the appropriate forum. Every matter of public interest or curiosity cannot be the subject matter of PIL. Courts are not intended to and nor should they conduct the administration of the country. Courts will interfere

only if there is a clear violation of constitutional or statutory provisions or non-compliance by the State with its Constitutional or statutory duties. None of these contingencies arise in this present case.

97. In the case of a policy decision on economic matters, the Courts should be very circumspect in conducting any enquiry or investigation and must be most reluctant to impugn the judgement of the experts who may have arrived at a conclusion unless the Court is satisfied that there is illegality in the decision itself.

98. Lastly, no ex-parte relief by way of injunction or stay especially with respect to public projects and schemes or economic policies or schemes should be granted. It is only when the court is satisfied for good and valid reasons, that there will be irreparable and irretrievable damage can an injunction be issued after hearing all the parties. Even then the Petitioner should be put on appropriate terms such as providing an indemnity or an adequate undertaking to make good the loss or damage in the event the PIL filed is dismissed".

39. With regard to the report of the State Government submitted to the MoEF, no doubt it has not preceded by Palli sabha constitution which can be said to be not only irregularity but also illegality. Having regard to the industrial policy of the State Government to generate employment for the unemployed youth, the forest land in question has been agreed to be transferred through IDCO by the State Government by entering into a memorandum of understanding with POSCO to establish Integrated Steel Plant which according to NCEA report will provide employment to 30,000 people and there will be huge generation of revenue through excise, customs duty VAT and income tax which will augment the Income and revenue of both the Central Government and the State Government. The same would serve the public interest as recommended by NCEA Body. The OTFD rights of the persons under the Act, 2006 claimed through public spirited persons is very minimal and such rights have not been determined and conferred as provided under the said Act and the Rules. Even in respect of the land against which OTFD right is claimed, the State Government has got every power to acquire such land of such person by awarding compensation for the public purpose is the legal submission made by the learned Advocate General. Although in the instant case there has been no determination of the rights provided under the provision of section 6 constituting various committees and inviting applications and examining the same with reference to the particulars that would be given in the prescribed form, even then the State Government without examining the correctness of their rights have granted the compensation. Taking into consideration the huge project which is planned to be established to achieve the industrial policy of the State Government, the Central Government in the Ministry of Environment and Forest has exercised its statutory power under the provisions of Section 2 of the FC Act on the basis of the relevant report sent by the State Government and other reports keeping in view the project clearance by the apex Court on certain conditions suggested by the CEC and granted approval for diversion of the forest land for the better purpose of generating employment and augmenting the revenue of the State as well as the Central Government which can be construed as public interest. Rights of few individuals who are claiming OTFD rights and also private rights in respect of other land which are indicated in the writ petition can well be safeguarded by further examining the case on merit and moulding the relief of adequacy and inadequacy of compensation and other better Rehabilitation Schemes such as either granting government lands for the occupation in other place or compensating them by adequate monetary benefits in lieu of their claim of OTFD rights at the time of final disposal of the writ petitions on merits by moulding the relief in favour of persons who have got OTFD rights under the provision of the Act

and Rules in exercise of this Court's discretionary power. By making this observation we are not approving the clearance given by the Ministry but this is one of the reasons assigned by us for not interfering with the further progress of the project at this stage by granting interim order. That would not be in the public interest. The balance of convenience certainly is in favour of the opposite parties and POSCO in view of the sworn statement made by responsible officer of the State Government that necessary steps are being taken for the purpose of establishing the Steel Project by engaging large number of employees for construction of buildings and making other infrastructural developments. If at this it is stalled on the basis that statutory provisions are not complied with by the State Government in not determining the rights of OTFD persons by accepting the case pleaded on behalf of persons claiming their rights that they have made out a prima facie case, great hardship will be caused to the OTFD can be compensated in terms of money and such other suitable Rehabilitation Schemes. That by itself is the reason for us to hold that there is no balance of convenience in favour of the persons who are claiming OTFD rights and more hardship would be caused to the opposite parties than the persons who will be claiming OTFD rights upon the forest land which is leased in favour of POSCO. It is no doubt true that the project which has been conceived to be established will sub-serve the public interest. These are the reason which weigh very much in our mind to decline to grant interim order in favour of the persons who are claiming OTFD right through the petitioners.

40. The case of the petitioners is that they have filed claims under section 3 (1) (a) of the Forest Right Act, 2006 on 20th April, 2011 and the same are awaiting further action by Palli Sabha. It appears that stage I forest approval for diversion of 1253. 225 hectare of forest land for POSCO project in principle was granted on 19th September, 2008. The State Government submitted point wise compliance of all the stipulations of the in principle approval order of the Government of India by letter dated 3.12.2009. Final approval of the project under section 2 of the F.C. Act was granted by the Government of India vide letter dated 29.12.2009. Of course there was stop work order dated 5.8.2010 but after scrutiny of the report of the Committee appointed by the Government of India and the views of the State Government on the purported Pallisabha resolutions dated 21.2.2011 of Dhinkia Village and dated 23.2.2011 of Govindpur village that the same were fraudulent and the aforesaid PalliSabha meetings were convened in gross violence of the relevant provisions of the Orissa Gram Panchayat Act, 1964 and Forest Rights Act, 2007, the Government of India has granted final approval vide their letter dated 4.5.2011. If at all the petitioners individual and community rights were at stake, they should not have waited till 20th April, 2011 to lodge their claims. Determination of their rights involves consideration of different aspects with reference to the Forest Rights Act and pending determination so such rights it would not be prudent to stay operation of the clearance given by the Government of India after application of mind and consideration of various aspects required to be considered for such grant.

41. The contention urged with reference to the clarification issued by the under Secretary to the Government of India, Ministry of Tribal Affairs on June 9, 2008 (Annexure 2) with regard to the word "primarily" used in Section 2 (0) to claim OTFD rights when there is no ambiguity in the definition clause of OTFD read with the forest rights in section 3 is required to be considered at the time of hearing on merits.

42. The Committee constituted to investigation into the proposal submitted by POSCO India Pvt. Limited in its report dated October 18, 2010 found that as per the Census of 2001 and the voter list, there are 21 adult S.T. persons residing in Polanga Village and the Ward Member is a female S.T. if this be believed, then nobody prevented such S.T. person to question the clearance.

43. For the aforesaid reason, we are of the view that the petitioners have not made out a prima facie case for grant of interim relief. Even assuming that the petitioners have made out a prima facie case, the balance of convenience is not in their favour as stated above. Therefore, we are not inclined to grant any interim relied as prayed for by the petitioners. The misc. case is accordingly rejected.

Kama Kunja vs. Union of India & Ors.

WP (C) NO. 864 OF 2014
ORISSA HIGH COURT, CUTTACK
28.03.2014
CORAM: A.K. GOEL, C.J. AND DR. A.K. RATH, J.

SUMMARY

The petitioner is an elected Sarpanch. He has filed this writ petition challenging the tender call notice dated 3.01.2014 issued by the State government, calling for the sale of kendu (tendu) leaves by way of tender by the Orissa Forest Department Corporation (OFDC). The petitioner argues that this tender call is in violation of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA), Section 44(2) of the Orissa Gram Panchayat Act, 1964, and also the Orissa government's own order dt. 1.1.2014 whereby tendu leaves were de-regulated, thereby leaving the people of Malkangiri district free to sell the leaves to anybody.

The respondent/ State government argued that tender call notice will not in any manner obstruct the functioning of the Gram Sabha. The OFDC was set up by the State government as its agent in order to protect the pluckers against non-purchase of leaves as well as exploitation by buyers who try to purchase at low prices.

The High Court decided against the petitioner, finding that there is no ground for interference with the impugned tender call notice. It observed that neither the rights of tribals nor of the panchayats are in any way affected by the tender call notice.

EDITOR'S NOTE

A special leave petition was filed in the Supreme Court against this judgment. However, by the time the matter came up for hearing, the period for which the tender had been floated had already expired. Permitting the petitioner to withdraw the petition, the Supreme Court passed the following order[73]:

> **"In view of the aforesaid, without expressing any opinion, we grant liberty to the petitioner to challenge the subsequent tender, if so advised, in a writ petition, on the constitutional backdrop categorically averring the basis on which it**

[73] Order dt. 17.3.2015 in SLP(C) 17579/14, *Kama Kunja vs. Union of India & Ors.*, Supreme Court of India.

intends to establish that the rights in respect of the minor forest produce, which would also include Kendu leaves, have vested with the Gram Sabha. Apart from granting such liberty, we have not expressed any opinion whatsoever on any of the aspects.

With the aforesaid liberty, the special leave petition is permitted to be withdrawn."

In short, rather than going into the correctness or otherwise of the decision of the Odisha High Court, the Supreme Court decided to leave the questions of law open, and also allowed the petitioner or any other party to challenge subsequent tender call notices, if any. For this reason the judgment of the Odisha High Court may not have precedent value.

ORDER

1. This petition seeks quashing of tender call notice,annexure-3, for sale of Kendu (Tendu) leaves.

2. Case of the petitioner is that he is an elected Sarpanch and the impugned tender call notice will affect the rights of the Panchayats under Section 44(2) of the Orissa Gram Panchayat Act, 1964 and also provisions of the Forest Rights Act, 2006. Though the Orissa Government vide order dated 1.1.2014 deregulated Kendu leaves operation and left the people of Malkangiri district free to sell the Kendu leaves to anybody, the impugned tender call notice dated 3.1.2014, annexure-3 has been issued, to sell the leaves by way of tender.

3. On 17.1.2014, the following order was passed:

> "Issue raised in this petition is whether opposite party no. 4 can dispose of Kendu Leaves of 2014 Crop contrary to the decision of the State Government, Annexure 2.
>
> Learned counsel for opposite party no.5 seeks time to take instruction.
>
> List again on 24.01.2014.
>
> In the meantime, the award of work may not be finalized."

4. Counter affidavits have been filed by the Orissa Forest Development Corporation Ltd. as well as by the State. The stand taken on behalf of the State is that the tender call notice does not in any manner obstruct the functioning of the Grama Sabha. The tender call notice covers the leaves purchased at the collection centres of the Forest Department in accordance with the notification of the Government. The relevant averments are following:

> "15. That in reply to the averments at paragraph 21 of the writ petition, it is humbly submitted that the sale notice for advance sale of Phal Kendu Leaf in deregulated areas of Nowrangpur KL Division and part of Jeypore Division is meant for the Kendu Leaf where the pluckers want to sell kendu leaf to KL organization in different collection centres/Phadis of their own volition. The intention is not to interfere with the rights and jurisdiction of Gram Sabha, rather to avoid exploitation of pluckers against non-purchase of leaves as well as payment of less price than notified rates by unscrupulous traders.

16. That in reply to the averments at paragraph-22 of the writ petition, it is humbly submitted that the Tender Call Notice of OFDC Ltd. neither takes away any power nor curtails the powers of Gram Panchayat. There is no intention to interfere in the role of Gram Panchayats so far as collection of Kendu leaves in deregulated areas is concerned. The primary collectors of the deregulated areas are given freedom to sell their Kendu leaves to any organization of their own choice.

17. That in reply to the averments at paragraphs-23 ad 24 of the writ petition, it is humbly submitted that the Tender Call Notice with necessary terms and conditions is meant to safeguard the interest of the primary collectors so that they are not exploited by the unscrupulous traders.

18. That in reply to the averments at paragraph-25 of the writ petition, it is humbly submitted that last year (during the crop year 2013) 99.5% of the production of Kendu leaves in the deregulated Division of Nowrangpur KL Division was sold by the pluckers to the KL organization as there were no private buyers. OFDC Ltd. faced difficulties in disposal of such Kendu Leaves as advance sale was cancelled. To prevent such difficulties, the OFDC Ltd has made Tender Call Notice for advance sale of the Kendu Leaves that will be sold to the KL organization voluntarily by the KL pluckers."

5. In the counter affidavit of the Corporation, the stand taken is that the State Government appointed the Corporation as its agent to sell the Kendu leaves already collected. Relevant averments are paras 4 and 5:

"4. That under the order dtd.01.1.2014 (annexure 2), State Govt. has given liberty to the people of the Malkangiri district to sale the Kendu leaves to anybody of their choice. But in order to protect the interest of the people of the area who collect the Kendu leaves from the forest, it has been stated that such people can also sell the Kendu leaves to the Kendu leaves organization in different Phadies (collection centres), opened by the Principal, Chief Conservator of Forests (Kendu Leaves) Odisha. Otherwise the traders of the area would exploit them. None of the Panchayats in the de-regulated area have any proposal for, nor have the funds for purchasing the Kendu leaves from the People of the respective Panchayat areas.

Thus the order of Govt. dtd.01.1.2014 is in no way contravened by issuing the notice for advance sale of Kendu leaves that would be sold by the people of the area to the K.L. Organisation of the State Govt. at their own volition.

5. That the State Govt. has appointed Odisha Forest Development Corporation as its agent to sell the Kendu leaves so collected for which Corporation gets a commission on the sale price. The Corporation also provides the entire working expenditures in advance by obtaining loan from Commercial Banks to the K.L. wing of Forest Department for purchasing Kendu leaves before each season which starts from Feb-March every year. A copy of the order dtd.24.02.1973 appointing the Odisha Forest Development Corporation Ltd. as the selling agent is filed herewith as Annexure-A."

6. In view of the stand taken by the opposite parties, it is clear that the tribal rights or panchayat rights are in no manner affected by the tender call notice which is in respect of Kendu leaves already purchased or which may be purchased by the State Government.

7. No ground is, thus, made out to interfere with the impugned tender call notice.

8. The petition is dismissed.

Keshab Behera & Ors. vs. State of Odisha & Ors.

W.P. (C) NO. 20091 OF 2013
HIGH COURT OF ORISSA, CUTTACK BENCH
04.09.2014
CORAM: AMITAVA ROY, C.J. AND DR. B.R. SARANGI, J.
CITATION: 2014 SCC ONLINE ORI 313, (2015) 119 CLT 265

SUMMARY

This writ petition was filed by the petitioners against the alleged encroachment and allotment of land under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) to ineligible persons inside Chakagujia Reserve Forest, and seeking directions from the Court that necessary action be taken by the concerned authorities.

The petitioners argued that the forest has been encroached by the mafia by taking advantage of the FRA. As a result sixty five persons have been illegally settled in forest lands without proper verification by the concerned officials and in violation of the FRA, since they had not been in occupation of the land for three generations prior to 13.12.2005.

The respondent State government argued that sixty five families have been conferred rights under the FRA after following due process of law. The State government also submitted that action has been taken by registering ninety six forest cases between 2004-05 and 2013-14, on recommendation by the Forest Rights Committee, to stop encroachment on forest land. It was also asserted that statutory requirements have been fulfilled before granting forest rights.

The Court examined the definition of "forest dwelling Scheduled Tribe" and "other traditional forest dweller" provided in the FRA, observing that for recognising any community or person as an "other traditional forest dweller", the person or the community has to be resident of or dependant on forests or forest lands for bona fide livelihood needs for a period of three generations prior to 13.12.2005.

However, for a person or community to be included within the scope of "forest dwelling Scheduled Tribe", tenure of such duration is not a condition precedent and it would be enough if he/it is a member belonging to the Scheduled Tribe

primarily residing in or dependant on forest or forest land prior to 13.12.2005. The sixty five families whose rights are being challenged by the petitioners fall under this category, and therefore the three generations requirement is not relevant for them.

Considering the report of the ACF and the action taken by the concerned authorities to protect the forest from encroachment, the Court held that the State government is duly ensuring the prevention and removal of encroachments on forest lands.

Dismissing the petition, the Court reiterated the need to maintain constant vigil in order to sustain and protect the forest from subsequent encroachments.

EDITOR'S NOTE

The approach of the High Court in this case is exemplary, in that it has reposed faith in the mechanism under the FRA and in the State machinery to provide necessary checks and balances against abuse of the beneficial provisions of FRA.

JUDGMENT

(the Judgment of the Court was delivered by Amitava Roy, C.J.)

1. The present proceeding filed as public interest litigation seeks to invoke the writ the jurisdiction of this Court to direct an enquiry into the alleged encroachment and allotment of land inside Chakagujia reserve forest (hereinafter referred to as 'Forest') and to reclaim the said area.

2. We have heard Mr. Satpathy, learned counsel for the petitioner and Mr. Mohapatra, learned Government Advocate for the opposite party.

3. Bare facts indispensable for the present adjudication are that the petitioners claim themselves to be the permanent residents of different places in the district of Bolangir. They have stated that the Forest which is located in the said district comprises of 1200 hectares and comes under Jamkhunta Beat within the territorial jurisdiction of four Gram Panchayats, Jamkhunta, Gandhavla, Khasmahal and Mahali. There is a perennial stream named Kundanala which caters to the needs of the villagers within the jurisdiction of these four Gram Panchayats. The petitioners have alleged that during the year 2003, some persons tried to encroach upon the Forest whereupon the villagers of Jamkhunta and Jamapada in a meeting held on 30.3.2003 constituted a Samiti namely, "Bana Surakhya Samiti" for protecting the same. According to them, Samiti was allotted some funds by the Forest Department during year 2008- 09 for block plantation. The Samiti thereafter in association with villagers of Jamakhunta and Khasbala Gram Panchayat in its meeting held on 1.10.2007 resolved to move the appropriate authority to take steps against the persons who were trying to encroach upon the Forest. In this regard, Hon'ble Chief Minister of the State was also moved for necessary action. The petitioners have imputed that the Forest has been encroached by Mafias and that those groups have managed to allot different areas in favour of various persons taking advantage of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (hereinafter referred to as the 'Act') which provides for settlement of Forest land to persons who are in possession thereof prior to 13.12.2005 for three generations.

The petitioners have stated that 65 such persons of village Barkani Jamapada have been illegally favoured with such settlement. According to them, those families were not in occupation of forest land prior to 13.12.2005 and they are also not landless persons and in fact possess land in mouza Barkani as well as Jamapada. According to the petitioners, settlement has been awarded to those families without proper verification with the Mafias. That they have also resorted to forcible occupation of vast area in the Forest has been mentioned. The petitioners have asserted that in spite of repeated endeavours made by them, no meaningful and effective action has been taken by the concerned authorities to the great detriment of Forest and its use. They have thus come to this Court for intervention.

4. The opposite party no.1, 3 and 4 in their counter affirmed by the Divisional Forest Officer, Bolangir Forest Division, Bolangir in essence have pleaded that 65 families referred to in the writ petition have been conferred the rights under the Act as they have been in possession of Forest land prior to 13.12.2005 and as per the recommendation of the Forest Rights Committee and due consideration of the Sub-Divisional Level Committee, Titilagarh and jurisdictional District Level Committee. Vis-à-vis the allegation of illegal encroachment and illicit felling of trees in the Forest, the opposite party have stated that 96 Forest Cases have been registered in Bangomunda Range from 2004-05 till 2013-14 and that further encroachment in such area have since been stopped. Detailing the process culminating in the conferment of rights under the Act, the opposite party have asserted that on the recommendation of the Gram Sabha and Forest Rights Committee, Barkani and Jampada, SDLC, Titilagarh had scrutinized and verified the applications of the persons concerned and thereafter had submitted the same to the District Level Committee which on exhaustive consideration of the facts had issued necessary orders to that effect. The opposite party have asserted that all statutory requirements have been scrupulously fulfilled before grant of forest rights. They have also referred to the numbers of forest cases registered against the encroachers. They have stated in particular that on receipt of the complaint from the villagers, the Asst. Conservator of Forests, Bolangir Division had conducted a survey and submitted a report on 9.12.2013. According to the opposite party, all necessary steps to protect the forest from encroachment have been taken and that the allegation to the contrary was unfounded.

5. In their rejoinder, the petitioners have reiterated that 65 persons/families settled with the forest land are ineligible as they were never in possession of the land in their occupation for three generation prior to 13.12.2005. They have alleged as well that these 65 persons after obtaining the settlement had encroached upon vast area of forest land and had destroyed forest produce by felling valuable trees. They have alleged that the report submitted by Asst. Conservator of Forest, Bolangir is a misleading one and that the purported enquiry had been made without issuing any public notice or intimation to them. They have pleaded that if a fresh enquiry is made by the Collector, Bolangir or any other independent authority, the correct state of affairs would come out. They have stated as well that though the particulars of some cases of encroachment instituted during the year 2004-2005, have been mentioned final result thereof has not been disclosed.

6. Mr. Satpathy, learned counsel for the petitioners has emphatically argued that the settlement of forest land in favour of 65 persons/families is patently in violation of the Act as they have not been in occupation of the land for three generations prior to 13.12.2005 and that the authorities concerned have failed to discharge their public duties to protect forest in spite of repeated requests and appeals made by the petitioners.

7. Learned counsel for the opposite party referring in particular to the report of the Asst. Conservator of Forest, Bolangir Forest Division, Bolangir has submitted that the

allegations levelled are baseless and that the instant proceeding has been instituted not to espouse any public cause but to protect individual interest. Learned counsel for the opposite party has refuted the allegation of inaction on the part of the Departmental Authorities.

8. We have carefully considered the pleaded facts and documents on record. We have perused closely the report dated 9.12.2013 laid by the Asst. Conservator of Forest, Bolangir Forest Division, Bolangir (Annexure C/3 to the counter of opposite party).

9. The Act defines "forest dwelling Scheduled Tribes" and "other traditional forest dweller" under Section 2 (c) and 2(o) respectively which being of formidable significance are extracted below:

"2(c). forest dwelling Scheduled Tribes means the members or community of the Scheduled Tribes who primarily reside in and who depend on the forests or forests or forest lands for bona fide livelihood needs and includes the Scheduled Tribe pastoralist communities.

2(o). other traditional forest dweller means any member or community who has for at least three generations prior to the 13th day of December, 2005 primarily resided in and who depend on the forest or forests land for bona fide livelihood needs."

10. Under the Act, provisions for vesting of forest rights in Forest dwelling Scheduled Tribes and other traditional forest dweller and procedure has been made. Noticeably for any member or community to be within the ambit of "other traditional forest dwellers" he/it has to be resident of or dependant on forests or forest lands for bona fide livelihood for a period of three generation prior to 13.12.2005, for a member of community to be included within the scope of 'forest dwelling Scheduled Tribes' tenure of such duration is not a condition precedent and it would be enough if he/it is a member of or belong to Scheduled Tribes primarily residing in or dependant on forest or forests land for bona fide livelihood needs.

11. A plain perusal of the report of the Asst. Conservator of Forests, Bolangir Forest Division reveals that 65 persons/families who have been settled with forest land belongs to Scheduled Tribe and are totally dependent on the forest to maintain their day to day livelihood, the enquiry conducted by the Asst. Conservator of Forests on 6.12.2013 has been made in presence of Range Officer (T), Bangomunda Range, Forester, Sindhekela, Forest Guard, Sindhekela Beat, In-charge of Jamkhunta Beat and the villagers, has been mentioned therein. The plea that this enquiry was conducted without public notice or intimation to the petitioners, thus, does not weigh with us to dismiss the veracity of the findings recorded in the report. The steps that were taken prior to conferment of right under the Act to 65 persons/families as set out in the report, inter alia, indicate the approval of the Gram Sabha, Jampada with all its relevant authorities present in the said meeting. The findings with regard to this exercise are wholly consistent with the averments made with regard thereto in the counter of the opposite party. The enquiry report discloses as well the details of encroachment in course of the field verification and registration of cases against encroachers during the relevant period. The Enquiry Officer did mention as well that the forest staff are regularly patrolling around the forest area and that in the meanwhile, they have taken steps to seize the fire wood and that in all 96 cases have been registered in Sindghekela Section with regard to various offences. The enquiry report further discloses that the perennial stream is not obstructed and that the water carried by it still caters to the needs of the villagers of Barkani, Jamkhunta, Jampada and Kalkut. It has been recorded in categorical terms that except the reserved forest land, no other encroachment has been found inside the forest.

The Forest Department has also taken steps to stop encroachment and smuggling of timber and fire wood and that no stone quarry operation has been noticed.

12. On a conjoint consideration of the pleaded facts and the disclosures made in the enquiry report, in particular, we are not persuaded to sustain the allegation of inaction on the part of the departmental authorities in the matter of protection of the Forest and steps required in law against the encroachers thereon. In view of the findings recorded in the report that 65 persons/families are members of Scheduled Tribe in occupation of forest land, we are of the considered opinion that requirement of possession of land in occupation for three generations prior to 13.12.2005 is not a condition precedent prescribed by the Act for them to be conferred with forests rights thereunder. There is no reason for this Court to doubt the correctness of the pleaded averments and the finding in the enquiry report that exercise as required under the Act had been undertaken for awarding forest rights to the 65 persons/families under the Act. With regard to the allegation of encroachment, we find that number of cases has been registered against the violators and the statement that the forest personnel are regularly patrolling the forest area and that no further encroachment has been noticed cannot also be discarded.

13. In the above view of the matter, we are not inclined to issue any order for fresh enquiry as prayed for by the petitioners. The petition is thus closed.

14. We, however, part with the observation that the departmental authorities would maintain constant vigil in order to sustain and protect the Forest as required in law and also take necessary follow up steps to conclude the pending proceedings qua encroachers with due expedition so much so that this Court does not encounter any similar complaint in future.

Khandadhar Horti-Agricultural and Forest Producers Development Co-operative Ltd. & Anr. vs. State of Odisha & Ors.

WP (C) (PIL) NO. 7219 OF 2013
HIGH COURT OF ORISSA, CUTTACK BENCH
26.11.2014
CORAM: AMITAVA ROY, C.J. AND DR. A.K. RATH, J.

SUMMARY

The petitioners who are a cooperative society of producers of horticultural and agricultural products, and its President, approached the High Court seeking implementation of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) and FR Rules, citing that there has been no effective response from the government on their numerous representations.

The State government, through the SC & ST Development Department, refuted the allegation stating that the petitioners should have approached the Committee under the FRA with their claims as provided under the law.

The Court disposed of the petition in view of the fact that the petitioners did not contest the statement of the State government.

EDITOR'S NOTE

Prior to the enactment of the FRA, the sale and purchase of minor forest produce was governed by the Orissa Gram Panchayats (Minor Forest Produce Administration) Rules, 2002. Clearly, there is some uncertainty among the beneficiaries of the previous legal dispensation regarding the change in the rights regime after FRA came into force.

ORDER

1. Heard learned counsel for the petitioners and learned counsel for the State-opposite party.

2. The petitioner no.1 has presented itself to be a Cooperative Society registered under the Orissa self-help Cooperatives Act 2002 and in essence has filed this petition for implementation of the provisions of the Scheduled Tribe and other Traditional Forest dwellers (recognition of Forest Rights) Act 2006 and rules framed thereunder.

3. They are before this Court with the grievance that in spite of several representations to the State-opposite party to implement the provisions of the Act in letter and spirit there has been no effective response.

4. The opposite parties 4 and 5 i.e. the Commissioner-cum-Secretary to Government SC & ST Development Department and the Collector Sundargarh in their joint counter have refuted the allegation made and have categorically stated that the Committee as contemplated under the Act has been formed in respect of the village Talbahali and that the members of the petitioners society vis-a-vis their claims as sought to be highlighted in the instant petition ought to have approached the Committee Gramsabha for necessary redress. There is no rejoinder as on date controverting the correctness of the above statement.

5. In the above view of the matter the petition is closed. In view of the recorded stand of the opposite party Nos. 4 and 5 we are of the opinion that the relief sought for has been met.

SIKKIM HIGH COURT

TABLE OF JUDGMENTS AND ORDERS

Shri Karma Bhutia vs. State of Sikkim & Ors.

WP (C) NO. 42 OF 2010
HIGH COURT OF SIKKIM
12.10.2010
CORAM: P.D. DINAKARAN, C.J. AND S.P. WANGDI, J.
CITATION: 2010 SCC ONLINE SIKK 28

SUMMARY

The writ petition challenged the eviction notice issued to the petitioner on the ground that his house was in a Reserve Forest. It sought directions to the respondent State government to recognize his rights under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA), treating him on par with others whose forest rights were duly recognized in the same area.

According to the petitioner, the respondent having permitted the request of similarly placed persons, ought to have considered his request also. The refusal to consider the request of the petitioner, and the direction issued to him to stop the unauthorised construction of the building, has been questioned in the writ petition as discriminatory, arbitrary, in bad faith, and violative of Article 14 of the Constitution of India, as well as contrary to the provisions of FRA.

The respondent State government argued that the land in question falls within the Reserve Forest range, and therefore the petitioner has no right to put up a building on such forest land. Further, the government authorities are empowered to initiate action under the provisions of the Sikkim Forests, Water Course and Road Reserve Preservation and Protection Act, 1988.

The Court examined in some detail the provisions as well as the objectives of the FRA and of the Rules framed thereunder. The petitioner's representations, made as early as in 1991 claiming his legitimate rights, which are now statutorily recognized under the FRA, ought to have been considered by the competent authorities in the manner provided under the FRA. But without following such due process of law, the Range Officer has directed the petitioner to remove the unauthorised construction, which is contrary to law.

The Court observed

> **"When the Act prescribes such a forest rights of forest dwelling Scheduled Tribes and other traditional forest dwellers, the authorities constituted under the Act and Rules framed thereunder, are expected to consider the rights of the Scheduled Tribes and forest dwellers following the procedure and in the manner known to law. Failure to follow such procedure not only violates the principles of natural justice, but also is contrary to the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007." (@ para 14)**

Accordingly, the Court passed an order permitting the petitioner to make a representation to the competent authority under the FRA and FR Rules within two weeks, and further directed the respondent to consider such representation and take a decision on it in terms of the FRA and FR Rules within twelve weeks thereafter.

The respondents were also directed to maintain status quo till final orders are passed by the competent authority.

EDITOR'S NOTE

This is an important judgment where the construction of two apparently contradictory laws within a particular fact situation is demonstrated by the Sikkim High Court. The Court recognises the fact that whereas under the previous legal regime the occupation of land and construction of a building inside a Reserve Forest was illegal, and liable for eviction under the Sikkim Forests, Water Course and Road Reserve Preservation and Protection Act, 1988, with the enactment of the FRA and FR Rules there is not only a substantive change in the right of the petitioner, but also a change in the mechanism by which such right shall be determined. Fixing of time frames for a decision on the application also ensures that the objective of "tenurial insecurity" does not remain a chimera.

JUDGMENT

(the Judgment of the Court was delivered by Dinakaran, C.J.)

1. The petitioner is a bona fide holder of Certificate of Identification dated 25-07-2006 issued by the competent authority that the petitioner belongs to the Scheduled Tribe Community. He seeks the benefit of Section 3 of Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (2 of 2007), of course, based on long his possession and enjoyment of forest land of an extent of 24' x 13' and 22' x 13' bounded in the East by North Sikkim Highway, in the West five storied RCC. building of one Shri Sonam Pintso Bhutia, Ex Assistant Conservator of Forest, four storied RCC. building of one Shri Tashi Bhutia, four storied RCC. building of one Smt. Jemima Pradhan and her father Late D. N. Pradhan, in the North one godown of one Shri D. B. Pradhan alias Damber Sardar and in the South stairway of Shri Sonam Pintso Bhutia situated at Burtuk, East Sikkim. The structure, according to the petitioner, was constructed by his grandfather in the year 1965. The petitioner claims that he made repeated representations to the respondents on 10-10-1991, 10-05-1994, 18-03-1996, 15-11-1996 and 27-01-2007 and 24-11-2007, seeking the benefit of Section 3 of the said Act; but he was made to run from

pillar to post forgetting allotment of the house site under the provisions of the said Act; and finally his request was turned down by the Range Officer, Gangtok Range by proceedings dated 11-01-2007, which is being impugned the writ petition. Of course, the petitioner made further representations dated 13-08-2009 and 21-04-2010, bringing to the notice of the respondents that similarly placed persons were allotted with forest house sites by the competent authority as informed to the petitioner by proceedings dated 26-11-2007, which reads hereunder:

"GOVERNMENT OF SIKKIM
FOREST, ENV. & WILDLIFE MANAGEMENT DEPARTMENT
DEORALI, GANGTOK-737102
No.30/RTI/HQ/GoS/FEWMD
26th November, 2007

To,
Divisional Forest Officer,
Territorial (East),
P.S. Road, Gangtok.

Sub: Furnishing of Information under Right to Information Act, 2005.

Sir,

Enclosed herewith is an original application dated 24th November2007 with Revenue Receipt No.0708N-17049 dated 24.11.2007amounting to Rs.100 submitted by Shri Karma Bhutia, resident of Upper Burtuk, Gangtok, Sikkim seeking information under Right to Information Act, 2005.

The application has been accepted under ID No. 19/RTI/HQ/GoS/FEWMD dated 26th November 2007 and is being forwarded in order to furnish the required information at the earliest directly to the applicant with a copy to the undersigned please.

Thanking you,

Yours faithfully,

Sd/-

(Mrs. M. Pradhan),
Joint Director, (P&Statistics)/SPIO(HQ)

Copy for information to:
1. CCF (T),
2. CF (T),
3. Shri Karma Bhutia, Stenographer,
   Home Department, Govt. of Sikkim, Gangtok.

LIST OF SITE ALLOTMENT UNDER EAST DIVISION (T)			
S. NO.	**NAME**	**LOCATION**	**ALLOTMENT ORDER DATE**
1.	Harka Bdr. Tamang	Martam	3-11-09

2.	Passang Tamang	Martam	-do-
3.	Harka Bdr. Rai	Martam	-do-
4.	Jit Bdr. Subba	Martam	-do-
5.	Budha Singh Tamang	Martam	-do-
6.	Harka Bdr. Tamang	Martam	-do-
7.	Prava Rai	Martam	-do-
8.	B .P. Kharel, Mamring (S)	SIMI Complex, Rangpo	508/Ed/F dtd 8/11/93
9.	S. K. Lepcha	Pakyong Bazar	During 1978
10.	Jai Bdr. Gurung, Driver Forest	2nd Mile, JN Road	7.3.94
11.	Navin Tamang, Driver Forest	Dechiling 30'x40'	5.3.94
12.	Lakchung Bhutia, Driver, Forest	-do-	5.3.94
13.	Bhutia, Forest	-do-	-do-
14.	Tshering Dorjee Bhutia, Driver Forest	-do-	-do-
15.	Sitaram Bhujel, Driver Forest	2nd mile, JN Road, 30'x40'	13.9.94
16.	Gopal Chettri, Drive Forest	Rongnek	13.9.94
17.	Phu Bhutia, Driver Forest	Dechiling 30'x20'	5.3.94

DETAILS ALLOTMENT OF FOREST SITE AND UNAUTHORISED HUTS FROM 'o' POINT TO TASHI VIEW POINT

S.NO.	NAME	AREA ALLOTTED	LOCATION	REMARKS
1.	Mrs. Laden Tsh. Bhutia Gaira	20'x30'	Ralling	Copy enclosed
2.	Lt. Mrs. Gita Gurung Gaira	20'x30'	Ralling	Allotted copy not provided
3.	Mrs. Phupu Doma	20'x32'	Ralling	Allotted copy

				not provided
4.	Shri Dazom Lachenpa		Burtuk	Allotted copy not provided
5.	Shri Ringzing Gyatso		Burtuk	Allotted copy not provided
6.	Ms. Katherine Sangay	100'x100'	Burtuk	Allotted copy not provided
7.	Lt. D.P. Rai		Burtuk	Allotted copy not provided
8.	Lt. M.B. Tamang C/o Kailash Tamang		Burtuk	Allotted copy not provided
9.	Lt. M.B. Tamang C/o Thama Tamang		Burtuk	Allotted copy not provided
10.	Lt. M.B. Tamang C/o Bir Bdr. Tamang		Burtuk	Allotted copy not provided
11.	Lt. M.B. Tamang C/o Sanju Tamang		Burtuk	Allotted copy not provided
12.	Lt. N.K. Rai C/o Bikar Rai		Burtuk	Allotted copy not provided
13.	Mrs. Bina Gurung		Burtuk	Allotted copy not provided
14.	Lt Khim Narayan Pradhan C/o Madan Pradhan		Burtuk	Allotted copy not provided
15.	Shri Mohanlall Rai		Burtuk	Allotted copy not provided
16.	Shri Tek Bdr. Chettri		Burtuk	Allotted copy not provided
17.	Mrs. Tshering Ongmu Bhutia	20'x25'	Swastik	Allotted copy not provided
18.	Shri Karma Bhutia		Swastik	Un-authorised
19.	Lt. D.M. Pradhan		Swastik	Allotted copy not provided
20.	Lt. D.M. Pradhan	10'x20'	Swastik	Un-authorised
21.	Shri K.B. Sunawar	15'x20'	3rd Mile	Un-authorised
22.	Shri Millan Gajmer	20'x30'	3rd Mile	Allotted copy

				not provided
23.	Shri Syam Lall Rai	20'x30'	3rd Mile	Allotted copy not provided

Sd/-

Range Officer
Gangtok Territorial Range
Forest Department"

The petitioner, therefore, complaints that his legitimate right under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 is not favourably considered by the respondents, and seeks a writ of mandamus to direct the respondents -

(i) to determine as to whether the land in question falls under the Forest land under the Respondent No.1 or under the proforma respondent No. 2 (U.D & H.D) for the purpose of allotment;

(ii) to treat the Petitioner at par and equally with other allottees with regard to the allotment of the housing site in possession of the petitioner since 1965;

(iii) to grant title of the land in possession of the petitioner under Section 3 of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006;

(iv) to vest upon the Petitioner the right over the land in question by regularization, grant or contract; and

(v) to rescind the stop order dated 11/01/2007 and allow the Petitioner to resume further construction.

Hence, the above Writ Petition.

2. According to the Mr. K. T. Bhutia, learned senior counsel appearing for the petitioner, the respondent having considered the request of similarly placed persons, ought to have considered the request of the petitioner also and, the refusal to consider the request of the petitioner and the direction dated 11-01-2007 issued to the petitioner to stop the unauthorised construction of the building, impugned in the writ petition, is discriminatory, arbitrary, mala fide and violative of Article 14 of the Constitution of India as well as contrary to the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

3. Per contra, Mr. Karma Thinlay, learned Government Advocate, contends that the impugned land falls within the reserved forest range and, therefore, the petitioner has no right to put up any multi-storied building in the forest land, for which the provisions of the said Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 are not applicable and that the petitioner is not a person falling within the definition of "forest dwelling Scheduled Tribe". The petitioner does not satisfy the statutory requirements contemplated under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007 that he has 'bonafide livelihood needs' as defined under Rule 2(b) of the said Rules, 2007. The learned Government Advocate further contends that the Government authorities are rightly empowered to initiate the action under the provisions of the Sikkim Forests, Water

Course and Road Reserve Preservation and Protection Act, 1988, when the petitioner proposed to violate the provisions of the same. However, the learned Government Advocate is not in a position to explain under what circumstances the similarly placed persons were granted dwelling right under the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

4. We have given our careful consideration to the submissions of both sides.

5. The impugned proceedings dated 11-01-2007reads as hereunder:

OFFICE OF THE RANGE OFFICER
GANGTOK TERRITORIAL RANGE,
FOREST COLONY, BALUKANI
GANGTOK, EAST SIKKIM

No. 1068/GR(T)

Dated:11/01/07

NOTICE

To,
Shri Karma Bhutia,
Upper Burtuk
East Sikkim.

Subject: Encroachment of forest land at Burtuk.

It has been observed that you have erected six numbers of RCpillars for construction of house within forest land at Burtuk. Your application dated 20th of December, 2006 submitted by you cannot be entertained in the mean time.

Hence, you are hereby directed to stop the unauthorised construction of the said building within Road Reserve and Forest Land immediately, failing which a case will be registered against you as per Sikkim Forest Water Courses Road Reserve (Preservation & Protection), Act 1988.

Sd/- 10/1/07

J. S. LEPCHA
Forest Range Officer
Gangtok (T) Range"

6. The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition or Forest Rights) Act, 2006 [hereinafter referred to as the Scheduled Tribes (Recognition of Forest Rights) Act, 2006] was enacted by the Parliament to recognise and vest the forest rights and occupation in forest land in forest dwelling Scheduled Tribes and other traditional forest dwellers who have been residing in such forests for generations but whose rights could not be recorded and to provide for a framework for recording the forest rights so vested, taking note of the following factors:
   (i) the recognized rights of the forest dwelling Scheduled Tribes and other traditional forest dwellers include the responsibilities and authority for sustainable use, conservation of biodiversity and maintenance of ecological balance and thereby strengthening the conservation regime of the forests while ensuring livelihood and food security of the forest dwelling Scheduled Tribes and other traditional

forest dwellers;

(ii) the forest rights on ancestral lands and their habitat were not adequately recognized in the consolidation of State forests during the colonial period as well as in independent India resulting in historical injustice to the forest dwelling Scheduled Tribes and other traditional forest dwellers who are integral to the very survival and sustainability of the forest ecosystem; and

(iii) it has become necessary to address the long standing insecurity of tenurial and access rights of forest dwelling Scheduled Tribes and other traditional forest dwellers including those who were forced to relocate their dwelling due to State development interventions.

It is under such circumstances the Scheduled Tribes (Recognition of Forest Rights) Act, 2006, was enacted.

7. Section 3(1) of the Scheduled Tribes (Recognition of Forest Rights) Act, 2006 recognises the following rights of the Scheduled Tribes and other traditional forest dwellers:

"(a) right to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood by a member or members of a forest dwelling Scheduled Tribe or other traditional forest dwellers;

(b) community rights such as nistar, by whatever name called, including those used in erstwhile Princely States, Zamindari or such intermediary regimes;

(c) right of ownership, access to collect, use, and dispose of minor forest produce which has been traditionally collected within or outside village boundaries;

(d) other community rights of uses or entitlements such as fish and other products of water bodies, grazing (both settled or transhumant) and traditional seasonal resource access of nomadic or pastoralist communities;

(e) rights including community tenures of habitat and habitation for primitive tribal groups and pre-agricultural communities;

(f) rights in or over disputed lands under any nomenclature in any State where claims are disputed;

(g) rights for conversion of Pattas or leases or grants issued by any local authority or any State Government on forest lands to titles;

(h) rights of settlement and conversion of all forest villages, old habitation, unsurveyed villages and other villages in forest, whether recorded, notified or not into revenue villages;

(i) right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protection and conserving for sustainable use;

(j) rights which are recognised under any State law or laws of any Autonomous District Council or Autonomous Regional Council or which are accepted as rights of tribals under any traditional or customary law of the concerned tribes of any State;

(k) right of access to biodiversity and community right to intellectual property and traditional knowledge related to biodiversity and cultural diversity;

(l) any other traditional right customarily enjoyed by the forest dwelling Scheduled Tribes or other traditional forest dwellers, as the case may be, which are not mentioned in clauses (a) to (k) but excluding the traditional right of hunting or trapping or extraction a part of the body of any species of wild animal;

(m) right to in situ rehabilitation including alternative land in cases where the Scheduled Tribes and other traditional forest dwellers have been illegally evicted or displaced from forest land of any description without receiving their legal entitlement to rehabilitation prior to the 13th day of December, 2005."

8. Section 4 of the Scheduled Tribes (Recognition of Forest Rights) Act, 2006 deals with the

recognition, restoration and vesting of forest rights in the forest dwelling Scheduled Tribes and other traditional forest dwellers.

9. Section 5 of the Scheduled Tribes (Recognition of Forest Rights) Act, 2006 prescribes duties of holders of forest rights, which reads as hereunder:

> "Duties of holders of forest rights.
>
> 5. The holders of any forest right, Gram Sabha and village level institutions in areas where there are holders of any forest right under this Act are empowered to-
>
> (a) protect the wild life, forest and biodiversity;
>
> (b) ensure that adjoining catchment area, water sources and other ecological sensitive areas are adequately protected;
>
> (c) ensure that the habitat of forest dwelling Scheduled Tribes and other traditional forest dwellers is preserved from any form of destructive practices affecting their cultural and natural heritage;
>
> (d) ensure that the decisions taken in the Gram Sabha to regulate access to community forest resources and stop any activity which adversely affects the wild animals, forest and the biodiversity are complied with."

10. Section 6 of the Scheduled Tribes (Recognition of Forest Rights) Act, 2006 defines different authorities, viz. Gram Sabha, Sub-Divisional Level Committee and District Level Committee and also prescribes the procedure for determining such vesting of forest rights, which reads as hereunder:

> "Authorities to vest forest rights in forest dwelling Scheduled Tribes and other traditional forest dwellers and procedure thereof.
>
> 6. (1) The Gram Sabha shall be the authority to initiate the process for determining the nature and extent if individual or community forest rights or both that may be given to the other forest dwelling Scheduled Tribes traditional forest dwellers within the local limits of its jurisdiction under this Act by receiving claims, consolidating and verifying them and preparing a map delineating the area of each recommended claim is such manner as may be prescribed for exercise of such rights and the Gram Sabha shall, then, pass a resolution to that effect and thereafter forward a copy of the same to the Sub-divisional Level Committee.
>
> (2) Any person aggrieved by the resolution of the Gram Sabha may prefer a petition to the Sub-Divisional Level Committee constituted under sub-suction (3) and the Sub-Divisional Level Committee shall consider and dispose of such petition;
>
> Provided that every such petition shall be preferred within sixty days from the date of passing of the resolution by the Gram Sabha;
>
> Provided further that no such petition shall be disposed of against the aggrieved person, unless he has been given a reasonable opportunity to present his case.
>
> (3) The State Government shall constitute a Sub-Divisional Level Committee to examine the resolution passed by the Gram Sabha and prepare the record of forest rights and forward it through the Sub-Divisional Officer to the District Level Committee for a final decision.
>
> (4) Any person aggrieved by the decision of the Sub-Divisional Level Committee may prefer a petition to the District Level Committee within sixty days from the date of decision of the Sub-Divisional Level Committee and the District Level Committee shall consider and dispose of such petition;

Provided that no petition shall be preferred directly before the District Level Committee against the resolution of the Gram Sabha unless the same has been preferred before and considered by the Sub-Divisional Level Committee;

Provided further that no such petition shall be disposed of against the aggrieved person, unless he has been given a reasonable opportunity to present his case.

(5) The State Government shall constitute a District Level Committee to consider and finally approve the record of forest rights prepared by the Sub-Divisional Level Committee.

(6) The decision of the District Level Committee on the record of forest rights shall be final and binding.

(7) The State Government shall constitute a State Level Monitoring Committee to monitor the process of recognition and visiting of forest rights and to submit to the nodal agency such returns and reports as may be called for by that agency.

(8) The Sub-Divisional Level Committee, the District Level Committee and the State Level Monitoring Committee shall consist of officers of the departments of Revenue, Forest and Tribal Affairs of the State Government and three members of the Panchayati Raj Institutions at the appropriate level, appointed by the respective Panchayati Raj Institutions, of whom two shall be the Scheduled Tribe members and at least one shall be a woman as may be prescribed.

(9) The composition and functions of the Sub-Divisional Level Committee, the District Level Committee and the State Level Monitoring Committee and the procedure to be followed by them in the discharge of their functions shall be such as may be prescribed."

11. Section 14 of the Scheduled Tribes (Recognition of Forest Rights) Act, 2006 empowers the Central Government to make rules in this regards.

12. Accordingly, the Government of India, Ministry of Tribal Affairs by a notification dated 01-01-2008 in exercise of the powers conferred under Sections 14(1) and (2) of the Scheduled Tribes (Recognition of Forest Rights) Act, 2006 (2 of 2007) framed the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007.

12.2. Rules 3 defines the Gram Sabha, Rule 4 prescribes the functions of the Gram Sabha, Rule 5 deals with the constitution of the Sub-Divisional Level Committee, Rule 6 provides the functions of the Sub-Divisional Level Committee, Rule 7 deals with the District Level Committee, Rule 8 deals the functions of the District Level Committee, Rule 9 deals with the State Level Monitoring Committee, Rule 10 deals with the functions of the State Level Monitoring Committee, Rule 11 deals with the procedure for filing, determination and verification of claims by the Gram Sabha, Rule 12 deals with process of verifying claims by Forest Rights Committee and Rule 13 deals with evidence for determination of forest rights.

13. It is, therefore, clear that the Act and the Rules framed thereunder define the forest rights of the Scheduled Tribes and other traditional forest dwellers, residing in the forest and the procedure to be followed in determining such rights. If that be the case, the petitioner's representations made as early as in 1991 claiming his legitimate rights under the Scheduled Tribes (Recognition of Forest Rights) Act, 2006ought to

have been considered by the competent authorities in the manner provided under the Scheduled Tribes (Recognition of Forest Rights) Act, 2006 and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007. But without following such due process of law, the Range Officer, by proceeding dated 11-01-2007 which is impugned in the writ petition, has directed the petitioner to remove the unauthorised construction and also informed the petitioner that action would be initiated against him under the Sikkim Forests, Water Courses and Road Reserve Preservation and Protection Act, 1988; which was enacted by the State of Sikkim as a consolidated enactment relating to the forests produce, water courses and road reserve and for the matters connected therewith or incidental thereto.

14. When the Act prescribes such a forest rights of forest dwelling Scheduled Tribes and other traditional forest dwellers, the authorities constituted under the Act and Rules framed thereunder, are expected to consider the rights of the Scheduled Tribes and forest dwellers following the procedure and in the manner known to law. Failure to follow such procedure not only violates the principles of natural justice, but also is contrary to the provisions of the Scheduled Tribes (Recognition of Forest Rights) Act, 2006 and the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007.

15. Therefore, without expressing any opinion as to the rights claimed by the petitioner, suffice it to permit the petitioner to make a representation to the competent authority within 2 weeks from the date of receipt of this order, seeking his entitlement under the provisions of the Scheduled Tribes (Recognition of Forest Rights) Act, 2006 and the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007 and direct the respondents to consider the said representation of the petitioner and pass appropriate orders following the procedure prescribes under the Scheduled Tribes (Recognition of Forest Rights) Act, 2006 and the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007 within 12 weeks from the date of receipt of the representation of the petitioner. The respondents are also directed to maintain status-quo till such final orders are passed by the competent authority.

16. The writ petition is disposed of accordingly with no order as to cost.

Chewang Pintso Bhutia & Anr. vs. State of Sikkim & Ors.

WP (C) NOS.22 AND 23 OF 2012
HIGH COURT OF SIKKIM
05.06.2014
CORAM: N.K. JAIN, C.J. AND S.P. WANDGI, J.
CITATION: 2014 SCC ONLINE SIKK 80; AIR 2014 (NOC 596) 217

SUMMARY

The petitioners in this batch of writ petitions assailed the implementation of the 97 MW Tashiding - Hydro Electric Project set up by the respondent State government on the river Rathong Chu, West Sikkim, on a variety of grounds, including -

(i) Religious, cultural and historical aspect not considered, resulting in violation of the petitioners' fundamental rights under Articles 25 and 26 of the Constitution;
(ii) violation of the environmental laws by the project;
(iii) inter-generational equity and public trust doctrine;
(iv) that money has been raised through financial institutions for this project, which will be a drain/burden on the public exchequer in the long term, and therefore ill-advised.

The petitioners argued that the religious rights of the Buddhist community under Articles 25 and 26 of the Constitution of India, and their rights to conserve their culture under Article 29 have been infringed by the State in commencing with the Tashding HEP. They argued that the river Rathong Chu, on which this project is being constructed, is sacred and holy.

The respondent State government denied all material allegations made in the writ petitions, and in particular argued that the River is not a notified sacred site, and therefore no religious right is violated.

FINDINGS OF THE COURT

In a detailed judgment, the Court examined in depth the arguments, records, and case law relied upon by the parties.

On the issue of notification of eco-sensitive zone at a distance of ten kilometres from

national parks and sanctuaries (in this case the Khangchendzonga National Park), the Court relied upon the judgment of the Supreme Court in the *Goa Foundation case*[74]. The Court held that the absence of a direction from the Supreme Court for maintaining 10 kilometres as eco-sensitive zone does not render the requirement of delineation of eco-sensitive zone unnecessary.

On the issue of rights of religious and cultural freedom, the Court examined in detail a wealth of material produced by the petitioners, and concluded that just because a site is not notified as sacred does not preclude its being a sacred site. It referred to the judgment of the Supreme Court in the *Niyamgiri case*[75], where the Niyamgiri hills, held to be sacred by the tribals in the area, were proposed to be mined for bauxite. The Court observed:

> **"(iv) As is apparent from the above, it had been noted by the Hon'ble Supreme Court that issues pertaining to the religious rights of worship over Niyamgiri Hills by the tribals had not been taken into consideration during the public hearing as would appear from the last part of paragraph 58 extracted above. In the present case also we find that the questions and answers recorded in the proceedings of the Public Hearing only deal with the individual claims arising out of the Project. We did not find a whisper on the religious aspect of the river and the area, and other social issues that may be impacted by the Project.**
>
> **xxx**
>
> **(vi) Although the decision in *Orissa Mining Corporation Ltd. case* (supra) was rendered in the context of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, we are of the considered view that the principle forming the basis of the decision would be applicable in the present case also." (@ para 38(iv) and (vi))**

Accordingly, the Court directed that the Ministry of Environment and Forests shall decide on the question of eco-sensitive zone and the issue of violations of religious rights in accordance with law and the procedure prescribed in that behalf in six months. While there was no order suspending the Project in question, the Court made it clear that the implementation of the Project shall be at the risk and peril of the respondent State government, and shall be subject to the decision of the MoEF.

EDITOR'S NOTE

Although the petitioners in this case did not raise the issue of violation of forest rights under FRA, the reliance of the High Court on the landmark judgment of the Supreme Court in the *Niyamgiri case* is important for the reason that it demonstrates the cross-cutting nature of the rights FRA is designed to protect. The essential interlinkages between the environment, the forests, and the cultural rights of forest dwelling communities, which the extant regulatory regime attempts to compartmentalize, finds a holistic articulation in FRA.

[74] Judgment dt. 4.12.2006 in *Goa Foundation vs. Union of India & Ors.* WP(C) No. 460 of 2004, Supreme Court of India. (2011) 15 SCC 791.

[75] *Orissa Mining Corporation Ltd. vs. Ministry of Environment & Forest & Others*, (2013) 6 SCC 476.

JUDGMENT

(the Judgment of the Court was delivered by Sonam Phintso Wangdi, J.)

1. Writ Petition (C) Nos. 22 and 23 of 2012 were originally filed before the Hon'ble Supreme Court being Writ Petition (C) Nos. 101 and 102 of 2012 respectively. Vide order dated 08-05-2012 the Hon'ble Supreme Court was pleased to transfer them to this Court for disposal under Article 226 of the Constitution of India as various issues involved in the cases were of local nature. We may reproduce the said order of the Hon'ble Supreme Court which reads as under:

> "The question raised in these writ petitions under Article 32 of the Constitution should, in our view, be first considered by the Sikkim High Court under Article 226 of the Constitution. There are various issues involved which are local in nature and should be considered at that level.
>
> Accordingly, let the writ petitions filed by Tenzing Bhutia and Another and Sonam Lama, which have been registered as Writ Petition (C) Nos. 101 and 102 of 2012, be transferred to the Sikkim High Court, to be treated as writ petitions under Article 226 of the Constitution.
>
> The Registry is directed to arrange for transferring the records of the writ petitions to the Sikkim High Court, within a week from date.
>
> Liberty is given to the petitioners in these writ petitions to mention the matter before the Sikkim High Court for taking up the matters at an early date.
>
> The writ petitions are disposed of accordingly."

2. In pursuance of the above, the cases were thus taken up by this Court and are being disposed of by this common judgment as the questions involved are identical.

3. The Petitioners are members of the Bhutia-Lepcha Community who are predominantly Buddhist by religion. They move the Writ Petitions seeking to assail the implementation of the 97 MW Tashiding-Hydro Electric Project (in short the "HEP") set up by the Respondents on the river Rathong Chu, West Sikkim primarily on two grounds:

(i) Violation of the Petitioners' fundamental rights under Articles 25 and 26 of the Constitution of India; and

(ii) Violation of the environmental laws.

4. The Respondent No. 1 is the State of Sikkim in which the Petitioners reside and the State in which the Project is being implemented under a Memorandums of Understanding (in short the "MoU") by the Respondent No. 4 Company promoted by the Respondent No. 5. Respondent No. 2, is the Ministry of Environment and Forests, which gives clearances and 'No Objection Certificates' (in short the "NOCs") to various power Projects after scrutiny under the relevant environment rules and regulations. Respondent No. 3, is the National Board for Wild Life (in short the "NBWL") constituted under Section 5A of the Wild Life (Protection) Act, 1972. Respondent No. 4, Shiga Energy Private Limited is the Hydro Power Company set up as a Special Purpose Vehicles (SPV) to implement the Project in question. Respondent No. 5, T. Nagendra Rao, is the Managing Director of Company called 'Rangit Valley Hydro Private Limited' and is the promoter of Respondent No. 4 Company. Respondents No. 7 and 8 are public financial institutions, which provide funding to power Projects and have been approached by the Respondents No. 4 and 5.

5. It is relevant to note that out of the two Petitioners who had originally filed Writ Petition No. 22 of 2012, the Petitioner No. 1, Tenzing Bhutia, died during the pendency of the case and accordingly his name was struck off on being mentioned leaving the Petitioner No. 2, Chewang Pintso Bhutia, as the sole Petitioner. The Respondents No. 6, 9 and 10 being Rural Electrification Corporation India Limited, Power Trading Corporation of India and Punjab National Bank, respectively were deleted from the array of Respondents by order of this Court dated 23-09-2013 passed in CM Appl Nos. 152 of 2012, 62 of 2012 and 153 of 2012 respectively.

6(i). The first ground taken in the Writ Petitions is that the religious rights of the Petitioners' community under Articles 25 and 26 of the Constitution of India and their rights to conserve their culture under Article 29 thereto have been infringed by the State in commencing with the 97 MW Tashiding HEP in West Sikkim. It is stated that Buddhism is integral to the Bhutia-Lepcha Community and various sites and places considered sacred under Buddhist beliefs have been accorded statutory protection under the Places of Worship (Special Provisions) Act, 1991 by virtue of Notification issued by the Respondent No. 1-State in the year 1998 and 2001. The effect of these Notifications, as per the Petitioners, is that the developmental activity is strictly prohibited at the sacred sites or in close vicinity to places of worship and religious institutions.

(ii) Apart from these, it is averred that the Rathong Chu river is considered sacred by the Buddhists and it finds specific mention in the sacred Buddhist text, namely, "Denjong Neyig". According to this text, Sikkim is the holiest of all the hidden countries of Mahaguru Padmasambhava which finds numerous reflections in most of the sacred Buddhist scriptures. The "Denjong Neyig" (guide to the sacred locations of Sikkim) explicitly mentions that area lying at the stretch of Khangchendzonga-Yuksam-Tashiding alongside the Holy Rathong Chu river must be preserved. It is also written that the Mahaguru Padmasambhava has hidden numerous major and minor Dharma treasures, both visible and invisible in streams, cliffs, rocks, trees, caves, mountains, ridges, etc., of these locations.

(iii) It is stated that the 'Bhumchu' ceremony (Bhum = vase and Chu = water) which till date is held on the 15th day of the first lunar month as per Buddhist Calendar is intrinsically connected to the Rathong Chu river and is one of Sikkim's most revered events annually attracting thousands of pilgrims from Sikkim, Nepal, Bhutan, and other States of India. It is said that in the eight century Guru Rinpoche consecrated the 'Bhumchu', or the sacred vase, which is the very same one that is preserved today in Tashiding Monastery in West Sikkim. The sacred vase is believed to have been granted its miraculous power by Guru Rinpoche after bestowing the unparallel Tantric system of tutelary deity [Maha Karunika Avaloketeshwara] (meditation) in the 8th century. This caused the "Yidam and the entire retinue of deities to appear in the sky and immersed in the water contained in the vase." ..... "Finally Guru Rinpoche concealed the 'Bhumchu' as a sublime hidden treasure and entrusted it to the protective deities". The 'Bhumchu' is opened during the nights of the 14th day of the first month of the lunar calendar, and three cups of water are taken from it which are replaced with water brought from the blessed Rathong Chu river.

(iv) Considering the above position, the Ecclesiastical Department of the Respondent No. 1-State had on 08-09-1994 clearly expressed its reservations to a 30 MW Rathong Chu Hydel Power Project which was earlier started on the Rathong Chu River in 1994 on the ground of importance and significance of the area and sacredness of the River. This combined with strong protests from the people forced the Respondent No. 1-State to cancel the said Project in 1997 in deference to the religion, history and culture of the Sikkimese people.

(v) It is submitted that ever since the closing down of the 30 MW Rathong Chu Hydel Power Project, no other Hydro Project should have been allowed to come up on the said

sacred river.

(vi) However, after a decade, in a curious turn around by the Respondent No. 1-State, agreements were signed with the Respondent No. 4, a Company promoted by Respondent No. 5, for implementation and construction of the three HEPs, namely, 99 MW Ting Ting, 96 MW Lethang HEP and 97 MW Tashiding on the Rathong Chu river.

(vii) It is submitted that numerous scholars and experts have expressed the imperative need to preserve the sanctity of the Rathong Chu river. Prominent amongst them has been Prof. P.S. Ramakrishnan of Jawaharlal Nehru University who stressed on this at various International Conferences and Workshops. This position stands further reinforced by "Kalop" (religious endorsements) of some of the greatest Buddhist Masters including Late His Holiness Dilgo Khyentse Rinpoche, His Holiness Chatral Sangye Rinpoche, His Holiness Dodrup Chen Rinpoche, His Holiness Lachen Gomchen Rinpoche and His Holiness Khenpo Dorje Dechen of Sikkim amongst others.

(viii) Interestingly, two of the three HEPs proposed on the Rathong Chu river, namely, 96 MW Lethang HEP and 99 MW Ting Ting HEP, were subsequently scrapped by the Respondent No. 1-State on grounds of religious sentiments and want of environment clearances.

(ix) Apart from the serious affront to Buddhist sentiments, the Project is also alleged to be in gross violation of the applicable environmental laws and procedures.

7(i). On the second ground of attack, it is submitted that the Hon'ble Supreme Court by its order dated 04-12-2006 in *Goa Foundation vs. Union of India* being Writ Petition (Civil) No. 460 of 2004, had laid down that the Project within 10 kms radius from the boundary of the National Parks and Sanctuaries had to obtain clearance from the NBWL, the Respondent No. 3. It is alleged that in spite of the fact that the Project is situated within the 10 kmsradius from the boundary of the Khangchendzonga National Park, the mandatory clearance from the NBWL has not been obtained thereby rendering the Project illegal.

(ii) It is stated that several experts have recommended non-implementation of HEPs in the State, especially those involving creation of a dam, as most of the State falls under Seismic Zones IV-V making it a high risk earthquake prone area.

(iii) It is alleged that the regulatory authorities appear to have ignored the aforesaid facts and are deliberately allowing the Project to continue in violation of the mandatory provisions of the law relating to the religious sites as well as damage to the environment and ecology.

(iv) It is further alleged that the various representations by concerned persons including letters by Spalzes Angmo, Member of the National Commission for Minorities, and the concern expressed therein, have remained unanswered and unaddressed.

(v) That the Petitioners have also come to know that unobstructed by the regulatory authorities, the Respondents No. 4 and 5, are raising capital through loans and investments from public sector banks and financial institutions.

(vi) That the prospect of potentially large amounts of public money being tied up in the Project also needs to be addressed immediately in order to prevent public money being squandered away in a patently illegal and dubious activities and that Respondents No. 4 and 5 are deliberately concealing material facts in an attempt to deceive certain public sector financial institutions into investing large amounts of public money.

8. In the above premises, the Petitioners have prayed for -

(i) A writ in the nature of mandamus directing the Respondent State to cancel the 97 MW Tashiding Hydro Electric Project.

(ii) A Writ in the nature of mandamus directing the Respondent No. 2, MoEF along with the national Board for Wild Life to withhold or withdraw clearance granted to the Tashiding Hydro Electric Project.

(iii) A Writ in the nature of prohibition restraining the Respondent financial institutions and all other public financial institutions from lending public money/further public money or investing or further investing public money in the Tashiding Hydro Electric Project.

(iv) Issue or pass any writ, direction or order, which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

9. The Respondents have filed their respective counter-affidavits denying all material allegations made in the Writ Petitions. In their counter-affidavit, the Respondent No. 1-State of Sikkim has raised certain preliminary objections which are set out as under:

(i) The Writ Petitions have been filed with an inordinate delay which has not been explained and, therefore, liable to be dismissed. That wide publicity was given in respect of the said project in as much as advertisements were issued on 17-05-2009 in various newspapers including local newspapers, both in English and local vernacular language, regarding the Public Hearing being held for the Project by the State Pollution Control Board, Government of Sikkim. The fact that the public participated during the Public Hearing held on 18-06-2009 and raised various issues establishes that the public at large were aware of the implementation of the Project. That notice under Section 4(1) of the Land Acquisition Act, 1894, was also published on 26-07-2010. The Petitioners thus being aware of the implementation of the Project remained silent and did not take any steps for three years thereby allowing the Project to progress resulting in creation of a third party right. The Writ Petitions seeking cancellation of the Project was filed only on 21-03-2012, which is almost after more than three years after the commencement of the process of project implementation.

(ii) The Petitioners have no locus standi to maintain the present Writ Petitions as they are not residents of Tashiding and do not have any activities there and are not affected by the Project. Neither the monks of the Tashiding Monastery nor the public of the area have raised any objection except for the Petitioners who are in fact residents of Sajong, Rumtek, East Sikkim and Singtam, also in East Sikkim respectively.

(iii) The Petitioners are neither spiritual persons nor do they have any record of public services nor have they been associated with any Project or any activities concerned with general public. As such, the Writ Petitions cannot be treated as a Public Interest Litigation (in short the "PIL"). It is also averred that the religious sentiments of an individual or a member of a particular religion cannot be treated as public interest. That the implementation of the 97 MW Tashiding HEP in no way affects the rights of the Petitioners under Articles 25 and 26 of the Constitution of India as the freedom of conscience and free profession, practice and propagation of religion do not get affected by the implementation of the Project.

(iv) That it is a settled principle of law that the Courts do not interfere with economic policy of experts and will not sit in judgment on matters of policy. It is stated that the Project in question was scrutinised/vetted by a Hydro Committee, consisting of

technical experts with the task to look into various aspects of hydro power development and make recommendations, and found the Project in consonance with the hydro policy of the State. Even M/s. Shiga Energy Private Limited, Respondent No. 4, to whom the questioned Project was allotted, had engaged WAPCOS, a Government of India Undertaking, to study and prepare a detailed Project Report.

That the implementation of the Project is a State action and the Courts while exercising its power of judicial review of administrative action, is not an Appellate Authority.

(v) The Writ Petitions involve disputed questions of fact and, therefore, liable to be dismissed on the ground alone.

(vi) That no legal or fundamental rights of the Petitioners have been infringed or will be infringed by the implementation of the 97 MW Tashiding HEP and in fact the implementation of the Project will result in the increase of State revenue and increase of employment opportunities to the people of Sikkim and also development of the region.

(vii) That the religious issues raised in the Writ Petitions have already been settled by this Court by order dated 13-12-1995 in Writ Petition No. 10 of 1994 in the matter of *Denzong Lho Man Choda & Others vs. Union of India & Others* and Writ Petition No. 25 of 1995 in the matter of *Chukie Tobdon & Others vs. Union of India & Others* wherein it has been held that development of HEP on the Rathong Chu river neither affects the religious sentiments nor interferes with the performance of the 'Bhumchu' ceremony. The Petitioners are thus barred from raising the same issues on similar grounds again.

(viii) That as the Petitioners having failed to disclose the *Denzong Lho Man Choda* (supra) order dated 13-12-1995, the Writ Petitions are liable to be dismissed for concealment of material fact.

(ix) That the present Project has been initiated after duly complying with the relevant requirements under the applicable laws obtaining all the necessary approvals. It is stated that pursuant to the signing of MoU between the Respondent No. 4, M/s. Shiga Energy Pvt. Ltd., with the Government of Sikkim on 03-09-2008, the Detailed Project Report of the Project was approved by the Government of Sikkim. Open Public Hearing for the Project was conducted by the State Pollution Control Board, Sikkim on 18-06-2009. Thereafter, MoEF accorded its final environment clearance on 29-07-2010 after due recommendation from the State Wildlife and Forest Department. The State Pollution Control Board, Sikkim issued the 'Consent to Establish' the Project under the Air (Prevention and Control of Pollution) Act, 1981 and the Water (Prevention and Control of Pollution) Act, 1974 on 25-11-2010. Further, the revised final approval from the MoEF, vide letter Ref. No. 1368/FCA/FEWMD 955-57 dated 24-09-2011 for diversion of 4.3492 Ha of forest land required for construction of the Project, were received through the Government of Sikkim on 24-09-2011 and the area has also been handed over.

(x) That at the end of 35 years, the Project would be transferred to the Government of Sikkim, which shall provide Sikkim with revenue amounting to crores of rupees for its remaining lifetime.

(xi) That the development of Project is also in line with the Hydro Policies issued by the Ministry of Power which, inter alia, envisages encouragement of investment from private sectors for HEPs by providing conducive environment for such investments.

(xii) That the question raised as regards the mandatory clearance of the NBWL as

required under the Order dated 04-12-2006 passed by the Hon'ble Supreme *Court in Goa Foundation case* (supra) and the judgment I*n Re: Construction of Park at Noida Near Okhla Bird Sanctuary - Anand Arya* and *Another vs. Union of India and Others* and *T.N. Godavarman Thirumulpad vs. Union of India and Others*: (2011) 1 SCC 744, is purely a question of interpretation of the order and the judgment passed by the Hon'ble Supreme Court.

(xiii) It is stated that during the 21st Meeting of the Indian Board for Wildlife held on 21-01-2002, a 'Wildlife Conservation Strategy-2002', was adopted vide letter F. No. 1-9/2007 WL-I (pt) dated 25-01-2012 (Annexure R-2) wherein it was proposed that lands falling within 10 kmsof the boundaries of National Parks and Sanctuaries should be notified as eco-fragile zones under the Environment (Protection) Act and Rules framed thereunder.

(xiv) Pursuant to the said meeting, letter F. No. 6-2/2002 WL-I dated 09-07-2003 (Annexure R-3) was received by the Chief Wild Life Warden of all the States/Union Territories whereby it was conveyed that the requisite information pertaining to notifying areas within 10 kms of the boundaries of National Parks, Sanctuaries and Wild Life corridors as eco-sensitive areas had not yet been received by the Ministry from the State of Sikkim. This was then followed by the order dated 04-12-2006 in WP(C) No. 460 of 2004, i.e., the *Goa Foundation case* (supra) observing that -

> ".....The Ministry is directed to give a final opportunity to all States/Union Territories to respond to its letter dated 27th May, 2005. The State of Goa also is permitted to give appropriate proposal in addition to what is said to have already been sent to the Central Government. The communication sent to the States/Union Territories shall make it clear that if the proposals are not sent even now within a period of four weeks of receipt of the communication from the Ministry, this Court may have to consider passing orders for implementation of the decision that was taken on 21st January, 2002, namely, notification of the areas within 10 km of the boundaries of the sanctuaries and national parks as eco-sensitive areas with a view to conserve the forest, wildlife and environment, and having regard to the precautionary principles. If the States/Union Territories now fail to respond, they would do so at their own risk and peril....."

(xv) The Ministry of Environment and Forests vide letter F. No. 6-1/2003 WL-I(pt) dated 19-12-2006 (Annexure R-4) had once again reminded the Chief Secretary of all the States/ Union Territories regarding the declaration of Eco-Fragile/Eco-Sensitive Zones around National Parks and Wildlife Sanctuaries within their States. The Chief Wildlife Warden, Government of Sikkim accordingly responded vide his letter No. 69/CWLW dated 09-02-2007 conveying to the Deputy Inspector General of Forest, Ministry of Environment and Forests, New Delhi, the views of the State Government enclosing a copy of the affidavit (Annexure R-6) filed before the Hon'ble Supreme Court in WP(C) No. 460 of 2004 in *Goa Foundation case* (supra) wherein it had been, inter alia, averred that the condition of declaring Eco-fragile/Eco sensitive zones within 10 (ten) kilometer limit (crow flying) from the periphery of the PAs was not tenable as per Sikkim conditions and that if the proposed identification is carried out, a substantial portion of the State will be covered under such zones and may intrude with the ongoing developmental process in the State. However, the State Government had already initiated survey in this direction in response to the Hon'ble Supreme Court directives.

(xvi) A draft proposal was forwarded by the Forest, Environment and Wildlife Management Department, Government of Sikkim vide letter No. 30/GOS/CWLW/ Forests dated 13-04-2011 (Annexure R-8), identifying six Eco-Sensitive Zones around National Park and Wildlife Sanctuaries on the basis of the guidelines issued by the

MoEF.

(xvii) However, the MoEF (Wildlife Division) by its letter No. 1-9/2007 WL-I(pt) dated 25-01-2012, conveyed that the proposals were not in accord with the guidelines of declaration of Eco-sensitive Zone and directed that a Committee be constituted to identify the prescribed activities within the Eco-Sensitive Zones and that the revised proposal should contain details as indicated in the said letter.

(xviii) That the PCCF-cum-Pr. Secretary vide Memo No. 101/FEWMD dated 02-08-2012 (Annexure R-11) has since forwarded a revised proposal for declaration of 50 meters as Eco-sensitive Zones around protected areas of Sikkim (Annexure R-12) based on the recommendation of the Committee set up by the State Government as directed by the MoEF. The proposal is still under consideration of the MoEF.

(xix) That the Government of Sikkim had already notified its buffer zones for Khangchendzonga National Park and, the Project did not fall within such buffer zone. However, pursuant to the resolution passed in the meeting of the NBWL on 17-03-2005, it was decided that "..... the delineation of eco sensitive zones would have to be site specific, and relate to regulation, rather than prohibition of specific activities. State Government will have to be consulted in this regard and concurrence obtained. ....." and, therefore, eco-sensitive zones were to be delineated/notified by the State Governments/Union Territories.

(xx) That after the Supreme Court judgment in *Anand Arya case* (supra), the MoEF has issued "Guidelines for Declaration of Eco-Sensitive Zones around National Parks and Wildlife Sanctuaries" vide F. No. 1-9/2007 WL-I(pt) dated 09.02.2011 ("Guidelines"). The Guidelines at Paragraph 4 dealing with 'Extent of Eco-Sensitive Zonse' at sub-paragraph 4.1 set out the following:

> "4.1 Many of the existing Protected Areas have already undergone tremendous development in close vicinity to their boundaries. Some of the Protected Areas actually lying in the urban set up (E.g. Guindy National Park, Tami Nadu, Sanjay Gandhi National Park, Maharashtra, etc). Therefore, defining the extent of eco-sensitive zones around Protective Areas will have to be kept flexible and Protected Areas specific. The width of the Eco-sensitive Zone and type of regulations will differ from Protected Area to Protected Area. However, as a general principle the width of the Eco-Sensitive Zone could go upto 10 kmsaround a Protected Area as provided in the Wildlife Conservation Strategy-2002."

(xxi) As far as the State of Sikkim is concerned, 28 out of 30 HEPs allotted fall within the 10 kmsradius of National Parks and Wildlife Sanctuaries located in Sikkim. These would include HEPs currently under construction, namely, Teesta-III HEP (12000 MW), Teesta-VI HEP (500 MW), Rongni Chu HEP, Chuzachen HEP, Bhasmey HEP, Rangit-II HEP, Dikchu HEP, etc. In the event 10 kmsarea around Wildlife Sanctuary and National Parks are considered as an eco-sensitive zone, more than 85% of the land area of Sikkim would fall within such eco-sensitive zone resulting in serious ramifications to the State's economic growth.

(xxii) That the Project in question being more than 5 kmsaway from the nearest boundary of the Khangchendzonga National Park, it neither falls within the eco-sensitive zones envisaged in the Draft Proposal nor within the earlier demarcated buffer zone. Even before the Project got its formal clearances under the earlier notified buffer zone, the APCCF-cum-Chief Wildlife Warden, Department of Forest, Environment and Wildlife Management, Government of Sikkim vide letter F. No. 128/NP&Z/WL/Forest/32 dated 23-01-2007, has issued 'NOC' as none of the components of the Project in question fall

within the boundary of the Khangchendzonga National Park and its Buffer Zone at Tashiding Kabirthang Village, West Sikkim.

(xxiii) Dealing with the various averments contained in the Writ Petitions, the Respondent No. 1 has denied that the Rathong Chu river is the most sacred river with Tashiding navel to all and that the river has not been classified as a protected place of worship by the Government of Sikkim and that no important places of worship are affected by the Project under construction at Tashiding area.

(xxiv) That a Committee was constituted by the State Government vide Notification No. 80/HOME/2011 dated 24-10-2011 (Annexure R-16) to review and examine issues relating to the implementation of (i) 99 MW Ting Ting HEP (ii) 97 MW Lethang HEP and (iii) 96 MW Tashiding HEP at Yuksam-Tashiding Constituency headed by the Chief Secretary, Government of Sikkim as the Chairman.

(xxv) Based on the recommendation of the Committee the State Government ordered the closure of (i) 99 MW Ting Ting HEP and (ii) 96 MW Lethang HEP vide Notification No. 12/Home/2012 dated 08-02-2012 (Annexure R-18).

(xxvi) That in the *Goa Foundation case* (supra) no direction was issued by the Hon'ble Supreme Court directing reference of all the future Projects to the Standing Committee of NBWL for clearance and that the order did not hold that an area of 10 kmsaround a National Park/Wild Life Sanctuary will automatically be construed as eco-sensitive zone or that the proposal for development of any Projects in future within 10 kmsradius of any National Park/Wild Life Sanctuary will require approval from NBWL. As regards the cancellation of Lethang HEP is concerned, it is stated that this Project was located at a distance of 0.2 km. from the Khangchendzonga National Park but, this was not relevant in the context of the Project in question. Rejection of the proposal for development of Lethang HEP by the Standing Committee of the NBWL (in its 20th Meeting on 13-09-2010) in consideration of religious sentiments was far in excess of its power and mandate under the Wild Life (Protection) Act, 1972, which only provides for protection of wild animals, birds and plants and matters related thereto. However, as the present Project did not require NBWL clearance, its parallel could not be drawn with the Lethang HEP.

(xxvii) As regards the letter dated 19-09-2011 written by Spalzes Angmo, it is stated that the contention that development of HEPs should not be allowed in seismic regions in view of earthquakes, was misc-conceived and devoid of any substance as there was no evidence that the earthquake was caused due to implementation of HEPs in Sikkim.

10. Respondent No. 2, the Ministry of Environment and Forests, Government of India, in its brief counter-affidavit has stated as under:
(i) That the MoEF accorded Environment Clearance for 97 MW Tashiding HEP in Sikkim to M/s. Shiga Energy Pvt. Ltd. as per the provisions of Environmental Impact Assessment Notification, 2006, subject to strict compliance of the terms and conditions (Specific and General Conditions) stipulated vide MoEF's letter dated 29-07-2010.

(ii) In order to address the environmental safeguards of the Reserve, the Environmental Clearance Order for Tashiding HEP, inter alia, provides for the following condition under Part A-Specific Conditions:

"(viii) The proposed site is about 5 km away from the buffer zone of Khangchendzonga Biosphere Reserve as per Supreme Court order clearance from NBWL may be obtained (if required)."

(iii) The Environmental Impact Assessment (EIA) and Environmental Management Plan (EMP) for 97 MW Tashiding HEP was prepared by M/s. R.S. Envirolinks Technologies Pvt. Ltd., Gurgaon. The Public Hearing was conducted on 18-06-2009. The methodology followed for preparation of EIA and EMP had been thoroughly examined by the Expert Appraisal Committee (EAC) in its meetings held on 22-04-2010 and 30-06-2010 and accordingly recommended for according environmental clearance (EC) to the Project. Thus, the MoEF has followed the due procedure and norms taking into account all relevant factors required for according EC for the Project.

(iv) All State Governments/Union Territories were requested to send their proposals including Sikkim in accordance with the guidelines for declaration of eco-sensitive zones around National Parks and Wild Life Sanctuaries issued by the Wildlife Division of the MoEF.

(v) Eco-Sensitive Zone has not yet been notified around the Khangchendzonga National Park but a proposal has been received from the Government of Sikkim in August, 2012, which is under examination. Further, the Wildlife Division of MoEF has not received any specific proposal with respect to 97 MW Tashiding HEP.

(vi) In view of the above, it is clear that the Environmental Clearance issued to the Project proponent is subject, inter alia, to the Specific Condition of it obtaining clearance from NBWL, if required, in order to make the Environmental Clearance effective.

11. The Respondent No. 3, NBWL, in its counter-affidavit has averred as follows:
(i) As per the practice in vogue, recommendations of the Standing Committee of the NBWL are necessary along with the environmental clearance for taking up activities within the notified Eco-sensitive zones around Wildlife Sanctuaries and National Parks falling within 10 kmsin the absence of delineation of such a zone. Ministry of Environment and Forests has issued guidelines in this respect, which have been circulated to all the States including Sikkim (Annexure-A1).

(ii) Eco-sensitive Zone has not yet been notified around the Khangchendzonga National Park. A proposal in this regard has been received in the MoEF from Government of Sikkim in August, 2012, which is under scrutiny.

(iii) Based on the representation received from the Sikkim Bhutia-Lepcha Apex Committee indicating that the 97 MW Tashiding HEP in West Sikkim is located within 10 kmsfrom the Khangchendzonga National Park, the Government of Sikkim has been requested to look in to the matter to ascertain as to whether the construction of the Project was already underway and, if yes, it was asked to be stopped immediately until further orders as it did not have necessary recommendations of the Standing Committee of the NBWL (Annexure-A2).

(iv) It is also stated that the Ministry of Environment and Forests has so far not received any proposal from the Government of Sikkim with respect to the 97 MW Tashiding HEP over the river Rathang Chu in West Sikkim for consideration by the Standing Committee of NBWL.

12(i). In its counter-affidavit, the Respondent No. 4 has taken the very same objections as the State-Respondent No. 1. It is alleged that there has been inordinate delay of approximately 3 years in filing the Writ Petitions from the date of the Open Public Hearing held by the State Pollution Control Board on 18-06-2009. The Writ Petitions are liable to be dismissed for laches particularly when hundreds of crores of rupees have already been invested in the Project after obtaining all requisite clearances. That the religious issues raised in the

Writ Petitions have already been settled by this Court in *Denzong Lho Man Choda* (supra) and *Chukie Tobdon* (supra), a fact which has been concealed by the Petitioners. That the Project has fulfilled all the requirements under the applicable laws and is a low impact, environment friendly project.

(ii) That the present Project is entirely in compliance with the requirements under the applicable laws having obtained all the necessary approvals required for development of the Project and was not in breach of any legal compliance.

(iii) The land acquisition process has been carried out in a lawful and transparent manner.
(iv) The Project is a run-of-river, renewable energy and greenhouse gas free Project and is amongst the most sustainable HEPs in the country. The Project does not involve construction of any large dam but a small barrage to divert part flow of water from the river through a tunnel to the power house and is channelled back to the river. The submergence area of the reservoir is only 1.33 ha while similar capacity hydro projects in the country generally submerge more than ten hectares of land.

(v) As regards the impact of the Project on flora and fauna in the vicinity of the site is concerned, it is stated that the Environment Impact Assessment study conducted by a reputed Agency and approved by the MoEF states that -

> "**6.5 Impacts on Terrestrial Fauna**
> **Disturbance to Wildlife**
> ..... Based on the field survey and interaction with locals, it was confirmed that no major wildlife is reported in the proposed submergence area. ..... The project area and its surroundings are not reported to serve as habitat for wildlife nor do they are located on any known migratory route. Thus, no impacts are anticipated on this account. ..... However, no large-scale fauna is observed in the area. Thus, impacts on this account are not expected to be significant."

(vi) The Project was found to be and continues to be overwhelmingly in larger interest of public. It is submitted that a vast majority of the local population of the region from all communities including those to which the Petitioners claims to represent, have wholeheartedly supported the Project since they recognise that the Project will not only be in the interest of the State, but will also generate revenue and employment.

(vii) That no issue with regard to the religious sentiments was raised during the process of acquisition of the land for the Project, 47% of which was from the members of the Bhutia-Lepcha Community (Annexure R7).

(viii) That a budget of Rs. 4.67 crores has been allocated to be spent on Environmental Management Plan (EMP) for the Project which includes Catchment Area Treatment Plan, Biodiversity Management Plan, etc. The moneys are being spent as per the EMP report approved by the MoEF.

13. The above substantially are the averments which are more or less identical to that of the State-Respondent No. 1. We may not deal with the rest as being immaterial for the disposal of the Writ Petitions.

14. The case of the Respondent No. 7 in its short counter-affidavit is that it has sanctioned financial assistance of Rs. 325 crores for implementation of 97 MW Tashiding HEP executed by the Respondent No. 4 in consortium arrangement with Respondent No. 8 as being the underwriter and that the loan document is under execution. That clearance of Ministry of Environment and Forests was submitted by the Respondent No. 4 based upon which it

had appraised and sanctioned the financial assistance and that as per the environmental clearance dated 29-07-2011, the proposed site is about 5 kmsaway from the buffer zone of Khangchendzonga Biosphere Reserve requiring NBWL clearance (if required) as per the order of the Supreme Court. This was suitably addressed in the sanction letter issued to the Respondent No. 4 for the financial assistance to be provided for the Project.

15(i). Respondent No. 8 in a separate counter-affidavit apart from taking the objection of delay and laches as the Respondents No. 1 and 4, has stated that the Respondent No. 8(IFCIL), is a financial institution which was established with a view to overcome the scarcity of long term finance plans in the industrial sector.

(ii) That prior to investing in the Tashiding HEP, the Respondent No. 8 conducted proper and thorough appraisal of the said Project. Upon receiving the proposal from Respondent No. 4, the Respondent No. 8 had duly verified as to whether the Project was in compliance with the necessary legal requirements with required consents and approvals obtained from the relevant Government Authorities. That while investing in the Tashiding HEP, the following factors were into consideration:

(a) The Detailed Project Report for the Tashiding HEP was approved by the Sikkim Power Development Corporation Limited on 06-04-2009;

(b) The Sikkim Pollution Control Board in terms of the Air (Prevention and Control of Pollution) Act, 1981 and the Water (Prevention and Control of Pollution) Act, 1974 had issued the 'Consent to Establish' to the Tashiding HEP on 25-11-2010;

(c) The final approval from the MoEF through the Government of Sikkim for diversion of 4.3492 Ha of forest land required for construction of the Tashiding HEP was obtained on 24-09-2011; and

(d) The procedure and formalities in respect of acquisition of land was substantially complied with.

(iii) That only after having satisfied itself with the various aspects did the Respondent No. 8 execute the syndicated secured term facility agreement with Respondent No. 4 whereby it has underwritten a loan of Rs. 487 crores for the construction and development of the Tashiding HEP. That the Respondent No. 8 has already disbursed Rs. 114.37 crores and in addition it has also entered into an agreement whereby it has committed to invest Rs. 76 crores as equity/preferential capital contribution in Respondent No. 4. Out of this, it has already invested a sum of Rs. 39.72 crores for shareholding of 37.1% in Respondent No. 4.

16(i). Before dealing with the rival contentions of the parties, it would be relevant to note that the Petitioners on 24-07-2012 had moved for stay of the Tashiding HEP on the ground that the mandatory requirement of clearance by the Standing Committee of NBWL had not been obtained by the Respondent No. 4 before commencing with the Project work. By order dated 24-07-2012, this Court had directed that "the execution of the project shall remain subject to the outcome of the writ petition". On the prayer for stay having again pressed on 10-04-2013, it was observed by us as follows:

"……We have heard Mr. Ashok Bhan, learned Senior Counsel for respondents No. 4 and 5. Mr. Bhan submits that the work is at an advanced stage and a sum of Rs. 260 crores has already been expended. This amount was raised by respondents No. 4 and 5 by borrowing from public institutions. According to the learned Senior Counsel, it is too late for the petitioner to request for a stay of the work. The order already passed to the effect that the work will be subject to the final outcome of the writ petition, will protect the interest of the petitioner. The respondents No. 4 and 5 are ready to

take the risk in going ahead with the construction. We record the submission of the learned Senior Counsel. We inform the respondents No. 4 and 5 that the ongoing work will be at the risk of those respondents. Learned Senior Counsel submitted that even at the time when Hon'ble Apex Court was moved, the work had progressed to a considerable extent and interim order of stay would have been declined at that stage also....." [emphasis supplied]

(ii) The Writ Petitions had thus proceeded in the above premises.

17(i). Opening his arguments, Mr. Zangpo Sherpa, Learned Advocate, appearing for the Petitioners, laid the premises of his arguments on the following-

(a) religious, cultural and historical aspect;

(b) aspect of environmental laws as regards the Project in question being regulatory and not prohibitory; and

(c) inter-generational equity and public trust doctrine.

(ii) The Learned Counsel addressed us firstly on the question as regards the violation of the environmental laws, seeking liberty to address on the others later. Having been permitted to do so, he proceeded to address us by referring to a Press Report appearing in an English daily, the 'Telegraph' dated 21-08-1997, stating that the 30 MW Rathong Chu Project was being cancelled which, as per the statement of the Chief Minister of Sikkim, was to honour and uphold the sentiments, religion and culture of the Sikkimese people and to save the environment. Thereafter, the Gazette Notification dated 02-09-1997 was published by the State Government ordering closure of the Rathong Chu Hydro Electric Project w.e.f. 20-08-1997. As per Learned Counsel, this pertains to an earlier Hydro Electric Project which had been proposed to be set up on the very river Rathong Chu on which the present Project has now been taken up.

(iii) Rebutting the contention as regards the *Goa Foundation case* (supra), it was argued that the order of the Hon'ble Supreme Court was clear to indicate that if the State/Union Territories failed to give proposals identifying areas on the boundaries of National Parks and Wildlife Sanctuaries as eco-sensitive areas within 4 weeks of receipt of the communication from the Ministry, the Court may consider passing orders for implementation of the proposal made in the "Wildlife Conservation Strategy-2002" on 21-01-2002, to notify the areas within 10 kms of the boundaries of National Parks and Sanctuaries as eco-sensitive zones with a view to conserve the forest, wildlife and environment and having regard to the precautionary principle. That since the States, particularly the State-Respondent No. 1, admittedly have not complied with the direction within the time stipulated by the Hon'ble Supreme, by implication the eco-sensitive area will have to be considered as 10 kms of the boundaries of the Khangchendzonga National Park. It was also directed upon the MoEF, Respondent No. 2, that all cases where environmental clearances had been given activities of which were within 10 kmszone, should be referred to the Standing Committee of the NBWL. It was submitted that Specific Conditions (viii) of the environmental clearance dated 29-07-2010 (Annexure P/11) granted by the Respondent No. 2 mandates that clearance from NBWL was necessary, if required. As per the Learned Counsel, this requirement was also reflected in paragraph 3 of the General Remarks of the Environment Clearance Status Query Form (Annexure P37 in CM Appl No. 63 of 2013) that the NBWL clearance was required to be obtained immediately.

(iv) That this position also stands confirmed by letter dated 28-05-2012 (Annexure A2) written by the Deputy Inspector General of Forests (WL) addressed to the Pr. Chief Conservator of Forests and HOFF, Government of Sikkim, by which it had been clearly

spelt out that as the Project did not have the necessary recommendations of the Standing Committee of the NBWL and, if it was underway, the same may be stopped immediately. As per the Learned Counsel, the affidavit dated 07-10-2013 (CM Appl No. 139 of 2013) filed on behalf of the Respondent No. 2 duly affirmed by the very Deputy Inspector General of Forests, states in most unequivocal terms that as there was no notified eco-sensitive zone, the recommendation of the Standing Committee of the NBWL was mandatory, and needed to be applied for and, that a proposal for an Eco-Sensitive Zone and notification thereof at that date would not absolve the Project authorities from such requirement.

(v) In the above premises, the Learned Counsel would submit that there could be no other conclusion but to hold that clearance from the NBWL was and is a mandatory requirement failing which all actions taken would be held illegal and under such circumstances the order dated 04-12-2006 in *Goa Foundation case* (supra) still holds good.

(vi) That although in *Anand Arya's case* (supra) it was the stand of Respondent No. 2 that in the absence of a declared eco-sensitive zone the construction work did not appear to violate any law which was also the submission on behalf of the State of Uttar Pradesh, in substance the decision did not depart from the essence of the *Goa Foundation case* (supra) when it was also held that absence of a statute would not preclude the Court from examining the Project's effect on the environment with particular reference to the sanctuary in question as it involved the right to life under Article 21 of the Constitution of India. As per the Learned Counsel, the conditional direction contained in the *Goa Foundation case* (supra) still subsisted in view of the admitted position that the eco-sensitive area has not yet been declared by the Respondent No. 2.

(vii) The sensitivity of the Rathong Chu Valley in the context of the environment is clearly set out in the Environmental Impact Assessment and Environmental Management Plan prepared for the Respondent No. 4 by M/s. R.S. Envirolink Technologies Pvt. Ltd., Gurgaon. The report indicates the fragile nature of the ecological lay out, its proximity to the buffer zone of Khangchendzonga Biosphere Reserve, innumerable taxonomic diversity, huge submergence area, the resultant dissemination of rich medicinal plants and trees, loss of flora, effect upon at least 160 species of mammals most of which fall under the endangered species under Schedule I of the Wild Life (Protection) Act, 1972, the avifauna, reptiles, butterflies, fish, etc. The report spells out the adverse impact on account of the immigration of construction workers to the area which is estimated to be about 1010, the impact on the environment due to utilisation of materials from the river bed, degradation of the quality of water of Rathong Chu river by sewage of the construction workers' camps, effluent from crushers, impacts due to damming of river, human activities, discharge of sewage, etc. The Learned Counsel submits that the Environment Management Plan put in place would not be sufficient to mitigate the serious impact on the Rathong River Valley by the Project.

(viii) Mr. Sherpa submits that the procedure for environmental clearance is not linked with clearances from forestry and wild life angle being independent of each other as would be evident from the minutes of the 19th Meeting of the State Environment Impact Assessment Authority held on 21-12-2009 (Annexure P-41). During the said meeting Office Memorandum dated 02-12-2009 (Annexure A1) laying down the procedure for consideration of proposals for grant of environmental clearance under EIA Notification dated 14-09-2006 (Annexure A1 to the counter-affidavit of the Respondent No. 3) was discussed. The Learned Counsel referred to Paragraph 2(i), (ii), (ii)(b) and (iii) of the said Office Memorandum which stipulates that environment clearance will not be linked with the clearances of forestry and wild life angle being independent of each other and, that the application for wild life clearance and clearance from Standing Committee of NBWL should be submitted by the Project proponent before applying for the environment clearance

and a copy of such application should also be furnished along with the environment clearance application. That the Office Memorandum also made it clear that the stipulation of 10 kmsradius laid down in *Goa Foundation case* (supra) would apply. That the Deputy Inspector General of Forests (WL) had only re-emphasised this position when in his letter dated 28-05-2012 he had asked the Pr. Chief Conservator of Forests and HOFF under the Respondent No. 1 to stop the Project in question until further orders as it did not have the necessary recommendations of the Standing Committee of NBWL. This has been further reinforced by the Respondents No. 2 and 3 in their counter-affidavits in stating that the Project proponent needs to obtain clearance from NBWL, if required, in order to make the environmental clearance effective. As per Mr. Sherpa, it is in this light that the statement of the NBWL in its affidavit as Respondent No. 3 that the recommendations of the Standing Committee of the NBWL was also necessary, "as per the practice in vogue", has to be understood.

(ix) It is submitted that the Respondents No. 4 and 5 were aware of this legal position and the requirements prescribed under the procedure as they were available on the website of the Respondent No. 2. The fact that the Respondent No. 5 also was personally aware of the above position can be inferred from the letter of the MoEF dated 04-07-2011 addressed to the Respondent No. 5 as the Director of M/s. T.T. Energy Pvt. Limited, the Project proponent of 99 MW Ting Ting HEP on the very river Rathong Chu, as it refers to the Office Memorandum dated 02-12-2009 (Annexure A1 to the counter-affidavit on behalf of the Respondent No. 3) conveying the necessity of wild life clearance/clearance from the NBWL.

(x) Mr. Sherpa also points out that the Office Memorandum dated 02-12-2009, while laying down the procedure and indicating the mandatory nature of the requirement for seeking forestry and wild life clearances apart from the environmental clearances, also made it clear that "The investment made in the project, if any, based on environmental clearance so granted, in anticipation of clearance from forestry and wildlife angle shall be entirely at the cost and risk of the project proponent and Ministry of Environment and Forests shall not be responsible in this regard in any manner." This, as per the Learned Counsel, was also re-emphasised in the letter dated 19-08-2010 of MoEF, Respondent No. 2, copies of which were endorsed to all the Principal Chief Conservator of Forests, Chief Wildlife Wardens, the Nodal Officer (FCA) of all the States including all Regional Offices of the Ministry. Thus establishing that the State-Respondents were fully aware of the requirement of seeking NBWL clearance in respect of Projects of the kind in question.

(xi) It is submitted that the directions contained in the letter dated 28-05-2012 issued by the Deputy Inspector General of Forests (WL) (Annexure A2 to the affidavit on behalf of the Respondent No. 3, the NBWL) has not yet been complied with although it was issued in pursuance to Section 3(1) read with Sections 3(2)(i), 3(2)(v) and 3(2)(vi) of the Environment (Protection) Act, 1986 and also Section 5C and Sub-Sections thereunder of the Wild Life (Protection) Act, 1972. Moreover, as per the Learned Counsel, the EIA Notification, 2006, would bring the Project under the purview of Central Government as it falls under Category 'A' contained in the Schedule appended thereto.

(xii) Mr. Sherpa further would submit that Office Memorandum dated 02-12-2009 and the letter dated 28-05-2012 have statutory force as the power to issue such directions emanate from Sections 5A, 5B, 5C and 6 of the Wild Life (Protection) Act, 1972. The orders and procedures laid down thereunder are, therefore, binding and unavoidable. The stipulation of 10 kmsas the eco-sensitive zone, as per Mr. Sherpa, has been prescribed by the Hon'ble Supreme Court by invoking the precautionary principle as would appear from the observation in the very order that "if the proposals are not sent even now within a period of four weeks of receipt of the communication from the Ministry, this Court may

have to consider passing orders for implementation of the decision that was taken on 21st January, 2002, namely, notification of the areas within 10 km of the boundaries of the sanctuaries and national parks as eco-sensitive areas with a view to conserve the forest, wildlife and environment, and having regard to the precautionary principles."

(xiii) Relying upon *M.C. Mehta vs. Union of India and Others*: AIR 2004 SC 4016 and *M.C. Mehta vs. Union of India and Others*: (2012) 8 SCC 132, it was submitted that the EIA Notification, 2006, is mandatory having statutory force.

(xiv) Relying upon *Krishnadevi Malchand Kamathia and Others vs. Bombay Environmental Action Group and Others*: (2011) 3 SCC 363 it was submitted that it was not permissible for the Respondents No. 1, 4 or 5 to ignore an order as being void and would rather require compliance until it is declared so by a competent forum. The Learned Counsel would submit that until it was decided by an appropriate forum that NBWL clearance was not required for whatever reason, it was not permissible for Respondents No. 1, 4 and 5 to ignore the orders passed by the Respondents No. 2 and 3 holding those as void or non est.

(xv) Although the legal entity of the NBWL as a statutory body created under Section 5A of the Wildlife (Protection) Act, 1972 is self-evident, Mr. Sherpa would refer to *Centre for Environmental Law, World Wide Fund-India vs. Union of India and Others*: (2013) 8 SCC 234 to re-emphasise the position that statutorily it is the duty of NBWL to promote conservation and development of wildlife with a view to ensuring ecological, environmental and security of the country and also its paramountcy over the State Board of Wild Life (SBWL). It was submitted that the 'doctrine of public trust' makes it incumbent upon the Government to protect the resources for the enjoyment of the general public rather than to promote their use for private ownership or for commercial exploitation to satisfy the greed of a few as held in *Association for Environment Protection vs. State of Kerala and Others*: (2013) 7 SCC 226. It is in order to uphold the doctrine of public trust that the environmental and other cognate laws have been framed by the legislature. The action of the Respondents No. 1, 4 and 5 would clearly indicate that they have deliberately chosen to flout the mandate of the law and the orders issued by the authorities created thereunder.

(xvi) It is next contended that as per the Annual Report for the year 2008-09 submitted by the Energy and Power Department, Government of Sikkim (Annexure R8/3 to the counter-affidavit of Respondent No. 8) there are almost 50 Projects of Mega, Small, Mini and Micro magnitude Hydel Projects in different stages of progress in the State, of which the Tashiding HEP is one. Therefore, it is incorrect to state that scrapping of the Project would adversely affect the economy of the State and, that because there were already Hydel Projects, on the Rimbi river, the water of the Rathong Chu river stands already polluted and defiled. Mr. Sherpa reiterates that in 1997 a similar Project on the Rathong Chu river had been withdrawn.

(xvii) The Learned Counsel by referring to the notes of the Committee dated 21-11-2007 (Annexure P-18) and the recommendation of the Principle Chief Engineer, Energy and Power Department, submitted that the Project in question had been withdrawn from the Respondent No. 4 by a Cabinet decision dated 18-01-2008 on account of its dubious intentions and incapability but, surprisingly the decision was reviewed and the earlier L.O.I. was revived permitting the Respondent No. 4 to develop the Project. As per the Learned Counsel this did not reflect bona fides on the part of the State-Respondents.

(xviii) It was then contended that as a consequence of the objections from various groups including those whose cause is being espoused by the Petitioner as well as the concerns expressed by the Member, National Commission for Minorities, a Committee was set up by the State Government vide Notification dated 24-10-2011 headed by the Chief Secretary

to examine the issues relating to the implementation of the three Projects including Tashiding HEP on the river Rathong Chu. The Committee upon consideration of various factors recommended scrapping of 99 MW Ting Ting HEP and 96 MW Lethang HEP but the decision as to whether or not the 97 MW Tashiding HEP should be scrapped was left on the Government. While doing so, the Committee noted that the Company had incurred an expenditure of more than 124 crores with the work in progress on the verge of constructing 3 adits and head rest tunnel and, that if the Government decided to scrap the Project the Project proponent will require to be compensated in excess of 150 crores. It was also pointed out that if the Project was to continue ramification in terms of public opinion and religious institutions had to be effectively dealt with being a sensitive issue.

(xix) Upon the above recommendations of the Committee the matter was referred for expert opinion but, was curiously marked to the Law Secretary who himself was one of the Members of the very Committee which had made the recommendations. It is submitted that the entire exercise was an eye-wash and a useless formality.

(xx) Mr. Sherpa submits that Shri R.K. Purkayastha, the Law Secretary, could not be considered as an 'expert' who was qualified to give an opinion on the question. In any case, even the opinion given by him could not be stated to be of substance as the only consideration for his recommendation that the Project should not be scrapped was that amount of about Rs. 150 crores had been spent on the Project by the Project proponent. It is submitted that the monetary value spent was not such that it could not be compensated and such liability could not over-ride the immense public interest that would have served in scrapping the Project.

(xxi) Of the three, two HEPs, namely, Ting Ting and Lethang HEPs, were cancelled by the Respondent No. 1 by Notification No. 12/Home/2012 dated 08-02-2012 but decided to carry on with the Tashiding HEP on the basis of the opinion of the Law Secretary despite objections from various public organisations including the Sikkim Bhutia-Lepcha Apex Committee and other organisations like "Save Sikkim". References were made to a number of representations including letter dated 25-06-2011 addressed to the District Collector, West Sikkim and representation dated 21-07-2011 addressed to Smt. Jayanthi Natarajan, Union Minister of State, MoEF.

(xxii) The opinion and the decision taken thereon, as per the Learned Counsel, were in conflict with the public trust principle as discussed in the *Association for Environment Protection case* (supra). That the Respondents No. 1, 4 and 5 were in the breach of the public trust and the statutory orders and notifications, is clearly established by the fact that to a question put in the prescribed format while seeking information under the Right to Information Act, 2005, demanding for copies of the revised report of EIA and EMP of 97 MW Tashiding HEP by the Respondent No. 5 and observations of the Expert Appraisal Committee in its 37th Meeting under the EIA Notification, 2006 held on 22-04-2010, it was stated that the information was not available with the Department.

(xxiii) There is also a conflict as regards the agency which prepared the DPR for the Project. Mr. Sherpa points out that while the Respondent No. 2 in his affidavit has stated that it was by M/s. R.S. Envirolink Technologies Pvt. Ltd., Respondent No. 1, on the other hand, has named WAPCOS as the one which prepared it. There are contradictions on other aspects also which render the bona fides of the Respondents No. 1, 4 and 5 suspect.

(xxiv) It is submitted that environment, ecology and the bounties of nature are for every citizen and the State is the trustee of these which has the responsibility to appropriate them in a just and equitable manner without being influenced by the unwanted commercial exploitation. The 'public trust doctrine' initiated by the Courts charges the

State with such responsibility with the object to meet inter-generalisation equity by resorting to the principles of sustainable development. Referring to the decision of *Fomento Resorts and Hotels Limited and Another vs. Minguel Martins and Others*: (2009) 3 SCC 571, it was submitted that the Legislature introduced Article 48-A with the object of protecting and improving environment and safeguarding forest and wildlife and, Article 51-A enumerated fundamental duties of every citizen, Clause (g) of which enjoins upon every citizen of India to protect and improve the natural environment. The Learned Counsel also referred to *Intellectuals Forum, Tirupathi vs. State of A.P. and Others*: (2006) 3 SCC 549 to assert that while the State-Respondents invoke the principle of sustainable development, it has failed to maintain balance between the development needs which the Respondent asserts and the environmental degradation. It is submitted that the balance is skewed against protection of the environment and ecology of the State due to the Project in question. It is also asserted that the Writ Petitions cannot be thrown out solely on the consideration of the Respondent No. 4 having invested huge amounts of money. If such be the consideration the Courts will not have any option but to deem a Project legal only because a party has made certain investments.

(xxv) On the point of encroachment on religious and customary rights of the Petitioner, the Learned Counsel would submit that the Petitioners were not against the development of the State and the economic prosperity of the people as was being alleged on behalf of the Respondents. Their objection was only restricted to the Rathong Chu Valley and the river Rathong Chu in the far corner of West Sikkim upon which the 97 MW HEP in question was being set up. It is urged that there were already a large number of Hydro Projects which were in different stages of development and other industries of huge magnitude in other parts of the State against which the Petitioners had not raised any question. It is an admitted position on the part of the State-Respondent that there were at least 30 such Hydro Projects out of which at least 6 of them were Mega Projects with more than 500 MW capacities and the rest were varying between 90-400 MW. Of them, Tessta-V Project having an installed capacity of 510 MW, was partially in commission.

(xxvi) The report of the Energy and Power Department, Government of Sikkim, Annexure R-8/3, indicates 61 MW as the peak load of the State which of course was expected to grow. The entire Hydro Projects taken together would have an installed capacity of 8000 MW. For a State having an area of 2700 sq. miles with a population of about 6 lakhs, the revenue that would be generated from these would be manifold in excess of its requirement to meet the necessary developmental expenditure. Moreover, due to the terrain and altitude of the State only 15% of the total area of the land is cultivable and inhabited and, most of these lie along with the river valleys which are being tapped for Hydro Electric generation. Under these circumstances, as per the Learned Counsel, it was incorrect to state that if the Tashiding HEP on the Rathong Chu river, in a far corner of West Sikkim was stopped, it would adversely affect the development process of the State.

(xxvii) That the Rathong Chu river and the entire area below the Mount Khangchendzonga in West Sikkim is considered as the most sacred area of Sikkim is well-established as would appear from the religious texts and, in particular, "Neysol" which describes the names of all the deities of Sikkim mentioned by one of its Saints of Sikkim 'Gyalwa Lhatsun Chenpo'. Referring to the excerpts of the note sheets at pages no. 1 and 2 of the former Secretary of the Ecclesiastical Department, Government of Sikkim (Annexure P4), it has been recorded that strictly from the religious point of view, the Project is located at the heart of the sacred areas of Sikkim indicated in the 'Neysol' text and that the Project from the religious perspective would defile the sanctity of the area. It is stated that the Sikkim is the only State which has an Ecclesiastical Department looking after the religious affairs of the State in view of the historical setting. Great Buddhist masters and scholars have also emphasised on the sacredness of the Rathong Chu and its surrounding areas. Mr. Sherpa drew our attention

to the views expressed by His Eminence Dodrup Chen Rinpoche, Venerable Lachen Gomchen Rinpoche, HH Dilgo Khyentse Rinpoche and HH Chatral Sangye Dorje Rinpoche, filed as Annexure P22 collectively. Reference was made to the paper "The Importance of Sacred Natural Sites for Biodiversity Conservation" submitted to the UNESCO during the International Workshop on the subject held in Kunming and Xishuangbanna Biosphere Reserve, People's Republic of China, between 17-20/02/2003 by Prof. P.S. Ramakrishnan in which he has also referred to the 'Neysol' text. The Learned Counsel submits that the paper, inter alia, referring to the "Neysol" text, most lucidly sets out the importance of the Rathong Chu catchment area considered as the mythical 'Demajong', that has a clearly defined norms and well-defined boundary of sacredness where the air, soil, water and biota are all sacred with an area measuring about 3,28,000 hectares out of which 28,510 hectares is under snow cover. It is stated that entire cultural fabric of Sikkimese society is dependent upon the conservation of the whole sacred landscape.

(xxviii) The National Biodiversity Strategy and Action Plan (NBSAP) prepared by the Ministry of Environment and Forests, Government of India, Respondent No. 2 (Annexure P24 to the Writ Petition) was also referred to point that the Nodal Agency of NBSAP also consisted of the PCCF/CWLW-cum-Secretary of the Department of Forest, Environment and Wildlife, Government of Sikkim and other Officers of the department. The plan, which is a Government document, also emphasises on the sacredness of the Yuksam valley in which the river Rathong Chu flows. It is submitted that an entire section of the report is devoted to this aspect at serial no. 5 under the head "Sacred Landscapes" which was pointed out to us. It is submitted that the entire Yuksam valley through which the river Rathong Chu flows and the river itself are worshipped by the Buddhists in general and, these form an essential part of their religious practices. He submitted that any encroachment in the natural settings of the valley and the river would encroach upon their rights guaranteed by Articles 25, 26 and also Article 29 of the Constitution of India.

(xxix) He further went on to refer to the case of *Orissa Mining Corporation Ltd. vs. Ministry of Environment & Forest & Others*: 2013(6) Scale 57 wherein the Hon'ble Supreme Court upon consideration of a similar aspect pertaining to the Niyamgiri hill of Orissa having religious significance to the tribals of that valley, referred the case back for a fresh public hearing in spite of two public hearings having already been held earlier.

(xxx) On the question of delay in filing the Writ Petitions, it was submitted that there was no delay at all in filing the Writ Petitions. It is stated that the Project was being objected to right from the inception by various groups as would appear from the report on visit of High Powered Committee dated November, 2011 which refers to a Group "Save Sikkim" (Annexure P29), and letter dated 16-11-2011 by District Collector, West to PCE-cum-Secretary, Energy and Power Department, Government of Sikkim (Annexure R-20) forwarding record of discussions held in his Chamber to discuss a representation dated 14-11-2011 submitted by the villagers in the name of "Save Sikkim".

(xxxi) Violation of the guidelines prescribing the procedure for obtaining environmental clearance stand established on the Respondents' own admission. This is a continuing wrong and the cause of action still continues. From the report of the High Powered Committee on the 97 MW Tashiding HEP dated November, 2011, which the Learned Counsel refers to, it is submitted that no physical work of substance appear to have taken place except for payment of land compensation, both private and forest lands, for which Rs. 124 crores had been spent with just about 12% to 14% of the civil works completed.

(xxxii) Similarly, the Sixth Monthly Compliance Report on Status of Environmental Safeguards of 97 MW Tashiding HEP forwarded by letter dated 22-11-2012 by the Environment Officer to the Joint Director, North Eastern Regional Office, MoEF, Annexure

P35, also indicates that the construction phase had just started with the financial closure of the Project having been achieved only in July, 2011, after which only the construction of roads in the area commenced. It is, therefore, submitted that on the Respondents' own admission, at the time when the Writ Petitions were filed, the Project was at its initial stage of implementation.

(xxxiii) In view of the widespread protest against the HEPs, the State Government ultimately had constituted a Committee to review and examine the issues pertaining to those by Notification dated 24-10-2011. Pursuant to its decision taken in its meeting held on 21-11-2011, a team of officers comprising of the Commissioner-cum-Secretary, Commerce and Industries Department and Secretary, Energy and Power Department, visited the spot. Based on this report, the Committee in its meeting held on 23-11-2011 proposed closure of Ting Ting and Lethang HEPs but referred the decision on the Tashiding HEP to the Government. The State Government accepted the recommendation for closure of the two but decided to continue with the Tashiding HEP by Notification only on 08-02-2012 (Annexure R-18) leading to the filing of the Writ Petitions on 21-03-2012 before the Hon'ble Supreme Court.

It was, therefore, submitted that there was no delay on the part of the Petitioner in filing the Writ Petition.

(xxxiv) The Learned Counsel urged that even the Office Memorandum dated 02-12-2009 prescribing procedure for consideration of proposals for grant of environmental clearance under EIA Notification, 2006, clearly stated that the investment made in the Project, if any, based on environmental clearance granted in anticipation of the clearance from the Forestry and Wild Life angle, shall be entirely at the cost and risk of the Project proponent.

(xxxv) Mr. Sherpa also referred to the order of this Court dated 24-07-2012 whereby this very principle had been adopted while dealing with the prayer for stay of the Project when it was clarified that "the execution of the project shall remain subject to the outcome of the writ petition" followed by our order dated 10-04-2013 wherein the submission of the Senior Counsel for the Respondents No. 4 and 5 to the effect that they are ready to take the risk in going ahead with the construction, was recorded. Therefore, when substantial portion of the expenditure was incurred by the Respondents No. 4 and 5 during the pendency of the case, they cannot now take the plea of being in a disadvantageous position on the principle of equity. As per the Learned Counsel, the case has been pending for the last almost 3 years having been duly admitted for hearing in consideration of the immense public importance involved in the matter. As such, even on this account the question of delay would pale into insignificance.

(xxxvi) On the Public Hearing conducted by the State Pollution Control Board and the NOCs received from different Monasteries, it is submitted that those do not reflect the correct position from the very records of the Public Hearing filed as Annexure R-8/2 by the Respondents from which it will be manifest that none of the persons belonging to the people whose cause the Petitioner espouses are found to be in the list of people contained in the report. No monks of the premier Monasteries, namely, Dubdi, Premayangtse, Tashiding, etc., were represented during the Public Hearing. He submits that the questions and the answers listed out in the report do not pertain to their religious, customary and traditional aspects at all but deal only with individual benefits accruing out of the Project. The NOC (Annexure R-22 series of the Respondent No. 1) are given by persons who apparently are not authorised. The NOCs are written in English and in computer prints some of which are in verbatim copies which the monks do not understand. Obviously, those were procured or obtained by misleading the signatories. That as per traditional practice, it is the administrative body of the Monastery known as 'Udoer Choesum' or

'Duchi' Committee who are authorised to make commitments of such nature. This is obvious from Annexure P-28 series filed by the Petitioners, consisting of objections from six Monasteries out of which four Monasteries, viz., Tashiding, Pemayangtse, Khechoperi and Dubdi, are from West Sikkim located in the Rathong Valley and its vicinity and considered to be the premier ones. It is stated that the legitimate authorities of those Monasteries have expressed their opposition to the Project on the river Rathong Chu and its periphery. The NOCs given by the persons indicated in Annexure R-22 series filed on behalf of the Respondent No. 1 have been denied by them as invalid. The claim of the Respondent No. 4 that monks of the Pemayangtse Monastery had performed the puja purportedly for restart of the Project during September, 2012, contained in the application dated 17-11-2012 has been denied by those very monks and that the said puja was performed for universal peace as requested by the Respondents No. 4 and 5.

(xxxvii) Summing up his submissions, Mr. Sherpa urged that the Project was in violation of the environmental laws for want of the necessary NBWL clearance and that the Project on the river Rathong Chu is in violation of the rights of the Petitioners under Articles 25, 26 and 29 of the Constitution of India guaranteeing freedom of religious practice and conscience and of preserving the customs and tradition of the Petitioners. It is submitted that the closure of the Project would not hinder the development work of the State and, even if there be any, it would be insignificant and worth the cancellation in view of the immense public interest that it would result in. The Project as stated lies in the far corner of West Sikkim.

18(i). Replying on behalf of the State of Sikkim, Mr. J.B. Pradhan, Learned Additional Advocate General, submitted that the oral arguments placed by the Learned Counsel on behalf of the Petitioners were beyond the scope of the pleadings as the only challenge to the Project in question in the Writ Petition is on the violation of the Supreme Court order dated 04-12-2006 passed in *Goa Foundation case* (supra). That although the Petitioners have prayed for cancellation of the Tashiding HEP, the MoU entered between the State-Respondent No. 1 and the Respondent No. 4 and the reassignment of the Project after it had been withdrawn from it earlier have remain unchallenged.

(ii) It was next contended that the Writ Petitions were factually mis-conceived and clarified that while the earlier Rathong Chu HEP which was scrapped by the Government was located upstream the river Rathong Chu and above Yoksum township, the present 97 MW Tashiding HEP is located after the confluence of river Rathong Chu and river Rimbi. Referring to a map (Annexure R21), it was asserted that the name of the river where the present Project is being set up is locally called 'Ladong Khola' and, therefore, would not hinder the 'Bhumchu' ceremony. That in his letter dated 16-12-2010, Annexure R17, the PCE-cum-Secretary, Energy and Power Department, Government of Sikkim, addressed to the Ministry of Environment and Forests, has stated that 99% of the local people supported the development of the Project and that it did not cause disturbance, displacement or defilement of any kind to any holy place of worship, holy shrine, structural and archeological importance or heritage and the sanctity of the sacred Tashiding 'Bhumchu'. That the earlier Rathong Chu HEP had been scrapped as open channel (water conductor) of the Project was proposed to pass through Yuksam village where some of the religious structures were located which is not the case in the present Project being is far from those places. That the monks of Denzong Pao Hungry Monastery, Tashiding Monastery, Duchi Committee of Khecheopalri Monastery and Duchi Committee of Dubdi Monastery, West Sikkim, have given their NOCs in support of the Project. It is contended that the Government Notification No. 70/HOME/2001 dated 20-09-2001 which declared sacred places, lakes, etc., also does not mention the Rathong Chu river as a sacred river.

(iii) It is his submission that the entire Writ Petitions being based on factually incorrect

premises, it deserves to be dismissed as such.

(iv) It is contended that the Petitioners were guilty of delay and laches in filing the Writ Petitions in as much as MoU was signed on 03-09-2008, the advertisement for conducting Public Hearing of the Project was published by Sikkim Pollution Control Board on 17-05-2009. On 18-06-2009, Open Public Hearing was conducted wherein the public of that area and many others participated. Notifications under Section 4(1) of the Land Acquisition Act, 1894, for acquisition of land for the Project were published firstly on 26-07-2010 and secondly on 24-03-2011. Environmental clearance from MoEF was obtained on 29-07-2010. NOCs were issued by monks of various Monasteries in October and November, 2010 but, the Petitioners have chosen to approach this Hon'ble Court after a period of two years and nine months from the date of Open Public Hearing. The Writ Petitions are, therefore, hit by unexplained delay and laches and thus not maintainable and liable to be dismissed on this ground alone.

(v) In support of his contention reference was made to *Delhi Development Authority vs. Rajendra Singh and Others*: (2009) 8 SCC 582 to emphasise on the principle that delay rules were also applicable to Public Interest Litigations (PILs) and that if there was no proper explanation for the delay, PILs are also liable to be summarily dismissed.

(vi) Referring to *Narmada Bachao Andolan vs. Union of India and Others*: (2000) 10 SCC 664 upon which heavy reliance was placed, it was submitted that when huge amount of public money has already been spent, the Petitioner in the garb of PIL cannot be permitted to challenge a policy decision belatedly and that such challenge after execution of the Project had commenced should be thrown out at the very threshold on the ground of laches if the Petitioner had the knowledge of such decision.

(vii) *Printers (Mysore) Ltd. vs. M.A. Rasheed and Others*: (2004) 4 SCC 460 and *Chairman & MD, BPL Ltd. vs. S.P. Gururaja and Others*: (2003) 8 SCC 567 were also referred to on the same point but we need not deal with those being repetitive.

(viii) That the Writ Petitions were also liable to be dismissed as there was no violation of the laws and of the relevant procedures requiring compliance.

(ix) It is asserted that the Petitioners have no locus standi to file the Writ Petitions and is not in public interest but is rather vexatious and frivolous deserving outright rejection. From the very averments contained in the Writ Petitions they are not the residents of the Project area in West Sikkim.

(x) The allegation that the Project in question was arbitrary and was bad for non-application of mind was sought to be repelled by submitting that all relevant factors have been taken into consideration and necessary procedures followed before finalisation of the Project.

(xi) The Learned Additional Advocate General then went on to submit that it was not for the Courts to interfere with the policies of the Government. A catena of decisions were cited on the point the substance of which is that when State action is challenged the function of the Court is to examine the action in accordance with law and to determine whether the Legislature or Executive has acted within the powers and functions assigned under the Constitution and if not, the Court must strike down the action.

(xii) Relying upon *Union of India and Others vs. J.D. Suryavanshi*: (2011) 13 SCC 167 it was submitted that judicial interference by way of PIL is available only if there is injury to public or dereliction or constitutional obligation by the State and that Court should

generally not interfere with technical and administrative decisions.

(xiii) Rebutting the contention of the Petitioners of the Respondents having violated the environmental law for failing to seek clearance from NBWL, it was submitted that all relevant approval and consents required for development of the Project had been obtained and the Project is in compliance with the applicable laws. The violation of the order dated 04-12-2006 passed by the Hon'ble Supreme Court in *Goa Foundation case* (supra) is mis-conceived. It was stated that the order did not hold that an area of 10 kmsaround the National Parks/Wild Life Sanctuaries will automatically be construed as an eco-sensitive zone or that the proposal for development of any Project in future within 10 kmsradius of any National Parks/Wild Life Sanctuaries will require approval from NBWL. As per the Learned Additional Advocate General, the area in *Goa Foundation case* (supra) has been clarified in *Anand Arya case* (supra) and by referring to paragraph 32 of the report of the Central Empowered Committee (CEC) extracted in paragraph 73 wherein it was observed that in the absence of a decision/notification presently there is no legal restriction against the implementation of the Project on the ground that the Project was adjacent to the Okhla Bird Sanctuary and further that it was decided by the NBWL that eco-sensitive zone should be specific to each National Parks/Wild Life Sanctuaries.

(xiv) It was then submitted that a Committee was constituted by the PCCF-cum-Secretary on 20-05-2006 to monitor activities in eco-sensitive zones and that the Committee in its meeting held on 30-07-2012 to determine the eco-sensitive zone beyond the boundary of the protected area, submitted a proposal which was forwarded to the MoEF by letter dated 02-08-2012 (Annexure R-11).

(xv) This was also in compliance to letter dated 09-02-2011 written by Deputy Inspector General (WL) to the Chief Wildlife Warden of all States/Union Territories directing them to forward sites specific proposals on the basis of a guideline framed by the Ministry enclosed with the said letter for taking necessary steps.

(xvi) That the *Goa Foundation case* (supra) did not mandate creation of an eco-sensitive zone within a radius of 10 kmsof the boundary of National Parks/Wild Life Sanctuaries is also apparent from the order dated 21-09-2012 passed by the Hon'ble Supreme Court in the case of *T.N. Godavarman Thirumulpad vs. Union of India and Others* in IA No. 1000 in *Writ Petition (Civil) No. 202 of 1995* which also covered the *Goa Foundation case* (supra) as would appear from the cause title, namely, *IA Nos. 170-175* in *WP(C) No. 460 of 2004* and *IA Nos. 176-178 in WP(C) No. 460 of 2004*. The order dated 21-09-2012 records the suggestions of the Central Empowered Committee (CEC) to restrict the safety zone around National Parks/Wild Life Sanctuaries to areas not less than 2 kms Although this was not decided finally, it clearly illustrates the fact that the extent of the eco-sensitive zone has not yet been decided.

(xvii) In the proposal submitted by the Respondent No. 1 the boundary of the eco-sensitive zone has been proposed at 50 meters of the boundary of the Khangchendzonga National Park. It is urged that the State of Sikkim had filed affidavits in response to the order dated 04-12-2006 in the *Goa Foundation case* (supra) expressing its reservation in declaring 10 kmsarea as eco-sensitive zone. It is thus submitted that the assertion made on behalf of the Petitioners that the Project was liable to be cancelled for having failed to obtain NBWL clearance is mis-conceived as being based upon an erroneous interpretation of the *Goa Foundation case* (supra). As per the Learned Additional Advocate General there was no mandate in law to seek such clearance.

(xviii) On the question of the religious and cultural aspects raised by the Petitioners, it was strongly argued that the Project did not at all interfere with rights of religious practice of

the Petitioners in as much as the Rathong Chu river is not at all declared as a sacred river under the Notification issued by the State Government.

(xix) The grievance of the river being defiled by the Project was unjustified as in the first place it is not been indicated as to from which the place of the river the water is drawn for the purpose of 'Bhumchu' ceremony. It is submitted that there is already an old Hydro Electric Project on the Rimbi river, a tributary to the Rathong Chu, which would indicate that the water of the Rathong Chu river already stands defiled and made impure and, therefore, the plea that the present Project will defile the river would not stand to sustain any longer. It is submitted that this very question had arisen in *Denzong Lho Man Choda case* (supra) before this Court and this Court had rejected the plea holding that the damage to the water had already been done and no graver infringement to the purity of the water was expected on account of another Hydro Project on Rathong Chu river.

(xx) Reliance placed upon the report of Prof. P.S. Ramakrishnan was assailed on the ground that it had also been rejected by this Court in *Denzong Lho Man Choda case* (supra) dated 13-12-1995 holding that Prof. P.S. Ramakrishnan was not an expert in the religious aspect or in social, cultural and religious aspect and that he did not take assistance of any expert in the matter although he had the option to do so.

(xxi) The Learned Additional Advocate General re-emphasises that the religious rights of a few cannot override the paramount right of the State in formulating policies for general good and that a balance has to be struck between two.

(xxii) Reference was made *The Commissioner, Hindu Religious Endowments, Madras vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt: AIR 1954 SC 282, Acharya Jagdishwaranand Avadhuta and Others vs. Commissioner of Police, Calcutta and Another: (1983) 4 SCC 522, S.R. Bommai and Others vs. Union of India and Others: (1994) 3 SCC 1 and Dr. M. Ismail Faruqui and Others vs. Union of India and Others: (1994) 6 SCC 360*, which deal with the principle which Mr. Pradhan laid stress upon.

19(i). Appearing on behalf of the Respondents No. 2 and 3, Ministry of Environment and Forests and the National Board for Wild Life respectively, Mr. Karma Thinlay Namgyal, Learned Central Government Counsel, sought to explain the letter dated 28-05-2012, Annexure A2, by submitting that the Project was directed to be stopped until further orders as it did not have the necessary recommendations of the Standing Committee of NBWL as envisaged under Office Memorandum dated 02-12-2009 prescribing the procedure for grant of environmental clearance under EIA Notification, 2006. The said Office Memorandum under Paragraph 2(ii) had made it clear that the proposal for environmental clearance was independent from the Forestry and Wildlife clearances which were required to be obtained as applicable to Project before starting any activity at site and, that while granting environmental clearance to Projects involving land located within 10 kmsof the National Parks and Wildlife Sanctuaries, a specific condition should be stipulated that the environmental clearance is subject to their obtaining clearance from the Standing Committee of the NBWL as applicable. This stipulation, as per the Learned Counsel, was inserted in pursuance of the order dated 04-12-2006 in *Goa Foundation case* (supra). Special Conditions (viii) of the letter, Annexure P11, granting environmental clearance, therefore, stipulated that the proposed site being 5 kmsaway from the buffer zone of Khangchendzonga Biosphere Reserve as per Hon'ble Supreme Court order, clearance from the NBWL may be obtained (if required).

(ii) The Learned Counsel urged that the expression 'if required' had to be understood in the context of the fact that the eco-sensitive zone/biosphere reserve had not been notified as the States had not sent any proposals for declaration of the eco-sensitive zone/biosphere

reserve as directed by the Hon'ble Supreme Court in the *Goa Foundation case* (supra). It is conceded that there is no order passed by the Hon'ble Supreme Court that the eco-sensitive zone/biosphere reserve should mandatorily be 10 kmsof the Khangchendzonga National Parks and Wildlife Sanctuaries. It had only observed that if the States did not respond to the MoEF by submitting its proposals within the time stipulated, then only it may consider taking 10 kmsas the eco-sensitive zone/biosphere reserve. The Learned Central Government Counsel stressed that the Ministry has not stated that the Project is illegal but that the recommendation of the Standing Committee of the NBWL was essential in the absence of a notified eco-sensitive zone/biosphere reserve.

(iii) Reiterating its averments contained in the counter-affidavit on behalf of the Respondent No. 2, Ministry of Environment and Forests, Government of India, it is submitted that a proposal has been received from the Government of Sikkim in August, 2012, which is under examination but, the Wildlife Division of the MoEF has not received any proposal from the State with respect to 97 MW Tashiding HEP. It is, therefore, re-emphasised that the Project proposal is subject, inter alia, to the Specific Conditions (viii) of the environmental clearance which stipulate that clearance from NBWL would be necessary, if required, in order to make the environmental clearance effective.

20(i). On behalf of the Respondents No. 4 and 5, Mr. V. Giri, essentially placed the same arguments as that of the State-Respondent. It was submitted that the scope of the Environment (Protection) Act, 1986 and the Wild Life (Protection) Act, 1972, envisages two different schemes. He took us through the various provisions to indicate the scope of these two legislations. He, however, emphasised that under Sections 18 and 35 under Chapter IV of the Act provided for 'Protected Areas' it was the State Governments which had been vested with the power to declare Sanctuaries and National Parks respectively. Similarly, under Section 36A the State Government was empowered to declare any area owned by the Government, particularly areas adjacent to the National Parks and Sanctuaries, etc., as a conservation reserve for protecting landscape, seascape, flora, fauna and their habitat.

(ii) Reiterating the submissions made on behalf of the State-Respondent, Mr. Giri pointed out that the Petitioner, as per their own averment contained in Paragraph 6 of the Writ Petition, was not challenging any clearance granted by the regulatory authorities but only pointing out the violation of the Hon'ble Supreme Court order dated 04-12-2006 passed in *Goa Foundation case* (supra) whereby a Project of the kind involved in the present case requires clearance from the NBWL. It is thus submitted that the only issue involved in the present case is the interpretation of the aforesaid order dated 04-12-2006 and nothing else.

(iii) It is then submitted that the Project in question was cleared after following an elaborate procedure laid down under MoEF Notification dated 14-09-2006 which includes amongst others detailed scrutiny by Expert Appraisal Committee (EAC) provided under List IV of the Notification. That before the grant of environment clearance, a Project is required to comply with various requirements set out in the Check List of Environmental Impacts contained in Appendix II of the Notification. That amongst the Members of the EAC is also an expert in Forestry and Wildlife as would appear under serial no. 2 of the Appendix VI. It is thus submitted that before the environmental clearance was granted all relevant factors had been taken into consideration and, therefore, it could not be heard to say that the aspect as regards the issue raised in *Goa Foundation case* (supra) was not considered.

(iv) In its 21st meeting held on 21-01-2002, the Indian Board for Wildlife (IBW) for the first time adopted the "Wildlife Conservation Strategy-2002", stipulating that "lands falling within 10 kmsof the boundaries of National Parks and Sanctuaries should be notified as

eco-fragile zones under section 3(v) of the Environment (Protection) Act and Rule 5 Sub rule (viii) & (x) of the Environment (Protection) Rules". In pursuance of this, the Additional Director General of Forests (WL) vide letter dated 06-02-2002 requested all Chief Wildlife Wardens of all States to list such areas within 10 kmsof boundaries of National Parks and Sanctuaries and furnish detailed proposals for Notification as eco-sensitive areas under the Environment (Protection) Act, 1986.

(v) Later, on 17-03-2005 in its meeting, the NBWL re-examined the above proposal of the IBW in view of many States having raised concerns over the 10 kmsrange limits and noted in its meeting on 21-01-2002, that "delineation of the eco sensitive zones would have to be site specific, and relate to regulation, rather than prohibition of specific activities". This decision was communicated to the State vide letter dated 27-05-2005 asking the States/ Union Territories to identify suitable eco-sensitive zones.

(vi) Taking note of this letter the Hon'ble Supreme Court passed the contentious order dated 04-12-2006 in the *Goa Foundation case* (supra) vide Writ Petition No. 460 of 2004. That it is in this light that the direction was issued upon the MoEF to give a final opportunity to all States/Union Territories to respond to its letter dated 27-05-2005 and if the proposals were not sent within a period of 4 weeks of the receipt of the communication from the Ministry, the Court may then have to consider passing orders for implementation of the decision that was taken on 21-01-2002 by the IBW. Thus no eco-sensitive zone of 10 kmshad been laid down by the Hon'ble Supreme Court.

(vii) In the guidelines of MoEF for declaration of the eco-sensitive zones it has also been stipulated at Paragraph 4.1 that the "extent of eco-sensitive zone around Protected Areas will have to be kept flexible and Protective Area specific". The width of the eco-sensitive zone and type of regulations will differ from Protected Area to Protected Area. However, as a general principle, the width of the eco-sensitive zone could go up to 10 km.

In view of the above, different States have declared different areas as eco-sensitive zone and not 10 kmsfrom the boundary of the National Parks and Sanctuaries.

(viii) In its letter dated 31-12-2012, the MoEF while conveying that the Hon'ble Supreme Court is considering the issue in I.A. No. 1000 in Writ Petition (Civil) No. 202/1995 being *T.N. Godavarman Thirumulpad case* (supra) and in Writ Petition (Civil) No. 460 of 2004 being *Goa Foundation case* (supra), asked all States/Union Territories to submit site specific proposals for declaration of eco-sensitive zones latest by 15-02-2013. It reminded the States/Union Territories of the letter dated 11-12-2012 whereby it had been warned that failure to submit the proposal within 15-02-2013, the activities prohibited as per the guidelines dated 09-02-2011 would stand prohibited within 10 kmsof the boundary of the National Parks and Sanctuaries.

(ix) It is stated that the Government of Sikkim submitted its first proposal in April, 2011, in compliance to the above but in view of the clarifications sought for by the MoEF a revised one in August, 2012 and in the final proposal the State Government has proposed 50 meters from the boundary of Khangchendzonga National Park as eco-sensitive zone which is still under consideration of the MoEF although this Court by its order dated 22-08-2013 had directed that a decision be taken on the proposal within one month.

(x) The unreasonableness of the 10 kmsstipulation was sought to be illustrated by the Learned Senior Counsel in stating that out of the 30 HEPs, 28 of them fall within 10 kmsfrom the Khangchendzonga National Park. That the State of Sikkim had already prepared a Project document for designating core zone, buffer zone and a transition zone which was accepted by the MoEF on 07-02-2000 directing that those will be designated

as Khangchendzonga Biosphere Reserve. That this Biosphere Reserve was for the same purpose for which the eco-sensitive zones were being proposed, i.e., "to create some kind of a 'shock absorber' for the Protected Areas". Thus, as the State of Sikkim was already regulating activities in the buffer zone and transition zones, no Project located within buffer zone has been approved by the State and that till the eco-sensitive zones are declared by the MoEF, the object of such declaration is being achieved by the Notification. That the Project in question being 5.84 kmsaway from the designated buffer zone, it is even outside the transition zone.

(xi) The Office Memorandum dated 02-12-2009 was assailed as being an internal memorandum and not a mandatory order. In any case, the Office Memorandum also stipulates that NBWL clearance would be necessary 'if required' and, therefore, since in the present case no NBWL clearance was required, none was obtained. It is further submitted that even otherwise the Office Memorandum was issued only after the application for environmental clearance had been submitted by the Respondent No. 4 and much after the Public Hearing had taken place and, therefore, there was no question of the Respondent No. 4 submitting application for wild life clearance prior to making an application for environmental clearance as required under the Office Memorandum dated 02-12-2009. That neither a show cause notice nor a direction nor any other communication was issued to the Respondent No. 4 to obtain NBWL clearance. It is stated that reference to the Hon'ble Supreme Court order dated 04-12-2006 was a clear misreading of the order by the person issuing the Office Memorandum.

(xii) Similarly, as regards the letter dated 19-08-2010, it was submitted that the said communication, apart from being an internal correspondence between Union and State which was never communicated to the Respondent No. 4, it was issued only in the context of diversion of forest lands for non-forest purposes under the Forest (Conservation) Act, 1980 and that although the letter states that Projects falling within 10 kmsfrom the boundary were being granted environmental clearances with a condition to obtain recommendations of the NBWL, there was no such stipulation in the case of Respondent No. 4, except that "NBWL may be obtained (if required)".

(xiii) Mr. Giri relying upon *Bharat Sanchar Nigam Limited and Another vs. BPL Mobile Cellular Limited and Others*: (2008) 13 SCC 597 submitted that internal letters/memorandums were not binding unless communicated to the concerned parties. *P. Mahendran and Others vs. State of Karnataka and Others*: (1990) 1 SCC 411 was cited on the proposition that Office Memorandums or internal letters cannot have any retrospective application unless specifically stated therein.

(xiv) On the letter dated 28-05-2012 (Annexure A2 to the affidavit of the Respondent No. 3) it was submitted that it was only a response to a representation dated 09-05-2012 submitted by SIBLAC one day after the Hon'ble Supreme Court transferred the Writ Petitions to this Court and, therefore, was preemptive and also hit by the principle of lis pendens. That the letter was issued without any notice to the Respondent No. 4 and in complete violation of the principles of natural justice and in violation of Rules 5(ii) and (iii) of the Environment (Protection) Rules, 1986. It is submitted that the Petitioners have suppressed the reply of the State to the said letter issued vide letter No. FCA/FEWMD/1105 dated 08-12-2012 (Annexure A1 to the affidavit of the Respondent No. 1). In the reply it had been conveyed that the Government of Sikkim had already submitted its draft proposal notifying eco-sensitive zone of 50 meters from the boundary of the Khangchendzonga National Park followed by a revised proposal dated 02-08-2012 and that the proposal was under consideration of the MoEF.

(xv) It is then stated that the Petitioners have singled out the Project of the Respondent

No. 4 when there are at least 28 HEPs which fall within the eco-sensitive zone requiring NBWL clearance when none of them have taken such clearance. It is submitted that the work on the Project has advanced considerably having completed all three adits of tunnel, 48% of tunneling and 70% of the excavation work of the power house area. Of the Project estimates of 650 crores, 278 crores have already been spent of which 178.35 crores is borrowed from financial institutions with about around 750 people employed directly or indirectly. The Learned Counsel went on to highlight the benefits of the Projects accruing to the State, Nation, the local population and the environment.

(xvi) The question of delay in filing the PIL was also raised by the Learned Counsel but we may not delay ourselves on this as it has been dealt with in extenso earlier. We may, however, indicate that a number of other decisions were cited, apart from one cited on behalf of the State-Respondent, which we may enumerate below:

(a) *Chairman and M.D., B.P.L. Ltd.* (supra); and

(b) *Raunaq International Ltd. vs. I.V.R. Construction Ltd. and Others*: (1999) 1 SCC 492.

(xvii) On the question of sustainable development and precautionary principle, reliance was placed on the following:

(a) *Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj and Others vs. The State of Gujarat and Others*: (1975) 1 SCC 11;

(b) *N.D. Jayal and Another vs. Union of India and Others*:(2004) 9 SCC 362; and

(c) *M.C. Mehta* (supra): AIR 2004 SC 4016.

(xviii) Mr. Giri then emphasised on the role of the Courts in matters of policy decisions but, since this has been discussed elaborately while dealing with the submissions made on behalf of the State-Respondent, we may not discuss further on this for the sake of brevity.

(xix) On the question of religious, cultural and customary rights, the stand of the State-Respondent was reiterated in as much as the Project does not violate any sacred rights of the local population and that there is no obstruction to the 'Bhumchu' ceremony which has been carried out each year. Referring to and relying upon *Orissa Mining Corporation Ltd. (supra), A.S. Narayana Deekshitulu vs. State of A.P. and Others*: (1996) 9 SCC 548 and *His Holiness Srimad Perarulala Ethiraja Ramanuja Jeeyar Swami etc. vs. State of Tamil Nadu:* AIR 1972 SC 1586, it was stated that only these religious, cultural and customary rights (sacred rights) especially of the STs which form an integral part of the religion, is to be protected.

(xx) It was finally submitted that the Petitioner has not fulfilled the requirements pertaining to PIL guidelines since the Petitioner has not established his credentials as a public spirited person and that he has concealed and misrepresented several facts and documents and also has indulged in making wild and reckless allegation against the Respondent No. 5 without any proof.

21. Mr. V. Sekhar, Learned Senior Counsel, also appearing on behalf of the Respondents No. 4 and 5 and Ms. Indu Malhotra, Learned Senior Counsel, appearing on behalf of the Respondent No. 8, also addressed us but, we need delay on those as their submissions were substantially the same as was urged by Mr. V. Giri, Learned Senior Counsel appearing on behalf of Respondents No. 4 and 5.

22. We have given our anxious consideration to the rival contentions made on behalf of the parties and have carefully examined the materials placed on record and we find that

there are essentially only two questions in the Writ Petition that require determination by us. They are:

(i) Whether the Respondents No. 1, 4 and 5 have violated the order of the Hon'ble Supreme Court dated 04-12-2006 in *Goa Foundation case* (supra) in setting up the Tashiding HEP in West Sikkim whereby such Projects require clearance from the NBWL?

and

(ii) Whether the river Rathong Chu in West Sikkim and the entire area below Mount Khangchendzonga in West Sikkim through which it flows is sacred? If so, whether the Tashiding HEP being set up on the river is in violation of the Petitioners' right to practice and propagate their religion.

23. Elaborate submissions were made by the Learned Counsel not only on the above two questions but also on other issues which, in our view, would not be of relevance and, therefore, deem it appropriate not to deal with those. We may, therefore, restrict ourselves to the above two questions and deal with them individually hereunder in seriatim.

24. Whether the Project in question was in violation of the order dated 04-12-2006 passed in *Goa Foundation case*?

(i) For the sake of convenience the order dated 04-12-2006 is reproduced below:

"**The order dated 16th October, 2006 refers to a letter dated 27th May, 2005 which was addressed by the Ministry of Environment and Forests (MoEF) to the Chief Wildlife Wardens of all States/Union Territories requiring them to initiate measures for identification of suitable areas and submit detailed proposals at the earliest.** The order passed on that date was that MoEF shall file an affidavit stating whether the proposals received pursuant to the letter of 27th May, 2005 have been referred to the Standing Committee of National Board for Wildlife under the Wild Life (Protection) Act, 1972 or not. **It was further directed that such of the States/Union Territories who have not responded to the letter dated 27th May, 2005 shall do the needful within four weeks of the communication of the directions of this Court by the Ministry to them.**

It seems that despite the letter dated 27th May, 2005 and despite the Ministry having issued reminders and also bringing to the notice of the States/Union Territories the orders of this Court dated 16th October, 2006, **the States/Union Territories have not responded**. However, we are told that the State of Goa alone has sent the proposal but that too does not appear to be in full conformity with what was sought for in the letter dated 27th May, 2005.

The order earlier passed on 30th January, 2006 refers to the decision which was taken on 21st January, 2002 to notify the areas within 10 km. of the boundaries of national parks and sanctuaries as eco-sensitive areas. The letter dated 27th May, 2005 is a departure from the decision of 21st January, 2002. For the present, in this case, we are not considering the correctness of this departure. That is being examined in another case separately. Be that as it may, it is **evident that the States/Union Territories have not given the importance that is required to be given to most of the laws to protect environment made after Rio Declaration, 1972**.

The Ministry is directed to give a final opportunity to all States/Union Territories to respond to its letter dated 27th May, 2005. The State of Goa also is permitted to give appropriate proposal in addition to what is said to have already been sent to the Central Government. The communication sent to the States/Union Territories shall make it clear **that if the proposals are not sent even now within a period of four weeks of receipt of the communication from the Ministry, this Court may have to**

consider passing orders for implementation of the decision that was taken on 21st January, 2002, namely, notification of the areas within 10 km. of the boundaries of the sanctuaries and national parks as eco-sensitive areas with a view to conserve the forest, wildlife and environment, and having regard to the precautionary principles. **If the States/Union Territories now fail to respond, they would do so at their own risk and peril.**

The MoEF would also refer to the Standing Committee of the National Board for Wildlife, under Sections 5(b) and 5(c)(ii) of the Wild Life (Protection) Act, the cases where environment clearance has already been granted where activities are within 10 km. zone." [emphasis supplied]

(ii) On a plain reading of the above and in consideration of the submissions of the Learned Counsel for the parties, there can be no dispute of the fact that the order was a conditional one passed following the precautionary principle. The order clearly reflects the concern of the Hon'ble Supreme Court in the States/Union Territories having ignored the letters of the MoEF conveying its earlier order dated 16-10-2006 requiring compliance of the MoEF letter dated 27-05-2005 and the fact that due importance was not being given to the laws to protect environment by the States/Union Territories.

(iii) Since the letter F. No. 6-1/2003 WL-I dated 27-05-2005, Annexure A-2, issued by the Assistant Inspector General, MoEF to the Chief Wildlife Warden of all States/Union Territories, has been referred to by the Hon'ble Supreme Court in its order dated 04-12-2006 in *Goa Foundation case* (supra) and, is of significance for the purpose of this case, we may reproduce its text which reads as under:

"The Wildlife Conservation Strategy 2002 adopted during XX 1st meeting of Indian Board for Wildlife held on 21st January 2002 stipulated that "Lands falling within 10 km of the boundaries of National Parks and Sanctuaries should be notified as Ecofragile Zones under Section 3(V) of the Environment (Protection) Act and rule 5, sub-rule 5(VIII) (X) of the Environment (Protection) Rule". The Member Secretary of the IBWL vide D.O. No. 6-2/2002 WL-I dated 5th February 2002 requested the State Government to list out such areas and furnish detailed proposals for their notification as Ecosensitive areas under the Environment (Protection) Act, 1986.

However many States/Departments had raised concerns over the 10 km range limits. The matter was, therefore, placed before the National Board for Wildlife in its meeting held on 17th March 2005 under the chairmanship of Hon'ble Prime Minister of India. The decision taken in the meeting is mentioned below.

"The proposal for augmenting the conservation of the existing Protect areas was agreed to. However the delineation of eco sensitive zones would have to be site specific, and relate to regulation, rather than prohibition of specific activities. State Government will have to be consulted in this regard and concurrence obtained. This being an area of potential conflict with local communities, no enhancement of area should be done arbitrarily".

I am, therefore, directed to request you to kindly initiate measures for identification of suitable areas and submit detailed proposals at the earliest." [emphasis supplied]

(iv) It is in this backdrop of the circumstances set out above that by the order dated 04-12-2006 the MoEF was again directed to write to the States/Union Territories giving them a final opportunity to respond to MoEF letter dated 27-05-2005 for submission of proposal for declaration of Eco-Sensitive Zone. The order was apparently an effort at persuading the State Governments to expedite the necessary steps as required for declaring the Eco-Sensitive Zone and nothing further.

(v) Without delving into this further, it would be pertinent to note that the order was also considered in *Anand Arya case* (supra). It may also be noted that concededly the eco-sensitive zone has still not been declared although a revised proposal was forwarded by the Respondent No. 1, the State of Sikkim, to the Respondent No. 2, MoEF, only on 23-01-2013 which is presently said to be under its consideration. This is apparent from the affidavit dated 07-10-2013 filed on behalf of the Respondent No. 2. Since the averments contained in that affidavit is of considerable significance having a bearing on the interpretation of the order dated 04-12-2006 in *Goa Foundation case* (supra) we may consider its material portions which read as under:

"2. That the issue of notification of Eco-sensitive zones as prayed in these CMA's is a part of a larger process in MoEF, being taken up under the provisions of Environment Protection Act, 1986, under Section 3(2)(v) in the background of earlier adoption of a recommendation of the National Board for Wild Life, for declaration of the Eco-sensitive zone around the Protected Areas for regulating land use. The matter concerns all the States and UT's of the country and is also being overseen by the Hon'ble Supreme Court in Writ Petition (C) No. 202 of 1995 *TN Godavarman Thirumulpad vs. Union of India & Ors.* and W.P. (C) 460/2004 i.e. *Goa Foundation vs. Union of India & Ors.*

.....

4. The proposal are processed and dealt under the section 5(iii) of the Environment Protection Rules, 1986 which envisages publication of a draft notification in public domain for seeking comments of public, consideration of the comments and thereafter only finalization of the notification in the Government gazette. While it takes effort for the whole process, a time period of 545 days has been prescribed vide notification no. 513(E) dated 28/06/2012. ..... This time is prescribed from the date of publication of the notification in the official Gazette, implying that the time taken for rectifications of initial deficiencies in the proposal and approval of draft notification are not a part of this prescribed time limit.

5. It is submitted that the eight revised proposals which include the Khangchenzonga National Park, submitted by the Government of Sikkim vide their letter dated 23/01/2013 are under process in the Ministry. .....

6. The revised proposals were scrutinized based on criteria proposed for ESZ's to ensure that they are in conformity with the MoEF Guidelines for declaration of Eco Sensitive Zones. However, the extent of the Eco-Sensitive Zone proposed around Protected Areas has been found not justified, in case of Singbha Rhododendron Sanctuary. Accordingly, a meeting was convened with the officials of the State Government of Sikkim on 03/09/2013, in which they have been requested to submit justification on the extent of proposed Eco-sensitive zones of all the 8 proposals of the Sikkim, which include the Khangchenzonga National Park also.

.....

10. That the main petitions W.P. (C)22 of 2012 and W.P. (C) 23 of 2012 under which these CMA's have been filed is about construction of the Tashiding Hydro Electric Project (97 MW) allegedly inviolation of environmental regulation by not obtaining clearance from the Standing Committee of NBWL, even though it is within the 10 kmsof the Khangchanzonga National Park. In the environmental clearance granted on 29/07/2010 for this project, specific conditions mentioned is as follows:

PART-A (viii)

"The proposed site is about 5 km away from the buffer zone of Khangchendzonga Biosphere Reserve as per Supreme Court Order clearance from the NBWL may be obtained (if required)"

As there was no notified Eco-sensitive zone, the recommendations of the Standing Committee of the NBWL were mandatory, and needed to the applied for. A proposal for an eco-sensitive zone and notification thereof at this date cannot absolve the project authorities from this requirement of Wildlife clearance.

As such, the process of declaration of the Eco-sensitive zone as proposed by the State Govt. of Sikkim is not linked to the required wildlife clearance for effective Environment clearance granted in 2010 for the Tashiding Hydro Electric Project.

11. That the declaration of the Eco-sensitive zone is not a limiting factor for an effective Environment clearance/Wildlife clearance of the Tashiding Hydro electric Project (97 MW), which is the subject matter of the main petitions i.e. W.P. (C) 22 of 2012 and W.P. (C) 23 of 2012 under which these CMA's have been filed.

12. It is submitted that these CMA's of the State Govt. of Sikkim seeking notification of the Eco-sensitive zones and the perceived pace of the process of declaration of ESZ may be seen in the background of above mentioned facts. There is no inaction on the part of the respondents in the matter and the Ministry of Environment and Forests has been taking appropriate action for the notification of the Eco-sensitive zones in all the proposals received from several States. Till the final notification, the requirement of seeking NBWL clearances prevails for the activities being undertaken within the 10 km from the boundary of the National Parks/Wildlife Sanctuaries." [emphasis supplied]

(vi) As noted earlier, the Learned Counsel for the Respondents No. 1, 4, 5 and 8, would argue that the affidavit is based upon an erroneous interpretation of the order in *Goa Foundation case* (supra) and, therefore, not legal and binding upon them. In order to get at the bottom of this, we have examined the various Notifications, Office Memorandums and letters that were referred to on behalf of the parties.

(vii) The first of those is EIA Notification dated 14-09-2006 issued by the MoEF which, inter alia, declared that-

".....the Central Government hereby directs that on and from the date of its publication the required construction of new projects or activities or the expansion or modernization of existing projects or activities listed in the Schedule to this notification entailing capacity addition with change in process and or technology shall be undertaken in any part of India only after the prior environmental clearance from the Central Government or as the case may be, by the State Level Environment Impact Assessment Authority, duly constituted by the Central Government under sub-section (3) of section 3 of the said Act, in accordance with the procedure specified hereinafter in this notification.

2. **Requirements of prior Environmental Clearance (EC):** The following projects or activities shall require prior environmental clearance from the concerned regulatory authority, which shall hereinafter referred to be as the Central Government in the Ministry of Environment and Forests for matters falling under Category 'A' in the Schedule and at State level the State Environment Impact Assessment Authority (SEIAA) for matters falling under Category 'B' in the said Schedule, before any construction work, or preparation of land by the project management except for securing the land,

is started on the project or activity:

(i) All new projects or activities listed in the Schedule to this notification;

(ii) Expansion and modernization of existing projects or activities listed in the Schedule to this notification with addition of capacity beyond the limits specified for the concerned sector, that is, projects or activities which cross the threshold limits given in the Schedule, after expansion or modernization;

(iii) Any change in product-mix in an existing manufacturing unit included in Schedule beyond the specified range.

.....

8. .....

(v) Clearances from other regulatory bodies or authorities shall not be required prior to receipt of applications for prior environmental clearance of projects or activities, or screening, or scoping, or appraisal, or decision by the regulatory authority concerned, unless any of these is sequentially dependent on such clearance either due to a requirement of law, or for necessary technical reasons." [emphasis supplied]

(viii) The next is MoEF Office Memorandum dated 02-12-2009 prescribing procedure for consideration of proposals for grant of environmental clearance under EIA Notification, 2006. The relevant portion of which reads as under:

"The issue regarding the procedure to be followed for consideration of proposals for grant of environmental clearance under EIA Notification, 2006, which involve forestland and or wildlife habitat has been under consideration of this Ministry. The issue has been discussed and deliberated at length and **the provisions of EIA Notification, 2006 as contained in para 8(v)** of the said notification have also been considered.

2. It has now been decided that the following procedure shall be adopted in dealing with such cases.

(i) The proposals for environmental clearance will not be linked with the clearances from forestry and wildlife angle even if it involves forestland and or wildlife habitat as these clearances are independent of each other and would in any case need to be obtained **as applicable** to such projects before starting any activity at site.

(ii) While, considering such proposals under EIA Notification, 2006, specific information on the following should be obtained from the proponent:

(a) .....

(b) Information about wildlife clearance, as applicable to the project should also be obtained. The project proponent should submit their application for wildlife clearance/ clearance from Standing Committee of the National Board for Wildlife to the Competent Authority before coming for environment clearance and a copy of their application should be furnished along with environment clearance application.

(iii) The proposal from environmental angle will be appraised by the respective Expert Appraisal Committee and recommendations made on the same which will be processed by the IA Division and approval obtained from Competent Authority.

However, while granting environmental clearance to projects involving forestland, wildlife habitat (core zone of elephant/tiger reserve etc.) and or located within 10 km of the National Park/Wildlife Sanctuary (at present the distance of 10 km has been taken in conformity with the order dated 4.12.2006 in writ petition no. 460 of 2004 in the matter of Goa Foundation vs. Union of India), a specific condition shall be stipulated that the environmental clearance is subject to their obtaining prior clearance from forestry and wildlife angle including clearance from the Standing Committee of the National Board for Wildlife as applicable. Further, it will also be categorically stated in the environment clearance that the grant of environmental clearance does not necessarily implies that forestry and wildlife clearance shall be granted to the project and that their proposals for forestry and wildlife clearance will be considered by the respective authorities on their merits and decision taken. The investment made in the project, if any, based on environmental clearance so granted, in anticipation of the clearance from forestry and wildlife angle shall be entirely at the cost and rick of the project proponent and Ministry of Environment & Forests shall not be responsible in this regard in any manner.

(iv) A copy of the clearance letter, besides others, shall also be endorsed to (i) IGF(FC), MoEF, (ii) IGF(WL), MoEF, (iii) PCCF of respective States and (iv) Chief Wildlife Warden of the State.

Note: There will not be any need to refer the files relating to grant of environmental clearance from IA Division to FC Division and or Wildlife Division during consideration of proposals under EIA Notification, 2006, as done at present in view of the course of action stipulated at paras 2(i)-(iv) above.

....."

[emphasis supplied]

(ix) Next is the environment clearance granted in respect of the Project in question which is dated 29-07-2010 in Part A: Specific Conditions (viii). The following is found to have been stipulated:

"(viii) The proposed site is about 5 km away from the buffer zone of Khangchendzonga Biosphere Reserve as per Supreme Court order clearance from the NBWL may be obtained (if required)." [emphasis supplied]

(x) The other is the contentious letter dated 28-05-2012, Annexure A2, issued by the Deputy Inspector General of Forests (WL), MoEF to the Pr. Chief Conservator of Forests and HOFF, Government of Sikkim, which reads as follows:

"This Ministry has received a representation from the Convenor, Sikkim Bhutia Lepcha Apex Committee regarding construction of the 97 MW Tashiding Hydro Electric Power Project. A copy of the representation is enclosed for your ready reference. It has been mentioned in the representation that the 97 MW Tashiding Hydro Electric Power project slated over the sacred Rathongcha River in West Sikkim has consistently been opposed by the Buddhist people of Sikkim since the river is regarded very sacred as per Sikkimese Buddhist tradition. It has also been mentioned that the said project is within the 10 kmsradius of Kangchengdzonga National Park. They have, therefore, requested that this Ministry may initiate necessary actions urgently for closing down the anti-Buddhist Tashiding HEP.

In this context, it is requested to kindly look into the matter as to whether the

construction of the 97 MW Tashiding Hydro Electric Power Project in West Sikkim is already underway and if yes, the same may kindly be stopped immediately until further orders as they do not have necessary recommendations of the Standing Committee of National Board for Wildlife. The said information may kindly be forwarded to this Office **MOST URGENTLY**."

(xi) There are also other correspondences, but, in our view, the ones set out above are the crucial ones that would shed light on the question. Upon a close examination and a conjoint reading of these documents, it would reveal that the stipulation by the MoEF for obtaining clearance from the Standing Committee of the NBWL was based upon the order dated 04-12-2006 passed in *Goa Foundation case* (supra). As would appear on a bare perusal of the order, the MoEF was directed to give a final opportunity to the States/Union Territories to comply to its letter dated 27-05-2005 requiring them to initiate measures for site specific identification of eco-sensitive zones around the boundaries of National Parks and Sanctuaries and that the communication should make it clear that if the States/Union Territories failed to send their proposal within four weeks of the receipt of the letter, it may then consider passing orders for implementation of its decision taken on 21-01-2002, i.e., Notification of the areas within 10 km of the boundaries of the Sanctuaries and National Parks as eco-sensitive areas, with a view to conserve the forest, wildlife and environment and having regard to the precautionary principles and, further that failure by the States/ Union Territories to respond would be at their own risk and peril.

(xii) Apart from this we also find other letters dated 09-02-2011, 11-12-2012 and 31-12-2012 issued by the MoEF reiterating what had been conveyed in the letter dated 27-05-2005 for site specific delineation of eco-sensitive zones.

(xiii) We, therefore, find the expression 'if required' inserted in every clearances and notifications or office memorandums issued by the MoEF is dependent upon the extent of the eco-sensitive zones to be notified and that whatever be the extent of the Eco-sensitive Zone, clearance of the NBWL would remain mandatory.

(xiv) The Office Memorandum of the MoEF dated 02-12-2009 referred to above was seriously assailed on behalf of the Respondents No. 4, 5 and 8 in as much it was only an inter-departmental correspondence not having the force of law and not at all brought to the notice of the general public and the Respondent No. 4. We are not able to accept this submission as we find that the Office Memorandum dated 02-12-2009 was issued in furtherance of paragraph 8(v) of the EIA Notification, 2006, prescribing the procedure for obtaining clearances from the other regulatory bodies or authorities mentioned therein. Contrary to the submissions of Mr. Giri we find that the Office Memorandum had been duly put up in the website of the MoEF as would appear from the endorsement of copies at sl. No. 8 which reads as "Website of the Ministry". Therefore, the Office Memorandum was accessible to the general public. The Respondents No. 4 and 5 are expected to have accessed it as they are vitally interested with the orders and notifications issued by the MoEF in view of their involvement in the Project under consideration. Questioning the validity of the Office Memorandum now cannot detract from the fact that it was in the public domain and that the Respondents were aware of it.

(xv) It appears to us that the Office Memorandum only qualifies that the grant of environment clearance under EIA Notification, 2006, would not absolve a Project proponent from the necessity of obtaining forestry and wildlife clearances as they are distinct from environment clearance and, that while granting environmental clearance to Projects of the present kind, a specific condition should be stipulated that the environmental clearance granted is subject, inter alia, to their obtaining prior clearance from the Standing Committee of the NBWL "as applicable" in conformity with the order dated 04-12-2006

in *Goa Foundation case* (supra). We, of course, also notice that the Office Memorandum further stipulates that the expenditure incurred on a Project in anticipation of forestry and wild life clearances shall be at the cost and risk of the Project proponent. The stipulation indicated in the Environmental Clearance at Clause (viii) of the Specific Conditions is also indicative of the directions contained in the Goa Foundation order (supra).

(xvi) The correctness of the letter dated 28-05-2012 was also questioned with great vehemence on behalf of the Respondents. It was submitted that the MoEF, Wildlife Division, had no jurisdiction to enter into religious aspects and that the letter was only a reaction to a representation received from Sikkim Bhutia-Lepcha Apex Committee dated 09-05-2012. In our view, this submission also does not appear to be correct as a bare perusal of the letter would show that one of the allegations taken up seriously was that the Project was within 10 kmsradius of Khangchendzonga National Park by which obviously reference was being made to the *Goa Foundation case* (supra).

(xvii) These questions, however, now stand settled and is no more res integra in view of the final judgment of the Hon'ble Supreme Court dated 21-04-2014 in *Goa Foundation vs. Union of India and Others*: 2014 (5) Scale 364 in Writ Petition (Civil) No. 435 of 2012 in which questions have been squarely dealt with by the Hon'ble Supreme Court. We may reproduce below its relevant portions:

"43. **When, however, we read the order dated 4.12.2006 of this Court in Writ Petition (C) No. 460 of 2004 (Goa Foundation v. Union of India), we find that the Court has not prohibited any mining activity within 10 kilometer distance from the boundaries of the National Parks or Wildlife Sanctuaries.** The relevant portion of the order dated 04.12.2006 is quoted here in below:

> "The Ministry is directed to give a final opportunity to all States/Union Territories to respond to its letter dated 27th May, 2005. The State of Goa also is permitted to given appropriate proposal in addition to what is said to have already been sent to the Central Government. The Communication sent to the States/Union Territories shall make it clear that if the proposals are not sent even now within a period of four weeks of receipt of the communication from the Ministry, this Court may have to consider passing orders for implementation of the decision that was taken on 21st January, 2002, namely, notification of the areas within 10 km. of the boundaries of the sanctuaries and national parks as eco-sensitive areas with a view to conserve the forest, wildlife and environment and having regard to the precautionary principles. If the State/Union Territories now fail to respond, they would do so at their own risk and peril.
>
> The MoEF would also refer to the Standing Committee of the National Board for Wildlife, under sections 5(b) and 5(c)(ii) of the Wild Life (Protection) Act, the cases where environment clearance has already been granted where activities are within 10 km. zone."
>
> It will be clear from the order dated 4.12.2006 of this Court that this Court has not passed any orders for implementation of the decision taken on 21st January, 2002 to notify areas within 10 kms of the boundaries of National Parks or Wildlife Sanctuaries as eco sensitive areas with a view to conserve the forest, wildlife and environment. By the order dated 04.12.2006 of this Court, however, the Ministry of Environment and Forest, Government of India, was directed to give a final opportunity to all States/Union Territories to respond to the proposal and also to refer to the Standing Committee of the National Board for Wildlife the cases in which environment clearance has already been granted in respect of activities within the 10 kms zone from the boundaries of the wildlife sanctuaries and national parks. There is, therefore, no direction, interim or final, of this Court prohibiting mining

activities within 10 kms of the boundaries of National Parks or Wildlife Sanctuaries."

[emphasis supplied]

(xviii) The question that would then follow would be as to whether the absence of the direction from the Hon'ble Supreme Court for maintaining 10 kmsas eco-sensitive zone would render the very requirement of delineation of eco-sensitive zone unnecessary. (xix) In order to answer this question, it would be essential to appreciate the import of the EIA Notification dated 14-09-2006 and the force of the orders issued by the MoEF in pursuance of the Wild Life (Protection) Act, 1972.

(xx) The fact that the EIA Notification, 2006, was issued by the MoEF in exercise of its powers conferred by Section 3 of the Environment (Protection) Act, 1986 cannot be disputed as was also noticed in the *Anand Arya case* (supra) [paragraphs 49 and 50]. The power to issue orders and notifications by the NBWL can be traced to Section 5C of the Wild Life (Protection) Act, 1972, which provides that it shall be the duty of the National Board to promote the conservation of wildlife and forest by such measure as it thinks fit and the measures referred to would, inter alia, include making recommendations on the setting up of a management of National Parks, Sanctuaries and other protected areas and on matters relating to restrictions of activities in those areas as provided under Sub-Section 2(c) of Section 5C of the Wild Life (Protection) Act, 1972. The Hon'ble Supreme Court had the occasion to examine the scope of this power in *Centre for Environmental Law, World Wide Fund-India* (supra) where it has been observed as follows:

"32. Parliament later vide Act 16 of 2003 inserted Section 5-A w.e.f. 22-9-2003 authorising the Central Government to constitute the National Board for Wildlife (in short 'NBWL'). By the same Amendment Act, Section 5-C was also introduced eliciting functions of the National Board. Section 5-B was also introduced by the aforesaid amendment authorising the National Board to constitute a Standing Committee for the purpose of exercising such powers and performing such duties as may be delegated to the Committee by the National Board. NBWL is, therefore, the top most scientific body established to frame policies and advise the Central and State Governments on the ways and means of promoting wildlife conservation and to review the progress in the field of wildlife conservation in the country and suggesting measures for improvement thereto. The Central and the State Governments cannot brush aside its opinion without any cogent or acceptable reasons. The legislation in its wisdom has conferred a duty on NBWL to provide conservation and development of wildlife and forests.

57. .....NBWL has a duty to promote conservation and development of wildlife and frame policies and advise the Central Government and the State Governments on the ways and importance of promoting wildlife conservation. It has to carry out/make assessment of various projects and activities on wildlife or its habitat. NBWL has also to review from time to time the progress in the field of wildlife conservation in the country and suggest measures for improving thereto. .....Statutorily, therefore, it is the duty of NBWL to promote conservation and development of wildlife with a view to ensuring ecological and environmental security in the country. ..... This Court, sitting in the jurisdiction, is not justified in taking a contrary view from that of NBWL."

[emphasis supplied]

It, therefore, follows that the orders and notifications issued by the NBWL have statutory force requiring due compliance and, even the Courts sitting in Writ jurisdiction will not be justified in taking a contrary view from that of the NBWL.

(xxi) That apart even in the Shah Commission Report on "Illegal Mining in the State of Goa" it has been observed that:

> "c. Approvals have been granted in many cases under the Forest (Conversation) Act, 1980 for diversion of forest land for iron ore mining leases in the eco-sensitive zones without placing the project proposals before the Standing Committee of national Board for Wild Life. It is one of the serious lapses on the part of MoEF (FC Section). This has caused an irreversible and irreparable damage to bio-diversity, wildlife, environment and ecosystem as a whole in the eco-sensitive zone of the Western Ghats of State of Goa. Immediate action should be taken in this regard wherever necessary and responsibility and accountability should be fixed on the officers concerned."
>
> [emphasis supplied]

(xxii) In our view, although no direction was passed by the Hon'ble Supreme Court to maintain 10 kmsas the eco-sensitive zones around the National Parks and Sanctuaries, it has also not held that such zone should not be declared at all and as a consequence clearance from the NBWL was no more required. Had it been so it was not expected of the MoEF to have insisted on the delineation of the eco-sensitive zones. It has rather persisted with it. This would be evident from the fact that the State-Respondent No. 1 and some other States have submitted their proposals and the same is under consideration before the MoEF. This, therefore, explains the expression 'if required' or 'as applicable' found mentioned in the order of the Hon'ble Supreme Court in its order dated 04-12-2006 in *Goa Foundation case* (supra) and the letters, office memorandums and notifications issued by the MoEF as well as the environment clearance dated 29-07-2010 granted by the MoEF in respect of the Project in question.

(xxiii) It is, however, an admitted position that the final Notification is yet to be issued purportedly in view of the various steps that are required to be taken in terms of the statutory provisions and the rules.

25. **Violation of the religious and customary rights under Articles 25, 26 and 29 of the Constitution of India.**

(i) The Petitioners contend that the river Rathong Chu is a very sacred river and the entire valley below Mount Khangchendzonga with Tashiding as the navel are held with reverence by the entire Buddhists. The sacred landscape that stretches from Mount Khangchendzonga down to lower valley that consists of the Rathong Chu catchment area as per the 'Neysol' text (Guide to sacred places of Sikkim) is worshipped by Sikkimese Buddhist as blessed by Guru Padmasambhava with a large number of hidden treasures (ter) concealed by him in the area. It is believed that these treasures are being discovered gradually and only revealed to the enlightened Lamas at proper times. Conserving these treasures and protecting them from polluting influence is considered important for human welfare. Any major disturbance to the river system would disturb the ruling deities of the 109 hidden lakes in existence in that area and of the river, resulting in serious calamity. It is submitted that the very cultural fabric of the Sikkimese Society is dependent upon the conservation of the whole sacred landscape.

(ii)(a) On behalf of the State, the above claims are sought to be repelled by submitting that the Government while issuing Notification No. 70/HOME/2001 dated 20-09-2001 has not declared river Rathong Chu as a sacred river and, therefore, any claim to the contrary is incorrect.

(b) The next is that the Project in question will not affect the 'Bhumchu' ceremony as the water for the ceremony is collected upstream the confluence of river Rimbi and

river Rathong Chu whereas the Project is downstream of the confluence.

(c) Next is that the assertion of defilement of the river Rathong Chu no more holds good in view of two Hydel Projects already being in existence on the Rimbi river which flows into the Rathong Chu river. That the name of the river beyond the confluence downstream is not 'Rathong' but 'Ladong' and, therefore, the proposed barrage that is not on the river 'Rathong' but river 'Ladong'. That there has been no obstruction to the performance of the 'Bhumchu' ceremony as would be evident from the fact that festivals are being held uninterruptedly for the last three years during the progress of the Project.

(d) The other aspect raised as noted already, is the impermissibility on the part of the Petitioner to seek prevention of the developmental activities and denial of benefits of the development to the people of the State and the area in question and that sentimental objections cannot be a ground for denials of such benefits to other citizens who also have fundamental rights of better quality and amenities of life. Decision of this Court dated 13-12-1995 in *Denzong Lho Man Choda* (supra) and Chukie Tobdon (supra) was relied upon in submitting that this question already stands decided to stress that the Petitioners are barred from raising the same issue in the present Writ Petitions.

(iii) The Petitioners, on the other hand, has placed before us a large number of documents in support of his contention as regards the religious significance of the place to the local Buddhists.

(iv) The first of these is a report submitted by a Committee constituted vide Notification No. 54(7) HOME/87/767 dated 28-04-1987 to identify 'Security of Important Historical Monuments and Religious Places of Worship of Sikkim' (Annexure P2 to the Writ Petition). In the report under 'Historical Monuments and Religious Places of Worship' at paragraph 2(b), mention of the 'Dubdi Gumpa', 'Sanga Cholling Gumpa', 'Pemayangtse Gumpa', 'Tashiding Gumpa', was pointed out to emphasise that these Monasteries fall in the valley lying in the lap of Mount Khangchendzonga through which the river Rathong Chu flows.

(v) The next is excerpts from the note sheet pages no. 1 and 2 containing notes written by the former Secretary, Ecclesiastical Department, which contains the following:

> "……It is to submit that the entire area below the Mount Kanchenjunga in West Sikkim as indicated in the rough sketch "B" is regarded as most sacred areas of Sikkim in religious texts. A copy of religious text "Neysal" describing the names of all deities of Sikkim by Gyalwa Lhatsun Chenpo is also flaged at "A" below.
>
> It is mentioned that Mount Kanchenjunga, the abode of the guardian deity of Sikkim is surrounded by other deities of Sikkim. The existence of all these deities are identified in the form of mountains, rocks, waterfalls, lakes, trees and sacred caves like Dichen-Phuk and Lharik Nying Phuk. There is mention of Tashiding, Sangachholing, Pemayangtse, and Rabdentse as abodes of deities guarding the land from all directions. It was also mentioned in the text that any burning of undesirable things like meat, killings, destruction of object of worship like chortens, cutting down of trees and plants, misuse of lakes, destruction/defacement of hills and rocks of the sacred areas of Sikkim would directly affect the deities of Sikkim and will provoke--disasters in the form of natural calamities. With very concern about possibility of such happenings in future and to avoid the same, Gyalwa Khatsun Chenpo prescribed prayers for the deities.
>
> It is therefore, to submit that, strictly judging from the religious point of view, the

present project is located at heart of the sacred areas of Sikkim indicated in the "Neysol" text. This project therefore is undesirable from the religious point of view and is against the sanctity of the area concerned, please.....

Reference PUC below, the Hon'ble Minister, Ecclesiastical, accompanied by the undersigned, paid a visit to Yoksan on the 5th September, 1994. The areas involved for Rathongchu project was inspected from Yoksan Norbugang. It is found that two approach roads towards the project sources are under construction. In the North side of Yosan Norbuganganear the Rest Houses of Tourism Department, the works are found being initiated for the construction of staff quarters etc. No Govt. officials of the project could be contacted out that day. The location of the project could be contacted out that day. The location of Yolisum Norbugang and its surrounding mountains and hills were photographed to indicate the locations of the project. The roads leading to the project sources are passing through the middle of Yoksan Norbugang hill. The sites acquired for the settlement of staff etc. are within the close proximity of Norbugang Northern.

It is to submit that the entire area below the Mount Kanchenjung in West Sikkim as indicated in the rough sketch 'B' are regarded as most sacred areas of Sikkim in religious toxts. A copy of the religious text "Neysol" describing the names of all deities of Sikkim by Gyalwa Lhatsun Chenpo is also flaged at 'B' below. It is mentioned that Mount Kanchengjunga, the above of the guard an deity of Sikkim, is surrounded by other deities of Sikkim. The existence of all these deities are identified in the form of mountains, rocks, waterfalls, lakes, trees and sacred cores like Kechen-Phuk and Lhari Nying-Phuk. There is mention of Tashiding, son sancholling, Penayangtac and Rabdentso as abodes of deities garaging the land from all directions. It was also mentioned in the text that any burning of undesirable thing like meat, killings, destructions of objects of worship like chortens, cutting down of trees and plants, misuse of lakes, destructions/defacement of hills and rocks of the sacred areas of Sikkim would directly affect the deities of Sikkim and will provoke disasters in the form of natural calamities. With very concern about possibility of such happenings in future and to avoid the same, Cyalwa Lhatsun Chenpo prescribed players for the deities. It is, therefore, to submit that, strictly judging from the religious point of view, the present project is located at the heart of the sacred areas of Sikkim indicated in the "Neysol" text. This project, therefore is considerable from religious point of view and is against the sanctity of the area concerned please....."

It may be relevant to note that the observations contained in the notes pertain to the very river "Rathong Chu" where the present Project is under construction and the surrounding areas in the Valley.

(vi) The next is the proceedings of the 'International Workshop on the Importance of Sacred Natural Sites for Biodiversity Conservation' held at Kunming and Xishuangbanna Biosphere Reserve, People's Republic of China between 17-20/02/2003. Our attention was drawn to the following portions:

"2. THE CONCEPT OF 'SACRED'

There is wide recognition worldwide and across disciplines that regions of ecological caution exhibit a symbiotic relationship between the biophysical ecosystem and the social system, with strong cultural interconnections between the two. This demonstrates that culture and environment are complementary, and in various stages of evolution (Ramakrishnan 2001). However, these traditional societies are no longer immune to changes occurring everywhere and continually. The predominant

culture of the over-consumption of natural resources is making an impression in these societies, resulting in the erosion of their time-tested and value-based institutions.

.....

Sacred landscapes have a particular significance in terms of biodiversity conservation. It is in this context that the 'Demajong' landscape of the Tibetan Buddhists in the Sikkim State of the Indian Himalayan region becomes significant.

3. SACRED LANDSCAPES AS A TOOL FOR BIODIVERSITY CONSERVATION

Biodiversity-rich mountains have always been home to the gods for many of the world's traditional societies. This sacredness is recognized in the sacred landscapes identified by a variety of mountain societies (Bernbaum 1997) among religious faiths the world over. Though these sacred landscapes have usage restrictions, they form an integral part of traditional cultures. The 'Demajong' landscape in west Sikkim is based on Tibetan Buddhist philosophy, with clearly defined norms and a well-defined boundary for sacredness (see Figure 1). The air, soil, water, and biota are all sacred;

FIGURE 1.

'Demajong', the land of the 'Hidden Treasures'--A pictorial depiction of holy sites in West Sikkim, according to the "Neysol' text of Tibetan Buddhism. Names with 'Tso' signify a lake, while 'Chu' is a river. This sacred landscape stretches from Khangchendzonga peak down to subtropical forest, natural and human-managed ecosystems, and historical monuments. (Drawing courtesy of Concerned Citizens of Sikkim, Gangkok) any disturbance in the landscape is restricted and bounded by cultural norms, and the guiding principles for natural-resource use are determined by social institutions. With a variety of rituals linked to the diverse communities living within this landscape boundary, who have their own predetermined rights to use natural resources, larger community participation is ensured (Box 1).

Of the Rathang Khola catchment area-the mythical 'Demajong' (totalling 328,000 hectares)--28,510 hectares is under snow cover. The vegetation is varied, ranging from alpine Rhododendron scrub vegetation at higher reaches to sub-tropical moist evergreen forests below. These forests cover a distance of about fifteen kilometres, and are extremely rich in plant biodiversity, including medicinal plants of value to traditional Tibetan pharmacopoeia. Due to external pressures on these resources, these ecosystems are degraded in many areas.

.....

THE 'DEMAJONG' LANDSCAPE:

Padmasambhava, worshipped by Sikkimese Buddhists, is considered to have blessed Yoksum and the surrounding sacred land and water bodies in West Sikkim District in eastern Himalaya, having placed a large number of hidden treasures ('ter') in the area. It is believed that these treasures are being discovered gradually and will be only be revealed to the enlightened Lamas, and only at appropriate times. For the Sikkimese Buddhists, conserving these treasures and protecting them from polluting influences is considered important for human welfare. The area below Mount Khangchendzonga in West Sikkim, referred to as 'Demojong', is the core of the sacred land of Sikkim. Here offerings are made to the protective deities, but no meaningful performance of Buddhist rituals is possible if the land and water is desecrated. Village-level activities

on the land and water resources are permitted.

Any large-scale human-induced disturbance in the land of the holy Yoksum region would destroy the hidden treasures (ters) in such a way that the chances of a visionary recovering them some time in the future will diminish (the last such discovery is thought to have occurred 540 years ago). Any major disturbance to the river system would disturb the ruling deities of the 109 hidden lakes of the river, thus leading to serious calamity. Indeed, the very cultural fabric of Sikkimese society is obviously dependent upon the conservation of the whole sacred landscape. The uniqueness of this heritage site lies in the holism and interconnection between the soil, water, biota, visible water bodies, the river, and the lake systems on the river bed, together with physical monuments such as monasteries."

(vii) Our attention was then drawn to the National Biodiversity Strategy and Action Plan (NBSAP) constituted by the MoEF, Government of India, a UNDP funded programme with the Department of Forest, Environment and Wildlife Management, Government of Sikkim, as the Nodal Agency for the State. The 'Executive Summary' of the NBSAP Project which was brought to our notice is reproduced below:

"..... Its execution was done by a technical and policy core group of various experts from all parts of India, headed by the reputed Indian NGO, Kalpavriksh. The Biotech Consortium India Ltd. coordinated its administration.

The state government of Sikkim approved this project in September 2000. Since June 2001, the Department of Forest, Environment & Wildlife tried to reach out to all sections of people across the length and breadth of the State in a massive effort to formulate the Sikkim Biodiversity Strategy & Action Plan in a participatory manner. This involved the full participation of maximum number of people from all walks of life, having any sort of traditional/scientific knowledge to contribute. Some of the remotest villages were visited as also villages on the peripheries of wildlife protected areas. Besides intensive public hearings, two biodiversity festivals were held at Yuksam in the west and Tsungthang in the north. The first state level steering committee meeting of various luminaries in the field was held at Gangtok on 20th August, 2001....."

(viii) The Learned Counsel then drew our attention to Section 5 under Chapter 2 of the above report on the topic 'Sacred Landscape' which is reproduced below:

"5. SACRED LANDSCAPES:

Yuksam' is a meeting place of Lamas Lhatsun Chempo, Gnadak Rinzing Chempo and Kathok Sempa Chempo who came to Sikkim from three different directions with an intention of establishing Buddhism. These monks searched for a fourth persons as per the vision of Saint Padma Sambhava (Guru Rim-bo-che). They found Phunstsog Namgyal, who was brought to Yuksam and coronated as the religious king of Sikkim with the title of "Chogyal" meaning "the King who rules with righteousness or Dharma Raja". The event took place in 1642 at Norbugyang. The construction of Dubdi monastery also took place around the same time. The Lamas and the local people of Sikkim and Tibetans implicitly believe that Saint Padma Sambhava, found Sikkim during his journey to Tibet and personally consecrated every sacred spot along the Rathong Chu Valley in Sikkim.

Rathong Chu is an area, which the people of Sikkim perceive as the very basis of their present culture. Padma Sambhyava, who is highly revered and worshiped by the Sikimese Buddhists is considered to have blessed Yuksam and the surrounding landscape, by having placed within it a large number of hidden treasures (ters) and

it is believed that they will only be slowly revealed to enlightened (terten) Lamas and discovered at appropriate time.

Yuksam region is considered to have 109 hidden lakes. Both the visible and less obvious notional lakes identified by religious visionaries are said to be presiding deities, representing good and evil. Propitiating these deities with different ceremonies is considered to be the path for salvation. Conserving and protecting these treasures from polluting and disturbing influences is considered to be vitally important for human welfare. Any major disruption to the river system would disturb the entire system of the area.

Sikkim is the only state with an Ecclesiastical Department in the state government, which is entrusted with the responsibility of the upkeep of the monasteries and other places of worship. Almost all the gompas (monasteries) and other religious institutions are responsible for a considerable degree of (unintentional) biodiversity conservation. Natural landscapes have been consecrated as sacred forests, sacred lakes, sacred boulders, stones and sacred spaces around these monasteries. Even lakes and mountains rocks and caves, springs and rivers here are considered holy as a result of which there is natural inhibition about pollution them. However these traditional beliefs are slowly eroding under the onslaught of modern education, consumptive lifestyles and other western influences."

(ix) Apart from the above, a map showing depiction of holy sites in West Sikkim according to the holy 'Neysol' text and the views of the several Buddhist Masters of high acclaim were also placed before us. We, however, need not go into those but suffice it to note that the Learned Counsel has sought to impress us on the unanimity of the views on the sacredness of the river Rathong Chu and the valley on the lap of Mount Khangchendzonga with Tashiding as the navel.

26. Indisputably, the submission made on behalf of the Petitioners is weighty as we find his contentions supported by credible documents. The former Secretary, Ecclesiastical Department is a responsible public servant and his report is based upon a tour of the place in question and the holy text 'Neysol'.

27. The paper 'Biodiversity Conservation: Lessons from the Buddhist Demajong Landscape in Sikkim, India' placed before 'UNESCO' by no less than Prof. P.S. Ramakrishnan, has also referred to the 'Neysol' text as one of the basis of his opinion. The NBSAP report is undeniably a Government document. The report is consistent with the opinions and comments of the eminent Buddhist Masters who are highly revered not only in Sikkim but all over the Buddhist world.

28. Despite this, we find that there are certain contradictions also. We find that a group of monks from the very Monasteries indicated as 'ancient' and 'holy' have declared that the river is not sacred and that they would have no objections if the Project was allowed to continue. There is another group who claim to be the legitimate authorities of the very Monasteries who contend to the contrary by submitting written declarations to that effect. We are conscious of the belief that the entire Yuksam-Tashiding Valley lying below Mount Khangchendzonga consisting of the river Rathong Chu in West Sikkim is holy and considered as the cradle of the Sikkimese history, culture and religion but, we deem it appropriate not to venture into those areas in the present proceedings and would rather issue an appropriate direction to arrive at a finding on those in the manner that will follow hereafter.

29. There are other facts stated on behalf of the State which we find quite contradictory

and conflicting. The maps, Annexure R-21 to the counter-affidavit of Respondent No. 4 and Annexure 4 to CM Appl No. 97 of 2013 reflect even the entire portion upstream as "Ladong Khola" leaving only the stretch which actually is "Chorang Chu" as Rathong Chu. These are inconsistent also with the physical map of the State which shows the entire stretch from the source to the point where it joins river Rangit as Rathong Chu. That apart, we find other maps on record which conform to the physical map of the State. Some of them are (i) Annexure R-13 to the counter-affidavit of the Respondent No. 4, (ii) maps found at pages 9 and 12 (internal) of the EIA and EMP (Annexure P-39 to CM Appl No. 114 of 2013) prepared by the Respondent No. 4, which also contains the note under paragraph 3.5 to the effect that "The Tashiding Diversion site is located on Rathang Chu river ....." and under the head "Taxonomic Diversity" mentioning clearly that "Tashiding H.E. Project area extends from Legship village near the confluence of Rathong Chhu with Rangit river up to Yuksum village and touches the Buffer zone-IV of Khangchendzonga Biosphere Reserve in the catchment of Rathong Chhu" and (iii) map attached to the draft notification dated 03-02-2014, Annexure R4/1 to CM Appl No. 19 of 2014.

30. From the facts and circumstances set out under the two questions discussed above, two conclusions are found to have emerged. Firstly, there is no dispute of the fact that the eco-sensitive zone along the boundary of Khangchendzonga National Park is yet to be declared by the MoEF as the proposal sent by the State Government on 23-01-2013 is still under its consideration.

Secondly, the question as regards the sacredness of the area below the Mount Khangchendzonga through which the river Rathong Chu flows, sacredness of the river Rathong Chu and the defilement of the water of the river by construction of the Tashiding HEP as perceived by both the sides do appear to require serious consideration for the reasons already indicated above. Weighty materials have been placed on behalf of the Petitioners to support their view which we find difficult to ignore completely but, those are questions which we desist ourselves from adjudicating, this being a proceeding under Article 226 of the Constitution of India.

31. No doubt, it was submitted on behalf of the State-Respondent that protection under Articles 25 and 26 of the Constitution envisages protection of religious practice that are considered as essential and integral part of the religion which the 'Bhumchu' ceremony performed at the Tashiding Monastery and the worship of the other sacred places in the Rathong Valley may not be. This principle is indeed well-settled but, in *AS Narayana Deekshitulu* (supra) reiterating this very principle, it was held that "What are essential parts of religion or religious belief or matters of religion and religious practice is essentially a question of fact to be considered in the context in which the question has arisen and the evidence-factual or legislative or historic-presented in that context is required to be considered and a decision reached."

32. However, before we venture to deal with the above, it would be necessary for us to consider two technical objections raised on behalf of the Respondents on the question of (a) delay and laches on the part of the Petitioners to bring the Writ Petition, and (b) that the Writ Petitions are hit by the principle of res judicata on the ground that the very issues involved in this case have already been decided finally by this Court in *Denzong Lho Man Choda* (supra) and *Chukie Tobdon* (supra). We may, therefore, proceed to deal with the above in seriatim below.

33. **Whether the Petitioners are guilty of delay and laches in bringing the Writ Petition?**

(i) On behalf of the Petitioners it was submitted that there was no delay as admittedly the Project was reassigned to the Respondent No. 4 in 2008, the Open Public Hearing had taken

place on 18-06-2009, consent to establish the Project was issued by the State Pollution Control Board on 25-11-2010, the environment clearance granted by the MoEF only on 29-07-2010, approval for diversion of forest lands for construction of Project was granted on 18-05-2011 and 24-09-2011 and various approvals granted only between 11-10-2011 to 04-06-2012. Objections were being raised by the Petitioners from time to time, which as per the Petitioners, is evident from the representation, Annexure P-29 dated 21-09-2010; constitution of a High Powered Committee by the State Government vide Notification dated 24-10-2011 to review/examine issues relating to implementation of (i) 99 MW Ting Ting HEP, (ii) 97 MW Lethang HEP and (iii) 96 MW Tashiding HEP at Yuksam-Tashiding Constituency headed by the Chief Secretary; representations dated 25-06-2011, Annexure P15 and 21-07-2011, Annexure P-16; concerns expressed by Member, National Commission for Minorities dated 04-11-2011 reflecting the objections raised by the Buddhists and, other representations submitted from time to time including representation dated 14-11-2011 upon which discussions were held on 16-11-2011. Then finally the Government decision to proceed with the Tashiding HEP was taken on 16-01-2012 based on the recommendation of the Committee and the advice of the Law Secretary which led to the Writ Petitions being filed on 21-03-2012 in the Hon'ble Supreme Court before it was transferred to this Court for disposal on the ground that as local issues were involved in the case, it would be best decided by this Court at the first instance.

(ii) Mr. Sherpa also pointed out that the Respondents No. 1, 4 and 5, were aware of the need to obtain clearance from the Standing Committee of the NBWL right from the inception as would be evident from the fact that the EIA Notification, 2006, and the Office Memorandum dated 02-12-2009 were put up on the website of MoEF. The series of other correspondences exchanged thereafter between them as noted earlier also confirms this position. The fact that the Respondent No. 5 was aware of such necessity is evident also from the Investment Overview Project report dated March, 2010 prepared by M/s. KPMG India Private Limited, which clearly reveals that Rangit Valley Hydro Private Limited, had floated three companies as Special Purpose Vehicles, namely, (i) Dans Energy Private Limited (ii) TT Energy Private Limited (iii) Shiga Energy Private Limited for implementation of three HEPs of which Tashiding HEP, the Project in question, was one. The promoter of all the three companies was Mr. T. Nagendra Rao, Respondent No. 5. M/s. Shiga Energy Private Limited is the Respondent No. 4, the Project proponent of Tashiding HEP.

(iii) The MoEF by letter dated 04-07-2011 (Annexure P-32) had brought to the notice of the Respondent No. 5 as the Director of M/s. T.T. Energy Pvt. Ltd., that EIA Notification, 2006 and Office Memorandum dated 02-12-2009 were necessary to be complied with. The fact that the Respondent No. 4 had not complied with those is evident from its stand that the requirement of getting clearance from the NBWL stipulated by the MoEF being based on an erroneous interpretation of the order dated 04-12-2006 in *Goa Foundation case* (supra), it was not necessary to be complied with and, accordingly did not comply.

We find that the aforesaid facts have remained undisputed and are found to have been borne out by the records. We, therefore, do not have any hesitation in accepting those as true.

(iv) As submitted on behalf of the Petitioner the principle of Section 22 of the Limitation Act, 1963, would have application in the circumstance as the present one. The fact that the Respondents have deliberately not complied with the NBWL requirement for seeking clearance is a continuing wrong and, therefore, a fresh period of limitation would begin to run at every moment of the time during the period which the breach or torts as the case may be continues as provided under Section 22 of the Limitation Act, 1963.

(v) The report on the visit of the High Power Committee to the Project dated November,

2011, reveals that no major construction work had commenced till then and that the expenditure had been incurred mainly on the payment of land compensation, both private and forest lands, which was only to the tune of Rs. 124 crores. It also appears from the "Six Monthly Compliance Report on Status of Environmental Safeguards" of the Project in question dated 22-11-2012, Annexure P-35, that the construction phase on the Project had just started. It, therefore, cannot be said that the Respondents are so adversely situated that the Writ Petitions called for dismissal only on that account. In I*ntellectuals Forums case* (supra), it has been held "that decision in the case of the present kind cannot be based solely upon investments committed by any party since, otherwise, it would seem that once any party makes certain investments in a project, it would be a fait accompli and this Court will not have any option but to deem it legal".

(vi) We are conscious of the decisions cited on behalf of the Respondents on the principle governing delay particularly, the *Narmada Bachao Andolan case* (supra) but, those do not appear to hold good in the facts and circumstances of the present case and, therefore, are of no assistance to the Respondents. We, therefore, hold that the Petitioners are not guilty of delay and laches in bringing the Writ Petition.

34. **Are the Writ Petitions hit by the principle of constructive of *res judicata*?**

(i) This principle obviously emanating from Section 11 of the Code of Civil Procedure, 1908, contemplates in substance that a suit would be barred if an issue arising in a subsequent suit was directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under same title, had been heard and finally decided in that suit. It is, therefore, to be seen as to whether questions raised in the present Writ Petition were heard and finally decided in *Denzong Lho Man Choda* (supra) and Chukie Tobdon (supra) as asserted by the Respondents.

(ii) The above cases were dismissed by a common judgment dated 13-12-1995 by a Bench of this Court rejecting the plea of defilement of the river and the area by the concerned Project but at the same time accepting the sacredness attached to those. This will be evident from the following portions of the judgment:

> "26. A very important matter agitated on behalf of the petitioners is that the project would pollute the water of Rathong Chu which the Sikkimese Buddhists consider to be purest of the pure from religious point of view. They require to take out a tumbler of water from Rathong Chu River for performance of the Boomchu ceremony on a particular day every year. The petitioners apprehend that existence of some obstruction to the flow of Rathong Chu River would pollute its water. It has been stated that the refuge (sic) of the people who would be staying in the locality during the construction of the project and also during the functioning of the project would pollute the water. Moreover, decomposed animal cadavers and other nuisance accumulating in the river on account of obstruction to its flow would contribute to further pollution of the water. It was suggested from the side of the respondents that the place from where the water is collected during Boomchu ceremony is at a place much below the project area and also much ahead of the place where river Rimbi meets with the Rathong River and flow together. There is already a hydel project on Rimbi, therefore, pollution of water in the particular area, if at all be, has already been effected since a number of years. To meet this argument it has been contended by the petitioners that they do not mean the physical purity of the water. It is something different. The Rathong Chu is a holy river and ancient texts indicate the holiness of its water. Be it physical or otherwise, if any hydel project could cause any damage to the water, it has already been done and no graver infringement to the purity of the water is expected on account of another hydel project on Rathong river. Though we must feel sorry for wounding the religious feeling of a section of people but nothing is left to be done as alleged violation to the purity has

already been caused when the Rimbi Hydel project was started.

29. No doubt the region is of value to the Sikkimese of Buddhist faith of this area. No doubt the area is covered with religious monuments and their ruins. No doubt the religious faith in observance of the Boomchu ceremony would get some amount of jolt. But on overall assessment of the entire situation it does not lead us to irresistible conclusion that the scheme is not viable from the socio-cultural and religious consideration. Some amount of tolerance from the side of some section of people helps the State to a great extent in undertaking works which ultimately culminate in maximum benefit to maximum people. As the Hon'ble Supreme Court observed in Bijoe Emmanuel's case reported in AIR 1987 Supreme Court 748 'our tradition teaches tolerance; our values preaches tolerance; our constitution practices tolerance; let us not dilute it'. Same has been echoed in S.R. Bommai's case reported in (1994) 3 S.C.C. 1. The Government appears to be sincere in taking care of the suggestions on the conditions or safeguards indicated not only in these reports but also in several other reports of several institutions and organisations. It is believed the Government would also make good the deficiencies found in these respects." [emphasis supplied]

(iii) The Petitions for Special Leave to Appeal filed by the Petitioners before the Hon'ble Supreme Court against the judgment were allowed by order dated 26-03-1996 but the consequent Civil Appeals were disposed of as being infructuous on the declaration of the State Government vide Notification dated 02-09-1997 declaring the closure of that Project. Evidently, therefore, the Appeal was not disposed of on its merits but on the case being rendered infructuous. Considering the trite position that an Appeal is a continuation of the original proceedings, it cannot but be held that there was no finding on the merits of the case and thus could not be said to have been heard and finally decided.

(iv) In our view, when the Government had set at naught the very cause of action, the issues arising in those Writ Petitions stood wiped out and resultantly, the findings on those issues ceased to survive. We may reproduce the order dated 26-03-1996, the Gazette Notification No. 187 dated 02-09-1997 (Annexure P-7) and the order of the Hon'ble Supreme Court dated 21-11-2002 in Civil Appeals No. 5110-5111 of 1996 below:

ORDER DATED 26-03-1996

"Leave granted.

Stay vacated on the undertaking given by Mr. Reddy, Learned Additional Solicitor General that whatever activity-constructional or otherwise, which has been or may in future be done pursuant to the project, that shall be at the risk and peril of the State Government and that in the event of the appeal succeeding, the ecology will put back to its own original position. Mr. Reddy further says that whatever conditions have been imposed by the High Court, they too would be strictly followed. Lastly, it is conceded by Mr. Reddy that but for the project in question no other project would be floated or executed in the Yuksom Valley, till further orders."

Gazette Notification dated 02-09-1997

Sikkim
Government Gazette
Extra Ordinary
Published by Authority

Gangtok Wednesday, 2nd September, 1997
No. 187

Government of Sikkim
Home Department
Gangtok

No. 42/A/Home/97

Dated: 2.9.1997

NOTIFICATION

The State Government is hereby pleased to order the closure of the Rathong Chu Hyde Project with effect from 20th August, 1997.

By order and in the name of the Governor.

Sd/-

[K. Sreedhar Rao]
Chief Secretary

F. No. 54(195) Home/95"

ORDER DATED 21-11-2002

"The Appeals above-mentioned being called on hearing before this Court on the 21st day of November, 2002 UPON perusing the record and UPON counsel for the appellants herein stating before the Court that in view of subsequent development, these appeals are rendered infructuous. THIS COURT DOTH ORDER:

THAT the appeals above-mentioned be and are hereby dismissed as having become infructuous:

AND THIS COURT DOTH FURTHER ORDER that this ORDER be punctually observed and carried into execution by all concerned....."

[emphasis supplied]

(v) The subsequent development noted in the above order is found reflected in a news report published in the "Telegraph" in its issue dated 21-08-1997 which reads as under:

"The Sikkim government has scrapped the controversial 30 mw hydel power project at Rathongchu in West Sikkim. The project, conceived in 1977 and launched in 1991, had incurred an expenditure of Rs. 13 crore over the last six years. The chief minister, Mr. Pawan Kumar Chamling, said work on the project but (sic) would be stopped to "honour the sentiments, religion, culture of the Sikkimese people".

The chief minister's announcement came at a public meeting in Paljor gymnasium here yesterday. The meeting was attended mostly by lamas from different monasteries and various tribal campaigning against the project.

Mr. Chamling said, "In witness of all. I close the Rathongchu project, in the interest of the Sikkimese people." He said he was ready to sacrifice his chair in the interest of the state. The chief minister said his government had laid greater emphasis on the state and its people as "they were more valuable than the Rs. 13 crore which had already

been spent on the project since its inception."

"Keeping in mind the religious sentiment of the people, as the project site houses valuable relies (sic) of the Buddhist preacher, Guru Rimpoche, the government had scrapped the project," he said.

Rathongchu, widely held as a sacred river in Yoksum valley, is believed to have 109 hidden lakes with presiding deities. The project had sparked off resentment among the people, who protested for more than a year. A social activist, Sonam Plajor, had even resorted to a hungerstrike for 28 days from June 8, 1995, to press for the scrapping of the project.

A one man commission headed by Prof. P.S. Ramakrishnan of the School of Environmental Sciences of the Jawaharlal Nehru University, in its report submitted on October 9, 1995 also recommended scrapping of the project. He said-Yuksum was a national heritage site and the Unesco was planning to upgrade it as a world heritage site. However, the chief minister's speech, which was based on the commission report, did not acknowledge the fact.

Yoksum in West Sikkim is referred to as "Denzong" (land of rice) as well as "Baiyul" the hidden valley. Since assuming power two and half-year ago, the Sikkim Democratic Front government faced opposition from various religious groups, environmentalists and social organisations for scrapping the project.

The government even won a case filed by the non-governmental organisations on ground that the project was not economically viable. Having won the case the government went ahead with construction work disregarding the protests mainly from the religious organizations which claimed that the project would submerge important Buddhist monuments.

The fallout of the government's move may be manifold. The Centre was likely to question the rationale of scrapping the project after the state government received funds for it in 1996-97 Moreover, the contractors would also oppose the decision."

[emphasis supplied]

(vi) Apart from the factual setting indicated above which negates the plea of constructive *res judicata* raised on behalf of the Respondents we also find that while dealing with this very question in *V. Purushotham Rao vs. Union of India and Others*: (2001) 10 SCC 305, it has been held as under:

"19. ..... Then again, the principles of Section 11 as well as Order 2 Rule 2, undoubtedly contemplate an adversarial system of litigation, where the court adjudicates the rights of the parties and determines the issues arising in a given case. The Public Interest Litigation or a petition filed for public interest cannot be held to be an adversarial system of adjudication and the petitioner in such case, merely brings it to the notice of the court, as to how and in what manner the public interest is being jeopardised by arbitrary and capricious action of the authorities. ..... The Court repelled the same by holding that the writ petitions are not inter partes disputes and have been raised by way of public interest litigation and the controversy before the Court is as to whether for social safety and for creating a hazardless environment for the people to live in, mining in the area should be permitted or stopped. The Court hastened to add: (1989 Supp (1) SCC p. 515, para 16)

"We may not be taken to have said that for public interest litigations, procedural

laws do not apply. At the same time it has to be remembered that every technicality in the procedural law is not available as a defence when a matter of grave public importance is for consideration before the court. Even if it is said that there was a final order, in a dispute of this type it would be difficult to entertain the plea of *res judicata*."

..... In our considered opinion, therefore, the principle of constructive *res judicata* cannot be made applicable in each and every public interest litigation, irrespective of the nature of litigation itself and its impact on the society and the larger public interest which is being served. ....." [emphasis supplied]

(vii) In any case, as alluded to earlier, there are two distinct issues arising in this case. One, being the sacredness of the river Rathong Chu and the valley below the Mount Khangchendzonga and, secondly, the failure of the Respondents No. 1, 4 and 5 in obtaining the necessary recommendations of the Standing Committee of the NBWL.

(viii) For the aforesaid reasons, we hold that the Writ Petition is not hit by the principle of res judicata.

35. Apart from the above, objections were also taken on the question of (i) the locus standi of the Petitioners in bringing the Writ Petitions as they were not the residents of West Sikkim, and (ii) impermissibility of this Court to interfere in economic and policy matters.

(i) On the first objections of locus standi the grievance expressed in the Writ Petitions pertain to an area considered as sacred by the entire Buddhist Community in the State to which the Petitioners belong and, therefore, place of residence would be of no relevance. The Petitioners as Buddhists are espousing the cause of entire Buddhist Community and, therefore, the objection does not appear to sustain.

(ii) The other objection as regards the interference with the policy and economic affairs are concerned, the facts and circumstances of the case discussed would reveal that these objections also would be of no consequence as the questions involved in the case primarily are the violation of the requirement of obtaining NBWL clearance for the Project and defilement of the Rathong Chu river and the surrounding areas held as sacred by the Buddhists due to the Project in question. We do not intend to interfere with any of the policies of the State Government notwithstanding the trite position that in the event of there being arbitrariness, unreasonableness, illegality and unconstitutionality in a policy decision of the Government, the Court have the necessary jurisdiction to interfere.

Considering the facts and circumstances discussed above, these objections do not appear to have any merit and of no relevance and accordingly, we reject them.

36. Having held so, we may now revert back to our findings on the two questions noted earlier and proceed to deal with those.

37. **Whether the Project in question was in violation of the order dated 04-12-2006 passed in *Goa Foundation case*?**

(i) From the entire discussion, there can be no doubt of the fact that in terms of the order dated 04-12-2006 in *Goa Foundation case* (supra) clearance of NBWL was necessary. This would be evident also from the EIA Notification, 2006, Office Memorandum dated 02-12-2009 and other Office Memorandums and letters issued by the Wildlife Wing of the MoEF. The final judgment dated 21-04-2014 in *Goa Foundation case* (supra) only clarifies that no specific direction had been issued to notify areas within 10 kmsof the boundaries

of National Parks and Wildlife Sanctuaries as eco-sensitive areas. It has not, and also could not, have held that in Projects of the present kind clearance from NBWL was not necessary.

(ii) As noted earlier, the stand of the Respondents No. 1, 4 and 5 as regards the necessity of seeking clearance from the NBWL is that there being no direction from the Hon'ble Supreme Court to seek such clearance they had not done so and that the Notifications and the Office Memorandums issued by the MoEF were non est and, therefore, did not require compliance. This, in our considered opinion, do not appear to be the correct approach. Unless an appropriate forum decides on the validity of such Notifications and Office Memorandums it is incumbent for them to have complied with those. In *Krishnadevi Malchand Kamathia* (supra) it has been held as under:

> "19. Thus, from the above it emerges that even if the order/notification is void/voidable, the party aggrieved by the same cannot decide that the said order/notification is not binding upon it. It has to approach the court for seeking such declaration. The order may be hypothetically a nullity and even if its invalidity is challenged before the court in a given circumstance, the court may refuse to quash the same on various grounds including the standing of the petitioner or on the ground of delay or on the doctrine of waiver or any other legal reason. The order may be void for one purpose or for one person, it may not be so for another purpose or another person."

(iii) The present confusion and the imbroglio appears to have arisen clearly on account of the lack of diligence and reluctance on the part of the States in submitting its proposals in response to the repeated reminders resulting in the delay in deciding on the question of eco-sensitive zones by the MoEF thereby enabling the Project proponents to make a premium out of the nebular situation. This explains the observation of the Hon'ble Supreme Court in *Goa Foundation case* (supra).

(iv) Admittedly a proposal by the Respondent No. 1 is under consideration of the MoEF whose expeditious decision on the proposal, in our view, is imperative and a direction to that end is necessarily called for.

(v) Establishment of Biosphere Reserve in Sikkim mentioned in the letter of MoEF dated 07-02-2000 and the subsequent Notification dated 24-05-2010 of the Government of Sikkim upon which the Respondents rely, would have no relevance to the requirement of clearance by the NBWL in view of the mandatory nature of such clearance as the Project in question falls under Category 'A' as provided in the Schedule read with paragraphs 4(ii) and 8(v) of the EIA Notification, 2006 and, the Office Memorandum dated 02-12-2009.

38. **Violation of the religious and customary rights under Articles 25, 26 and 29 of the Constitution of India.**

(i) The next is the question of sacredness of the river Rathong Chu, its defilement and its adverse effect on the 'Bhumchu' ceremony held at Tashiding annually. We have already observed that weighty materials have been placed on behalf of the Petitioner in proof of the sacredness of the Rathong Chu river and the Valley below the Mount Khangchendzonga through which it flows. But, there are also conflicting claims made by the monks of the premier Monasteries situated in the valley. Controversy has also been raised by the Respondent-State as regards the very name of the river. However, these are questions which we shall withhold ourselves from entering into except to issue appropriate directions to the extent as shall be revealed hereafter.

(ii) Public Consultation which is mandatorily required to be conducted under the EIA Notification dated 14-09-2006 (Annexure-R8/1) as prescribed under State (3) envisages,

inter alia, the following:

"**III. Stage (3)-Public Consultation:**

(i) "Public Consultation" refers to the process by which the concerns of local affected persons and others who have plausible stake in the environmental impacts of the project or activity are ascertained with a view **to taking into account all the material concerns** in the project or activity design as appropriate. All Category 'A' and Category B1 projects or activities shall undertake Public Consultation, except the following:

.....

(ii) The Public Consultation shall ordinarily have two components comprising of:

(a) a public hearing at the site or in its close proximity-district wise, to be carried out in the manner prescribed in Appendix IV, for ascertaining concerns of local affected persons;

(b) obtain **responses in writing** from other concerned persons having a plausible stake in the environmental aspects of the project or activity.

(iii) the public hearing at, or in close proximity to, the site(s) in all cases shall be conducted by the State Pollution Control Board (SPCB) or the Union territory Pollution Control Committee (UTPCC) concerned in the specified manner and forward the proceedings to the regulatory authority concerned within 45(forty five) of a request to the effect from the applicant.

(iv) in case the State Pollution Control Board or the Union territory Pollution Control Committee concerned does not undertake and complete the public hearing within the specified period, and/or does not convey the proceedings of the public hearing within the prescribed period directly to the regulatory authority concerned as above, the regulatory authority shall engage another public agency or authority which is not subordinate to the regulatory authority, to complete the process within a further period of forty five days,.

(v) If the public agency or authority nominated under the sub paragraph (iii) above reports to the regulatory authority concerned that owing to the local situation, it is not possible to conduct the public hearing in a manner which will enable the views of the concerned local persons to be freely expressed, it shall report the facts in detail to the concerned regulatory authority, which may, after due consideration of the report and other reliable information that it may have, decide that the public consultation in the case need not include the public hearing.

(vi) .....

(vii)....."

[emphasis supplied]

Quite evidently, the process of Public Consultation is elaborate during the proceedings of which concerns of affected persons and others are mandatorily required to be ascertained with the object to take into account all material concerns in the Project and that responses from others concerned having a plausible stake in the environmental aspects of the Project or activity have to be obtained in writing.

(iii) In the present case the Public Hearing, one of the components of Public Consultation, conducted by the State Pollution Control Board for the purpose of EIA Notification, 2006, upon which the Respondents heavily rely upon also does not appear to be beyond reproach. In *Orissa Mining Corporation Ltd.* (supra) the Hon'ble Supreme Court while dealing rights of the Scheduled Tribes of worship over the Niyamgiri Hills in Kalahandi and Rayagada districts of Orissa held as under:

"37. The customary and cultural rights of indigenous people have also been the subject matter of various international conventions. International Labour Organization (ILO) Convention on Indigenous and Tribal Populations Convention, 1957 (No. 107) was the first comprehensive international instrument setting forth the rights of indigenous and tribal populations which emphasized the necessity for the protection of social, political and cultural rights of indigenous people. Following that there were two other conventions ILO Convention (No. 169) and Indigenous and Tribal Peoples Convention, 1989 and United Nations Declaration on the rights of Indigenous Peoples (UNDRIP), 2007, India is a signatory only to the ILO Convention (No. 107).

38. Apart from giving legitimacy to the cultural rights by 1957 Convention, the Convention on the Biological Diversity (CBA) adopted at the Earth Summit (1992) highlighted necessity to preserve and maintain knowledge, innovation and practices of the local communities relevant for conservation and sustainable use of bio-diversity, India is a signatory to CBA. Rio Declaration on Environment and Development Agenda 21 and Forestry principle also encourage the promotion of customary practices conducive to conservation. The necessity to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources have also been recognized by United Nations in the United Nations Declaration on Rights of Indigenous Peoples. STs and other TFDs residing in the Scheduled Areas have a right to maintain their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands.

.....

55. Religious freedom guaranteed to STs and the TFDs under Articles 25 and 26 of the Constitution is intended to be a guide to a community of life and social demands. The above mentioned Articles guarantee them the right to practice and propagate not only matters of faith or belief, but all those rituals and observations which are regarded as integral part of their religion. Their right to worship the deity Niyam-Raja has, therefore, to be protected and preserved.

.....

58. We are, therefore, of the view that the question whether STs and other TFDs, like Dongaria Kondh, Kutia Kandha and others, have got any religious rights i.e. rights of worship over the Niyamgiri hills, known as Nimagiri, near Hundaljali, which is the hill top known as Niyam-Raja, have to be considered by the Gram Sabha. Gram Sabha can also examine whether the proposed mining area Niyama Danger, 10 km away from the peak, would in any way affect the abode of Niyam-Raja. Needless to say, if the BMP, in any way, affects their religious rights, especially their right to worship their deity, known as Niyam Raja, in the hills top of the Niyamgiri range of hills, that right has to be preserved and protected. **We find that this aspect of the matter has not been placed before the Gram Sabha for their active consideration, but only the individual claims and community claims received from Rayagada and Kalahandi Districts, most of which the Gram Sabha has dealt with and settled.**"

[emphasis supplied]

(iv) As is apparent from the above, it had been noted by the Hon'ble Supreme Court that issues pertaining to the religious rights of worship over Niyamgiri Hills by the tribals had not been taken into consideration during the public hearing as would appear from the last part of paragraph 58 extracted above. In the present case also we find that the questions and answers recorded in the proceedings of the Public Hearing only deal with the individual claims arising out of the Project. We did not find a whisper on the religious aspect of the river and the area and, other social issues that may be impacted by the Project.

(v) The entire process of Public Hearing in the present case is reflective of the observation of Hon'ble Shri Justice K.G. Balakrishnan, former Chief Justice of India, in his talk during the seminar on 'Law and Environment' held at Chandigarh on 23-05-2009 which we may reproduce below:

> "..... The impact on the local communities can only be accurately assessed if their concerns are effectively heard through methods such as 'Pubic hearings'. However, several independent studies have demonstrated the lack of transparency and inclusiveness in such hearings. In some cases, the 'Public hearings' are not adequately notified and even held in remote locations, where the concerned stakeholders do not get a say. The picture if even more complicated when business concerns lobby with local officials to ensure that genuine concerns are not voiced. In such situations, the courts are again called on to protect the interests of the local communities who are displaced or adversely affected by developmental projects. ....."
>
> [emphasis supplied]

(vi) Although the decision in *Orissa Mining Corporation Ltd. case* (supra) was rendered in the context of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, we are of the considered view that the principle forming the basis of the decision would be applicable in the present case also.

(vii) There is no doubt of the fact that the Rathong Chu river is still in its pristine condition flowing through verdant green valley rich in biodiversity. We are of the considered opinion that not notifying a place as sacred by a State Government cannot be considered as a determining factor in deciding as to whether a place is sacred or not. It is the belief and faith of the people and the practice which is considered essential to the faith that would be relevant as a factor for such consideration. It has been accepted that religion, customs and tradition of the people form integral units of the entire biosphere, ecology and environment and, that man and nature make up an indivisible whole. "There is wide recognition worldwide and across disciplines that regions of ecological caution exhibit a symbiotic relationship between the biophysical ecosystem and the social system, with strong cultural interconnections between the two. This demonstrates that culture and environment are complementary, and in various stages of evolution (Ramakrishnan 2001)." *[Proceedings of the Workshop on the Importance of Sacred Natural Sites for Biodiversity Conservation-UNESCO, Kunming and Xishuangbanna Biosphere Reserve, People's Republic of China, 17-20/02/2003]* We are of the view that the issues raised in the Writ Petitions require serious consideration and cannot be ignored and brushed aside.

(viii) In *Orissa Mining Corporation Ltd. case* (supra) under somewhat similar circumstance, following directions were issued:

> "60. We are, therefore, inclined to give a direction to the State of Orissa to place these issues before the Gram Sabha with notice to the Ministry of Tribal Affairs, Government of India and the Gram Sabha would take a decision on them within three months and communicate the same to the MoEF, through the State Government. On the conclusion

of the proceeding before the Gram Sabha determining the claims submitted before it, the MoEF shall take a final decision on the grant of Stage II clearance for the Bauxite Mining Project in the light of the decisions of the Gram Sabha within two months thereafter.

62. The proceedings of the Gram Sabha shall be attended as an observer by a judicial officer of the rank of the District Judge, nominated by the Chief Justice of the High Court of Orissa who shall sign the minutes of the proceedings, certifying that the proceedings of the Gram Sabha took place independently and completely uninfluenced either by the Project proponents or the Central Government or the State Government."

[emphasis supplied]

39. Considering the entire facts and peculiar circumstances of the case, we are of the considered opinion that in the interest of justice it will be appropriate and expedient if both the issues are referred to the MoEF, Respondent No. 2, for a decision in order to take care of the anxiety which finds expression in paragraph 62 of the judgment in *Orissa Mining Corporation Ltd. case* (supra) reproduced above.

40. We, therefore, direct as under:
The MoEF, Respondent No. 2, shall, in due compliance of the **MoEF letter dated 27-05-2005**, order of Hon'ble Supreme Court dated 04-12-2006 in *Goa Foundation case* (supra) so far as it is relevant to that letter, and **MoEF Office Memorandum dated 02-12-2009** and other related letters, decide on the question of eco-sensitive zone in accordance with law and the procedure prescribed in that behalf within a period of six months from the date of this judgment after affording the parties opportunity of hearing on all aspects including the religious aspect raised by the Petitioners.

41. Having regard to the facts and circumstances, we withhold ourselves from passing any order suspending the Project in question making it clear that the implementation of the Project shall be at the risk and peril of the Respondents No. 4 and 5 as indicated in the Office Memorandum dated 02-12-2009 of MoEF and shall be subject to the decision of the MoEF which it may take after issuance of the final notification.

42. In the interregnum, it shall be open for the State-Respondent No. 1 to take such decision as may be advised unhindered by the proceedings before the MoEF being held by virtue of this order.

43. We also make it clear that the observations or remarks made by us in this judgment shall not be construed as expressions of our opinion on the merits of the case.

44. The Writ Petitions stand disposed of in terms of the above directions.

45. No order as to costs.

UTTARAKHAND HIGH COURT

TABLE OF JUDGMENTS AND ORDERS

Sattar vs. State of Uttarakhand & Anr.

WPMS NO. 2407 OF 2007
HIGH COURT OF UTTARAKHAND
04.12.2007
CORAM: PRAFFULA C. PANT, J.
CITATION: AIR 2008 UTR 18; 2007 SCC ONLINE UTT 19

SUMMARY

A batch of several writ petitions was filed by members of the community of Ban Gujjars who used to live in the forest land. The petitioners sought directions that their representations for recognition of forest rights under the Scheduled Tribes and Other Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) be considered. It was further prayed by the petitioners that they may not be dispossessed. A preliminary issue was raised regarding whether the rights can be claimed under a statute which has been passed by Parliament, but has not come into force.

The Court was of the view that when it had been specifically provided in the Act itself that it will come into force from the appointed day mentioned in the notification, it cannot be said that the Act has come into force prior to such date. The Court found that the petitioners failed to show the notification in the Official Gazette, in which the date of commencement of the FRA is specified in terms of Section 1(3) of the Act. As such, the petitioners cannot say that they had a right to get their forest rights determined under the provisions of the FRA.

The writ petitions were dismissed for this reason.

EDITOR'S NOTE

Ironically, the FRA came into force by a duly published gazette notification only 3 weeks later, i.e. on 31.12.2007.

ORDER

1. Heard.

2. By means of this writ petition, the petitioner has sought writ in the nature of certiorari quashing the order dated 17-11-2007, passed by respondent No. 2.

3. Brief facts of the case are that various writ petitions No. 275 of 2006 (M/B), 393 of 2007 (M/B) (New No. 1446 (M/S) of 2007), 395 of 2007 (M/B) (New No. 1445 (M/S) of 2007), 391 of 2007 (M/B) (New No. 1442 (M/S) of 2007), 394 of 2007 (M/B) (New No. 1444 (M/S) of 2007), 396 of 2007, (M/B) (New No. 1443 (M/S) of 2007), 392 of 2007 (M/B) (New No. 1446 (M/S) of 2006), were filed In this Court, which were disposed of by this Court in which directions were issued to consider the representations of the petitioners in the light of the provisions of the Schedule Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. The petitioners in said case and the present petitioner have sought rehabilitation in the forest land as they allegedly belong to community of Ban Gujjars, who used to live in the forest land. It is further prayed by the petitioner in the present case that he may not be dispossessed. In the aforesaid writ petitions other petitioners of said cases, made similar prayer. It appears that in compliance of order dated 20-6-2007, passed in writ petition No. 275 of 2006 (M/B), which was filed by one Gujjar Kalyan Samiti, the representation of the members of said Society and the other petitioners of aforesaid writ petitions, who claimed similar rights were considered and respondent No. 2 rejected the representations on the ground that the Scheduled Tribe and Other Traditional Dwellers (Recognition of Forest Rights) Act, 2006, has yet not Come into force. And no right can be given under said Act to the petitioners.

4. Learned Counsel for the petitioner relied on the principle of law laid down in *Pt. Rishikesh vs. Salma Begum* 1995 (2) A C 224 :AIR 1995 SCW 2476 and argued that it is not necessary to issue a notification in the official gazette before an Act can be said to have come into force.

5. *Pandit Rishikesh case* (Supra) is on the point as to from which date, State amendment made in the Code of Civil Procedure, 1908, could be said to be inconsistent to the amendment made in the Central Code. In the above mentioned case, the Apex Court has clearly held that there is distinction between making of law and its commencement. A Bill passed by the Parliament can be said to have become law from the date when President gives his assent. But the date of commencement of the Act does not necessarily be the date when assent was given by the President.

6. In the present case, it is pertinent to mention here Section 1 of Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (Act No. 2 of 2007) to which the President gave its assent on 29-12-2006, which reads as under:

> "1. Short title and commencement.-- (1) This Act may be called the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.
>
> (2) it extends to the whole of India except the State of Jammu and Kashmir.
>
> (3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint."

7. Learned Counsel for the petitioner failed to show the notification in the Official Gazette in which the date of commencement of aforesaid Act is specified. Since requirement of Sub-section (3) of Section 1 of the aforesaid Act requires Central Government to appoint a date by issuing notification, required to be published in the Official Gazette, unless the same is shown it is not open for the petitioner to say that the Act has come into force and his representation is wrongly rejected by the authorities, made under the aforesaid Act. Learned Counsel for the petitioner argued that under the provision of General Clauses Act, in view of the above mentioned case law, even if no date is specified in the

notification, the Act has come into force.

8. I do not see force in the contention for the reason that provisions of General Clauses Act, would be helpful only where the Act is silent as to its commencement. Where it has been specifically provided in the Act itself that it will come into force from the appointed day mentioned in the notification, it cannot be said that the Act has come into force prior to such date, as such, the petitioner cannot say that he had a right to get his rights determined in the light of the provisions of the Act so made.

9. For the reasons, as discussed above, the writ petition is dismissed.

Shamsher & Ors. vs. State & Ors.

WRIT PETITION NO. 1708 OF 2008 (M/S)
HIGH COURT OF UTTARAKHAND
26.09.2008
CORAM: PRAFULLA C. PANT, J.

SUMMARY

The petitioners are tribals from the Ban Gujjar tribe, who have made representations for the recognition of their forest rights under Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA). However, even though the FRA and Rules framed thereunder are in force, and the State government has also issued a G.O. on 15.3.2008 (No.439/XVII-1/2008-01(26)/2004) directing its implementation, the Committees at the Village, Subdivision and District level have not been constituted.

The writ petition sought directions in the nature of mandamus to the respondent State government to constitute such Committees so that the representations of the petitioners can be decided.

Counsel appearing for the State government agreed that the State government was required to constitute the Committees concerned.

Accordingly, the Court disposed of the writ petition at a preliminary stage with a direction to the State government to constitute the committees as provided under the FRA and FR Rules within 60 days.

EDITOR'S NOTE

This writ petition clearly brought before the Court the same issue raised in the previous case, namely, failure to implement the FRA with regard to forest rights of Ban Gujjars. The High Court would have been within its jurisdiction to keep the matter pending until the State government implements the directions of the Court to put the implementation machinery under the FRA into place. However, the Court chose not to do that, and it is apparent from the monitoring reports submitted to the Central government over the years by the State government that this order was not complied with, and most certainly not within the timeframe of 60 days.

JUDGMENT

1. Heard learned counsel for the parties

2. By means of this writ petition, the petitioners have sought writ in the nature of mandamus commanding the respondents No. 3 to 5 to constitute a committee, as per the Government Order dated 15.03.2008, for redressal of grievances of Ban Gujjars (members of a tribe living in forest) and a further direction has been sought directing to decide the representations of the petitioners.

3. Brief facts of the case are that it is pleaded that the petitioners are Ban Gujjars (members of a tribe living in forest). Under Section 14 of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, which came into force on 01st of January 2008, Rules are said to have been framed by the Government of India (a copy of which is annexed as annexure-4 to the writ petition). Rule 5, 7 and 9, provide for constitution of Sub-Divisional Level Committee, District Level Committee and State Level Monitoring Committee respectively by State Government to decide the claims made under the Act. Learned counsel for the petitioners submitted that even after issuance of the Government Order No. 439/XVII-1/2008-01 (26)/2004, dated 15.03.2008, issued by Government of Uttarakhand, District Magistrates have yet not constituted the Committees required to be constituted at the District Level, Sub-Divisional Level and Gram Sabha level.

4. Learned Additional Chief Standing Counsel pointed out that under the aforesaid Rules, Committees are required to be constituted by the State Government and not by the District Magistrate. However, he agrees that decision is required to be taken on the claims of the petitioners under the provision of the aforesaid Act and rules framed thereunder. Learned counsel for the parties have no objection if this writ petition is disposed of summarily.

5. In the above circumstances, having heard learned counsel for the parties, and in view of the provisions contained in the aforesaid Act and the Rules, this writ petition is summarily disposed of directing the respondent No. 1 to get constituted the committees, as provided under the aforesaid Rules positively within a period of 60 days from the date of certified copy of this order is produced, so that the petitioners may make representations / claims before the Committees concerned. (Interim relief application No. 6391of 2008, also stands disposed of).

NATIONAL GREEN TRIBUNAL

TABLE OF JUDGMENTS AND ORDERS

Pandurang Sitaram & Ors. vs. State of Madhya Pradesh & Ors.

ORIGINAL APPLICATION NO. 03 OF 2014 (CZ) (THC) NATIONAL GREEN TRIBUNAL, CENTRAL ZONAL BENCH, BHOPAL
11.03.2014
CORAM: DALIP SINGH J, AND P.S.RAO
CITATION: SCC ONLINE NGT 1177

SUMMARY

The petitioners had originally approached the Madhya Pradesh High Court by way of a writ petition seeking the Court's intervention in irregularities in the grant of forest rights certificates to ineligible persons under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition Of Forest Rights) Act, 2006 (FRA). Consequent upon the Supreme Court's directions in the *Bhopal case*[76], this writ petition was also transferred to the National Green Tribunal (NGT).

However, when the matter came up for hearing, the NGT took the view that its jurisdiction is restricted to the statutes listed in the Schedule under the National Green Tribunal Act, 2010. Since FRA is not listed in this Schedule, it does not have jurisdiction to hear this petition. The matter was accordingly transferred back to the High Court[77].

ORDER

1. This Application was registered after the Writ Petition (PIL) No.4571/2013 was transferred from the Hon'ble High Court of Madhya Pradesh at Jabalpur vide Order dated 10.12.2013 in terms of the directions of the Hon'ble Supreme Court issued in the case of *Bhopal Gas Peedith Mahila Udyog Sangathan and Others vs. Union of India*

[76] By judgment and order dt. 09.08.2012 in *Bhopal Gas Peedith Mahila Udyog Sangathan and Others vs. Union of India & Others* (2012)8 SCC 326, the Hon'ble Supreme Court had directed that petitions relating to environmental and related issues be transferred to the National Green Tribunal.

[77] The final order dt. 28.10.2014 in WP 4571/2013 passed by the Madhya Pradesh High Court is extracted elsewhere in this compendium.

& Others (AIR 2013 SC 3081). Notices were ordered to be issued to the parties by the Tribunal on 05.02.2014 and after service the matter has been listed for hearing today.

2. The Writ Petition filed as PIL primarily alleges large scale irregularities, fabrication and manipulation of records in the grant of forest right certificates issued to ineligible persons / encroachers in terms of The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition Of Forest Rights) Act, 2006 (Central Act No. 2 of 2007) (Hereinafter referred to as the Act of 2006).

3. A perusal of the petition as contained in para 3 and its various sub-paragraphs indicates the brief history of encroachment of forest before the 'Act of 2006' came into force including orders passed by the Hon'ble High Court of Madhya Pradesh at Jabalpur in W.P. No.5341 of 2001 and the constitution of High Level Committee by the Hon'ble High Court to examine the matter of encroachments in the forest and submit the report.

4. The petitioner has alleged that the provisions of the 'Act of2006' has been misconstrued and wrongly applied by the concerned authorities and such persons who are encroachers as distinct from forest dwellers have been granted certificate (pattas) without following the due procedure under the law.

5. We are conscious of the fact that the petitioner has also alleged that such pattas have been given in the Reserve Forest which could not have been issued. However, the basic grievance raised is on the account of issuance of the pattas under the 'Act of 2006'.

6. We have heard the Learned Counsel for the parties and it is not disputed that the principal grievance raised relates to issuance of pattas to alleged forest dwellers under the Act of 2006.

7. The National Green Tribunal constituted under the National Green Tribunal Act, 2010 (Central Act 19 of 2010) (hereinafter referred to us the 'Act of 2010') has been conferred jurisdiction and powers with respect to proceedings under the chapter 3 of the NGT Act of 2010 wherein the Tribunal may exercise jurisdiction over all Civil Cases relating to environment arising out of the implementation of enactments specified in Schedule-I of the 'Act of 2010'. Perusal of Schedule-I appended to the Act of 2010 does not include Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 among the seven enactments specified under Schedule-I.

8. As has been alleged in the petition the grievance raised pertains to the alleged wrongful act of grant of Pattas under the 'Act of 2006'which is not a scheduled act under the 'Act of 2010'. Therefore, we are of the view that the National Green Tribunal does not have jurisdiction under the 'Act of 2010' to deal with the issues raised in this petition.

9. The Learned Counsel for the petitioner submitted that the petition also raises the issues of illegal felling of trees and clearance of forest land. So far as the aforesaid grievances are concerned we find that the Hon'ble High Court has been pleased to take note of the grievances and issue interim order in this regard in the earlier petition of 5341/2001 on 04.03.2011 which was read out before us by the Learned Counsel of the applicants.

10. In view of the above discussion and the provisions contained in the 'Act of 2010'this Tribunal does not have jurisdiction with respect to matters arising out of 'Act of 2006'. Therefore, it is directed that the Writ Petition be transferred to the Hon'ble High Court of Madhya Pradesh of Jabalpur with a request to the High Court Registry for listing the same before the Hon'ble High Court for necessary action.

11. The Registrar, National Green Tribunal, Central Zone Bench, Bhopal is directed to return the Writ Petition with the copy of this Order to the Hon'ble High Court of Madhya Pradesh at Jabalpur. The O.A. No. 03/2014 accordingly stands disposed of.

Mithlesh Bai Patel vs. State of Madhya Pradesh & Ors.

ORIGINAL APPLICATION NO. 41 OF 2013 (CZ)
NATIONAL GREEN TRIBUNAL, CENTRAL ZONAL BENCH, BHOPAL
26.3.2014
CORAM: DALIP SINGH J. AND P.S. RAO
CITATION: 2014 SCC ONLINE NGT 1846

SUMMARY

The application was filed by Mithlesh Bai Patel, elected Sarpanch of Village Pratappur in Jabalpur district. The present application is part of a prolonged litigation relating to a plot of land measuring 5.42 hectares in the said village, which has dense tree growth, including 397 mahua trees over which the tribal villagers have nistar rights, and more than one thousand trees planted as part of the Mahatma Gandhi National Rural Employment Guarantee Scheme.

Initially, the State government had recommended issue of a mining lease (ML) over the said area for mining of iron-ore (a major mineral), which did not fructify for a variety of reasons, one of them being that the applicant obtained directions from the High Court.

Thereafter, the State government issued a prospecting licence (PL) for laterite (a minor mineral) to another party. This has been challenged in the present proceedings on a number of grounds, which need not be examined in great detail for the present purpose. The main argument raised by the applicant is that forest clearance under the Forest Conservation Act, 1980 (1980 Act) has not been obtained. One of the arguments raised by the applicant is that the tribal villagers are eligible for grant of forest rights in the said area under the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA).

The State government as well as the PL holder argued that the land in question is not "forest land" within the meaning of the 1980 Act for the reason that it is not a notified forest, nor has it been identified as a forest-like area by the Expert Committee constituted by the State government pursuant to the judgment of the Supreme Court in the *Godavarman case* expanding the definition of "forest land"[78].

The Tribunal accepted this argument of the State government, overriding the

documentary, photographic and legal material placed before it by the applicant. Having concluded that the land in question was not forest land, the Tribunal further decreed that the FRA, which is restricted in its operation to forest land, does not apply. The Tribunal further observed that the PL has not permitted the cutting of any trees, and in the event a ML is eventually issued, the applicant may exercise the legal remedies available to her.

Accordingly, the application was dismissed, albeit with observations that mining ought to be conducted within the principles of sustainable development.

EDITOR'S NOTE

The Tribunal proceeded on the flawed premise that the judgment[79] of the Supreme Court expanding the definition of forest land is restricted by the findings of the Expert Committee appointed by the State government to identify 'forest-like areas'. Therefore the conclusion that the 1980 Act does not apply appears to be erroneous.

Even more importantly, the Tribunal has proceeded on the footing that the Expert Committee's report, which lies in the executive domain, would restrict the operation of the FRA, which is a legislative act of Parliament. Section 2(d) of FRA provides the definition of "forest land" and Section 4(1) provides that the rights vested under this law "override any other law for the time being in force".

JUDGMENT

1. This Application has been filed by one, Smt. Mithlesh Bai Patel who claims that she is an elected Sarpanch of Village Pratappur, Tehsil Siroha, District Jabalpur and she is filing this Application in larger public interest on behalf of the villagers of Pratappur. She says that she is challenging the order dated 15th May, 2013 in Reference No. F3-7/07/12/2 (Annexure P/8) issued by the Under Secretary, Department of Mines, Government of Madhya Pradesh whereby a Prospecting License (in short referred to as 'PL') for prospecting laterite mineral has been granted in favour of Respondent No. 6 over an area of 5.42 hectares out of the total extent of 9.85 hectares land in Khasra No. 413 of village Pratappur, Tehsil Siroha, District Jabalpur. It is stated that this is a government land under the control of the Revenue Department and there is a dense tree growth with approximately 397 Mahua trees standing in the area allotted for PL and the villagers are having Nistar rights over the land. It falls under the definition of 'Forest' as given under Section 2 of the Forest (Conservation) Act, 1980. She further states that No Objection Certificate (in short referred to as 'NOC') was not obtained from the Forest Department before granting the PL. Initially an application for granting PL for mining iron ore, filed by one, M/s Anand Mining Corporation was recommended by the Government of Madhya Pradesh and PL was granted in their favour but having objected by the villagers, the lease holder could not commence any mining work. Subsequently an application was filed seeking grant of Mining Lease (in short referred to as 'ML') for mining of iron ore over a period of 30 years by M/s Ind Synergy Ltd. However, as the villagers objected, that application was not considered by the Government of Madhya Pradesh for recommending the case to the

[78] *T.N. Godavarman Thirumalpad vs. Union of India & Ors.* (1997) 2 SCC 267.

[79] Ibid.

Central Government and in this regard a Public Interest Litigation (in short referred to as 'PIL') by way of Writ Petition No. 830/2009 was filed by one, Shri Anadilal Sen before the Hon'ble High Court of Madhya Pradesh (Annexure P/1) wherein the Hon'ble High Court vide order dated 4th March, 2009 (Annexure P/2) issued notice to the Respondents and ordered that in case the Central Government grants approval for ML, the Petitioner is at liberty to move the Court for appropriate interim relief.

2. The Applicant further stated in her application that under Mahatma Gandhi NREGS, the Gram Panchayat Pratappur has planted approximately one thousand trees in the said piece of land in Khasra No. 413 during the year 2011 by investing an amount of about Rs.1.48 lakhs. But the Respondent No.6 uprooted the plants and a complaint in this regard was made before the District Collector, Jabalpur vide complaint dated 13th September, 2011(Annexure P/4) but no action was taken by the Collector and it was informed by the office of the Collector that no such application is pending in their office in respect of the aforesaid land for mining purpose (Annexure P/5). The Divisional Forest Officer, Jabalpur vide his letter dated 1st May, 2007 informed the District Collector that 397 Mahua trees are standing in part of Khasra No. 413 in an area of 5.42 hectares (Annexure P/5). When the matter was referred to the SDM, Siroha, it was reported that the land situated in Khasra No. 413 is not fit for mining activities. (Annexure P/6). When NOC was sought from the Forest Department for granting mining lease in Khasra No. 413 and a letter dated 29th October, 2011 was addressed to the Secretary, Mining Department, Government of Madhya Pradesh that this particular piece of land is not a forest land (Annexure P/4)

3. Thus the Applicant has stated that the issue of granting ML for iron ore was taken up twice in the above piece of land and the PIL filed is still pending before the Hon'ble High Court and no NOC was issued by the Forest Department for granting ML. She contended that in order to by-pass the orders of the Hon'ble High Court subsequently an application was moved seeking PL for mining laterite mineral instead of iron ore and accordingly the aforesaid order dated 15-5-2013 was issued by the Government of Madhya Pradesh granting PL to the Respondent No. 6. She further states that earlier vide memo dated 3 rd February, 2007 the then District Collector, Jabalpur had submitted a report to the Secretary, Mining, Government of Madhya Pradesh stating that there are 694 Mahua trees standing in Khasra No. 413 and it is not suitable for granting ML (Annexure P/7). Thus, the Applicant lamented that due to negative reports sent from the office of the District Collector, Jabalpur and in spite of the fact that the land in question is having such large number of Mahua trees, the Government of Madhya Pradesh granted PL over an extent of 5.42 hectares in Khasra No. 413 for laterite mining in favour of Respondent No. 6 (Annexure P/8). It was further stated by the Applicant that a close look at the order dated 15th May, 2013, gives an impression that the mineral limestone is expected to be found rather than laterite and there is neither leterite nor limestone deposits in the said piece of land except iron ore but to circumvent the Hon'ble High Court order, the PL was granted for prospecting laterite since it is only the Central Government which is competent to grant ML in case of iron ore mining and thus an incorrect and false mineral has been mentioned in the order granting PL and there is no clear NOC issued from the Forest Department. The Applicant expressed her concern that if mining activity is taken up in the said piece of land, it will not only lead to removal/damage of the huge number of existing Mahua trees but it will also affect the ecology and environment in the area besides robbing the livelihood opportunities of the villagers as they are presently collecting the Minor Forest Produce (MFP) from the Mahua trees. In support of her claim, she filed photographs depicting tree growth in the said piece of land (Annexure P/9). She further alleged that though the Respondent applied for iron ore mining surprisingly PL was granted for laterite mining and this is a deliberate act on the part of Respondent government to bypass the law. It was further stated that the land in question bears

approximately 5.13 million tons of iron ore deposits as per the survey conducted by the Geological Survey of India and ultimately it is not the laterite or limestone but the iron ore that will be mined from the area. She prayed that though the land is a Government land, the Respondent No. 6 should not have been granted PL for mining brushing aside the objections raised by the villagers and thus she had no alternative except to approach this Tribunal seeking justice. She pleaded that the impugned order dated 15th May, 2013 should be quashed immediately.

4. Upon registration of the Application, notices were issued to the Respondents and interim stay was granted on 18th July, 2013 on the operation of the impugned order.

5. The Respondent Nos. 1 to 5 in their reply have stated that the land in question in Khasra No. 413 is not a forest land. In view of the orders of the Hon'ble Supreme Court dated 12th December, 1996 in the matter of *T.N. Godavarman vs. Union of India* (1997) 2 SCC 267 and as per the Circular No. 16610/7/1-A dated 13th January, 1997 (Annexure RI-1) issued by the Revenue Department, Govt. of Madhya Pradesh wherein on the recommendation of the Expert Committee the following criteria has been fixed to declare the tree clad areas in the state as 'Forest' but not yet notified as 'Forest' under any Act and not recorded as 'Forest' in Government records :

   i. The extent of area should be 10 hectares or more;

   ii. On an average the area should consist at least 200 naturally growing trees per hectare;

6. The Respondent Nos. 1 to 5 further stated that the govt. land in Khasra No. 413 is less than 10 hectares in extent and it was further divided into restricted and unrestricted parts. The restricted part is of 4.43 hectares while the unrestricted part is 5.42 hectares and the Respondent No. 6 has been sanctioned PL for mining over the unrestricted area. Therefore the contention of the Applicant that the land is a forest land, is misconceived and it does not qualify to be brought under the provisions of the Forest (Conservation) Act, 1980. The unrestricted area where the PL for mining was granted, consists 303 Mahua trees which becomes on an average 56 Mahua trees per hectare. It was further stated in the reply that the State Government has not sanctioned the PL in favour of the Respondent No. 6 in suppression of earlier orders but the PL was sanctioned in accordance with law within the purview of Section 11(2) of the Mines & Minerals (Development & Regulations) Act, 1957 considering the preferential rights of the Respondent No. 6 after giving opportunity of hearing to all the parties. The relief sought by the Applicant is premature because it is only the PL that has been granted in favour of the Respondent No. 6 and no permission was granted for cutting the Mahua trees as prospecting of mineral does not require cutting of trees. It was further stated in the reply that MLs were sanctioned in the areas adjacent to the land in question and this application was filed on the instigation of those mine owners whose mines are located adjacent to Khasra No. 413.

7. As directed by the Tribunal, the counsel for the State of Madhya Pradesh filed the report of the Expert Committee constituted in pursuance of the directions of the Hon'ble Supreme Court in the case of *T.N. Godavarman vs. Union of India* (supra) copy of which has been furnished to the learned counsel for the Respondent No. 6 as well as to the Applicant. A perusal of the report of the Expert Committee indicates that Government lands measuring a total of 16,616.80 hectares are outside the control of the Forest Department but having tree growth and falling in 295 nos. of Khasras located in 146 villages in Jabalpur District and they meet the aforesaid criteria and qualified to be declared as 'Forest'. Thus they are eligible to be brought under the definition of 'Forest' irrespective of their ownership. However, the Khasra no. wise and village wise details

were missing in the report. Therefore, the learned counsel for the State of Madhya Pradesh was directed to produce particulars of villages and Khasra numbers where such 'Forests' were identified by the Expert Committee to know whether this particular Khasra No. 413 in village Pratappur finds place in the list or not. The District Collector, Jabalpur in his affidavit dated 28th February 2014 stated that village Pratappur does not find place within the list of 146 villages where 'Forest' was identified by the Expert Committee and therefore the govt. land in Khasra No. 413 is only a revenue land and does not fall under the definition of 'Forest' and therefore Forest (Conservation) Act, 1980 is not applicable in this case. The Collector further stated that as per the provisions under Section 2 of the Madhya Pradesh Adim Janjatika Sanrankshan (Vrikshon ka hith) Adhiniyam, 1999 which lays down the list of special category trees including Mahua tree at Entry No. '7' and Section 240 of the Madhya Pradesh Land Revenue Code, 1969 confer powers to the District Collectors to permit cutting of any standing tree including that of Mahua tree. The Collector further stated that the Mahua trees existing in Khasra No. 413 are not the exclusive source of livelihood for the tribals in the area and the PL for mining was granted by the Government of Madhya Pradesh taking into account of the above facts and as mining of minerals is essential for the development of the State of Madhya Pradesh and the country as a whole.

8. The Divisional Forest Officer, Jabalpur was present before the Tribunal and filed an affidavit dated 1st March, 2014 stating that the land in question is a revenue land and not a forest land.

9. The Respondent No. 4 i.e. Madhya Pradesh State Pollution Control Board (MPPCB) filed their reply stating that no application has been received from the Respondent No. 6 for granting any permission for mining and if any such application is required for granting permission under the Water (Prevention & Control of Pollution) Act, 1974 and Air (Prevention & Control of Pollution) Act, 1981 it will be examined after inspection of the site. It was further stated by the MPPCB that under the EIA Notification dated 14th September, 2006 under the schedule of projects or activities requiring Environment Clearance (EC) the activity of prospecting of minerals is exempted and therefore no EC is required for granting PL in this case. However, the Officer-in-Charge of the area of the MPPCB inspected the site and observed that few pits/holes have been dug up in the site and neither there is any damage caused to the environment nor is any activity going on there. It was further stated that the MPPCB has specifically directed the Respondent No. 6 that without obtaining written consent from the PCB no mining activity shall be undertaken in the area.

10. The Respondent No. 3 i.e. Central Pollution Control Board (CPCB) in their reply has stated that they do not issue any consent/license/NOC/EC/FC in such cases and Prior EC is required to be given by the MoEF/SEIAA depending upon the category of project as specified in EIA Notification dated 14th September, 2006 and 'Consent to Operate' and 'Consent to Establish' is granted by the concerned State Pollution Control Board under the Water (Prevention & Control of Pollution) Act, 1974 and Air (Prevention & Control of Pollution) Act, 1981 and therefore the CPCB has got no role to play in this case.

11. The Respondent No. 6 filed his reply dated 19th September, 2013 stating that the adjudication of the matter as to whether the PL has been rightly granted or not, is outside the purview of this Tribunal as the National Green Tribunal Act, 2010 provides that this Tribunal shall have jurisdiction over all the civil cases where substantial question relating to environment is involved and such question arises out of implementation of the enactments specified under schedule-I of the National Green Tribunal Act, 2010. In this particular application no civil case involving substantial question relating to environment has been raised by the Applicant. It was further stated that the Applicant

is under the wrong notion that because the land in Khasra No. 413 is having Mahua trees it falls within the definition of 'Forest' and PL has been granted in violation of the Forest (Conservation) Act, 1980. The Respondent No. 6 averred that the land in question is not a Reserved Forest and as per the recommendations of the Expert Committee constituted consequent to the orders of the Hon'ble Supreme Court in the case of *T.N. Godavarman* (supra) this particular piece of land has not been declared to come under the definition of 'Forest' and hence Forest (Conservation) Act, 1980 is not applicable. It was further stated in the reply that PL was granted only over an area of 5.42 hectares in Khasra No. 413 and not for the entire area of 9.85 hectares and it was also denied that the villagers have got any Nistar rights over the land which is a revenue land and no Mahua usufruct is being collected by the tribals from the trees occurring in the said piece of land. It was further stated by the Respondent No. 6 that presently it is not sure whether the land in question has got any iron ore deposits and no PL was granted in favour of M/s Anand Mining Corporation for iron ore mining. However, the Government of Madhya Pradesh recommended the case of *Ind Synergy Limited* to the Government of India for granting lease for 30 years for mining of iron ore in Khasra No. 413 over an extent of 5.42 hectares but the said recommendation was not confirmed by the Government of India as the Government of India came to the conclusion that there is no material on record to suggest that iron ore deposits occur in the area and no prospecting of mineral has been done earlier for the purpose of iron ore. It was mentioned as virgin area and thereafter the Central Government directed the State Government to look into the matter and take a fresh decision. Orders dated 8th November, 2010 passed by the Central Government under Section 30 of the Mines & Minerals (Development & Regulations) Act, 1957 are annexed by the Respondent at Annexure R-6/2 and R-6/3. Thereafter, the State Government duly considering all the relevant facts decided to grant PL to Respondent No. 6. It was further stated by the Respondent No. 6 that M/s Ind Synergy Limited filed Writ Petition No. 12062/2011 and 12063/2011 before the Hon'ble High Court of Madhya Pradesh at Jabalpur challenging the order of remand made by the Central Government and vide order dated 16th May, 2012 the Hon'ble High Court dismissed the above petitions (Annexure R6/4). With regard to the PIL filed by Sri Anandilal Sen, it is stated that the PIL was filed in the year 2009 against the order dated 4th October, 2008 of the govt. of Madhya Pradesh by which it was recommended for granting ML for iron ore in favour of Ind Synergy Ltd. However, the Hon'ble High Court has not granted any stay as agreed by the Applicant herself. The Respondent No. 6 averred that perhaps the writ petition must have been rendered infructuous as the Central Government remanded the matter back to the State Government by not accepting the recommendation of the state Government.

12. The Respondent No. 6 further denied that the villagers have planted trees in the land in question under NREGS and no such plantation is existing at the site. The alleged filing of the complaint by the Applicant to the District Collector is only a motivated one and the allegations made therein by her are incorrect. It was further stated that SDM, Siroha only wrote a note sheet on the objections raised by the villagers and not recommended to the Collector that ML should not be granted. Nevertheless, the said objections raised by the villagers were not accepted by the District Collector. Thus ML was recommended by the State Government in favour of M/s Ind Synergy Ltd. in the year 2008 and though the Applicant is aware of it, she has deliberately hidden this fact. Respondent No. 6 further contended that without prospecting of mining being taken up the question of concluding that the said land is harbouring iron ore deposits does not arise and accordingly the Government of India has mentioned in its order that there is no evidence on record to show that the land in question has got iron ore deposits. Therefore, considering all the aspects, the State Government has granted PL for laterite mining to the Respondent No.6. Therefore, only after prospecting is done, it can be ascertained whether the land has got laterite deposits or not. Therefore, it is

incorrect on the part of the Applicant to say that the land in question does not consist laterite deposits. The Respondent No. 6 in his application for granting PL clearly stated that it is for prospecting laterite only and just because that few trees are existing on such piece of land which does not qualify to be brought under the definition 'Forest', such activity of granting PL cannot be denied. Any piece of land lying idle for a long period will allow tree growth to come up and simply because few trees have come up on the site in question the plea that no permission shall be granted there for mining activity, is not correct. Moreover prospecting of mine does not require cutting of trees. It was also stated that the Forest Department has not raised any objection and based on the recommendations of the District Collector, the PL was granted by the government and no public places of worship are located in the said piece of land as revealed from the report of the District Collector. Only after the prospecting is completed, application for granting ML shall be made and Government at that time would examine all the aspects and would impose the terms and conditions including compensatory afforestation if required in lieu of the cutting of trees and presently it is only for the purpose of prospecting of mineral and no tree is required to be cut and after prospecting is done, the Government would take a conscious decision as to whether it is necessary to allow mining of the mineral if found located and if required, take up compensatory afforestation on alternate site to compensate the loss of trees existing on the land in question. It was also averred that it is incorrect to say that the aforesaid Mahua tree are the only source of livelihood for the villagers. In the circumstances the Respondent No. 6 prayed for dismissal of the OA.

13. In response to the reply dated 19th September, 2013 of the Respondent No. 6, the Applicant filed rejoinder dated 9th October, 2013 stating that she is challenging the government order on the grounds of disturbance of ecological balance which may occur due to felling of such large number of grown up Mahua trees which are more than 100 years old and it involves a substantial question relating to environment and if the prospecting of mineral is permitted it may lead to subsequent granting of ML and therefore it may be inevitable to fell such large number of trees. It was wrongly stated by the Respondents that the area does not qualify to be declared as 'Forest'. It contains about 397 Mahua trees and the orders of the Hon'ble Supreme Court in the case of *T.N. Godavarman* (supra) dated 12th December, 1996 are applicable to this particular piece of land and it does qualify to be recorded as 'Forest' where no non-forest activity can be permitted to be taken up. The Applicant further stated that to favour the Respondent No. 6 the authorities deliberately bifurcated the land in Khasra No. 413 to demonstrate that the trees in that particular portion of land where PL is granted in Khasra No. are less in number. PL for mining was granted over 5.42 hectares though initially Respondent No. 6 applied the PL over the entire 9.85 hectares of land in Khasra No. 413. It was further stated that the contention of the Respondent No. 6 that there is no material on record to suggest occurrence of iron ore deposits in the said land, is not correct and in fact the Government of Madhya Pradesh while addressing the Secretary, Department of Mines, Government of India stated that as per the estimates made by the Geological Survey of India, the availability of minor mineral laterite and major mineral iron ore over the said piece of land has been established and the expected quantity of iron ore deposits is approximately 5.13 million tons and the Central Government has only remanded back the matter to the State Government to comply with the norms of principles of natural justice without commenting upon the minutes of the case whether existence of iron ore deposits as stated by the Government, was proved or not. It was further contended by the Applicant that in case of granting PL for a minor mineral Madhya Pradesh Minor Minerals Rules, 1996 come into play and as per Rule 18 of the said rules on receipt of any application the details shall be first circulated on the notice board of Zila Panchayat, Janpad Panchayat and Gram Sabha but in this case this mandatory provision has been not followed. It was also stated that in Madhya Pradesh Minor Minerals Rules, 1996 it is

provided that no lease shall be sanctioned without obtaining opinion of the concerned Gram Sabha but in the instant case no such exercise has been done.

14. The counsel for the Applicant in his objections on behalf of the Applicant in response to the Miscellaneous Application No. 140/2013 filed by the Respondent No. 6, has contended that Madhya Pradesh (Prohibition or Cutting of Trees) Rules, 2002 prohibit cutting of trees on hilly grounds. As per rule 5 cutting of Mahua trees without permission of the District Collector in consultation with Gram Panchayat is prohibited and in the instant case the trees are standing on hilly terrain. It was also stated that as per the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 the tribes consisting about 100 families residing in the village come under the category of forest dwelling tribes and the said Mahua trees are the source of their livelihood and therefore no permission shall be granted for mining.

DISCUSSION

15. Having gone through the averments made by the Applicant and replies submitted by the Respondents and having heard the learned counsel for the parties at length and after perusing the record placed before us it is required to examine the following questions in detail :

    (i) Whether the State Government is competent to grant PL for mining of minor mineral laterite in the Government land where it has earlier recommended to the Central Government for granting ML for iron ore which is a major mineral and why initial granting of iron ore mining over a period of 30 years to M/s Ind Synergy Ltd. was cancelled by the Government ?

    (ii) Whether the land in question is qualified to be defined as 'Forest' and does it attract the provisions of the Forest (Conservation) Act, 1980 ?

    (iii) Whether there are any Rules/Orders/Notifications prohibiting cutting of Mahua trees as they are one of the important sources of collection of MFP by the tribals and other traditional forest dwellers irrespective of their location on the Government lands other than notified forests or private lands and objections raised by the villagers for granting PL in government land has any legal validity?

    We may examine each of the above 3 points in detail as follows.

16. Point No. (i) :

    Initially the Applicant filed this OA challenging the impugned order dated 15th May, 2013 granting PL for prospecting of laterite mineral over Khasra No. 413 in Pratappur village over an extent of 5.42 hectares. Later on, in the MA and rejoinders filed by her, the Applicant contended that as the issue involves substantial question relating to environment she is challenging the order and she is not just challenging the order granting PL per se. This Tribunal can go into the issues concerning the environment and if any decision taken or order issued by the Government or any other authority under any of the existing Acts or Rules that affects the environment, it can be examined and in this particular case the PL is granted by the state government under MP Minor Mineral Rules 1996. However the fact is that initially the State Government recommended to the Government of India for granting of ML for iron ore mining over the same piece of land in Khasra No. 413 but the proposal was returned back to the State Government and it clearly reveals that the State Government took a decision to grant the PL for laterite which is a minor mineral and comes under the purview of the State Government and the Respondent/Government Authorities could not explain convincingly as to why it was agreed to grant PL for

laterite mining when initially ML was proposed to be granted for iron ore mining to M/s Ind Synergy Ltd. However, this issue doesn't come under the purview of this Tribunal The main issue to be considered here is whether there is any violation of environmental laws in granting the PL. Therefore, this Tribunal need not go into the correctness or otherwise of the decision of the state government in granting PL for laterite over the same piece of land where initially it recommended granting of ML for iron ore mining which is a major mineral. Nevertheless, the concern raised by the Applicant that mining activity over the said piece of land involves substantial question relating to environment will not get altered irrespective whether it is mining of iron ore or laterite. Therefore, this Tribunal need not go into the merits of granting PL for laterite mining or ML for iron ore mining. The Applicant may raise this issue with the appropriate authority/ court of law if she finds violation of any Act/rules concerning granting of mining leases by the state government.

17. Point No. (ii) :

The record placed before us reveals that the land in question is neither a notified forest nor recorded as 'Forest' in revenue/village records. It is a revenue land consisting tree growth. As per the recommendation of the Expert Committee, constituted by the state government in consonance with the Hon'ble Supreme Court orders in the case of *T.N. Godavarman* (supra), the land is not qualified to be defined as 'Forest' since it did not fulfil the criteria recommended by the Expert Committee constituted in terms of the order dated 12.12.1996 of the Hon'ble Apex Court. Therefore it can be safely concluded that the Forest (Conservation) Act, 1980 is not applicable to the land in Khasra No. 413. The contention of the Applicant that as per the Hon'ble Supreme Court order the meaning of the definition of 'Forest' shall ipso facto be applied to this particular piece of land, is not agreed to since on the basis of the orders of the Hon'ble Supreme Court the State Government has constituted the Expert Committee which identified areas outside the purview of the Forest Department and which are not recorded as 'Forest' in revenue/village records but bear tree growth and it is found that this particular Khasra No. does not fulfil the criteria and therefore not included in the recommendation of the Expert Committee. Thus the question of application of Forest (Conservation) Act, 1980 does not arise in this case.

18. Point No. (iii) :

In exercise of the powers conferred by Sub-Section (1) and Clause LXI of sub-section (2) of Section 258 read with sub-section(1) of Section 240 of the Madhya Pradesh Land Revenue Code, 1959 the State Government issued Madhya Pradesh (Prohibition or Regulation of the Cutting of Trees) Rules, 2007 wherein certain restrictions have been imposed on cutting of trees. The trees shall not be cut without the permission of concerned Tehsildar on the recommendation of Gram Panchayat level committee. However, the rules prescribe that the trees standing on unoccupied Government land shall not be cut without granting permission in writing by the District Collector and there is no provision of complete ban of cutting Mahua trees standing on Government lands as per the above Rules. The District Collector is having powers to accord permission to cut the Mahua trees under the said Rues. As per the *Madhya Pradesh Lokvaniki Adhiniyam, 2001* there is a provision to regulate and facilitate management of tree clad private and revenue lands in the State of Madhya Pradesh wherein felling of trees shall be permitted if management plan is prepared and approved by the competent authority and there is no ban on cutting of Mahua trees. The Applicant did not produce any other order/notification or rule either in the OA or in the subsequent additional applications or rejoinders filed during the course of hearing to the effect that there is a total ban on cutting of standing Mahua trees or any restrictions imposed in the state of Madhya Pradesh.

No document was placed before us to the effect that rules have been enacted by the state of Madhya Pradesh declaring the Mahua trees under the category of 'Reserved trees' and they are prohibited from being cut. The rules placed before us reveal that there is a provision of granting permission for cutting Mohua trees. However, in this particular case only PL for mining laterite was granted and no permission was sought or granted for cutting of trees existing on the said piece of land. PL involves only digging holes/small pits on the ground for extracting the mineral samples to arrive at the nature of mineral deposits and their quantity and no felling of trees is required for the purpose.

19. With regard to application of Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 in this case it is found that this Act is not applicable here as the land in question is located neither in a notified scheduled area nor any individual or community rights accrue to the villagers for granting forest rights over a piece of land which is not notified as forest and the land in question doesn't qualify to be brought under the definition 'Forest'.

20. Therefore, mere sanctioning of PL *ipso facto* does not entail the lease holder to undertake regular mining by clearing the vegetation. The apprehension of the Applicant in this regard is unfounded. Eventually if cutting of trees is required at the time of regular mining, if permitted subsequent to prospecting, it is for the authorities to examine whether it is required to sacrifice such large number of Mahua trees and if so what measures can be taken to compensate the loss of trees. So far no evidence is produced before us that the Respondent-6 resorted to cutting of trees and inspection by the officials of PCB also revealed that no such activities have been taken up. The photographs placed before us also reveal that the said land in Khasra No. is not located on a hilly terrain but it is more or less plain.

21. In conclusion we may observe that though it is for the State Government to examine the issues in totality including the resolutions passed by the Gram Sabha and objections raised by the villagers before granting the PL it is left to the authorities to take the aforesaid observations into account if subsequently ML is granted based on the result of the prospecting of mineral. But in the existing circumstances since it does not come under the category of 'Forest' there is no law prohibiting PL in the said piece of land in Khasra No. 413. Further no information was produced before us as to how much quantity of usufruct is being obtained from the Mahua trees by the villagers and how much dependence they have on these trees for their livelihood and it is for the authorities to examine how to compensate in case the villagers' livelihood is going to be affected if in future these trees are permitted to be cut at the time of granting ML, if granted. The EIA Notification, 2006 requires the Applicant to seek Environmental Clearance (EC) from MoEF/SEIAA at the time of seeking granting of ML and therefore Environment Impact Assessment (EIA) study may be required to be conducted and all the aspects related to the environment and ecology including the existence of Mohua trees on the land in question will have to be examined by the concerned authorities which will take care the concern of the Applicant.

22. While the objective of granting PL for mining is for systematic development of minerals which forms part of the development process of the country, it is the duty of the Central Government and the State Government to take steps to protect the environment and maintain the ecological balance and prevent damage that may be caused by prospecting and mining operations. The Hon'ble Supreme Court in the case of *MC Mehta vs. Union of India*, {2009) 6 SCC 142} while stressing the need for regulating the mining activities in a sustainable way in view of the large scale environmental concerns raised across the county and also to prevent further environmental degradation, inter alia, held that;

".....Mining within the principles of sustainable development comes within the concept of 'balancing' whereas mining beyond the principle of sustainable development comes within the concept of 'banning'. It is a matter of degree. Balancing of the mining activity with environment protection and banning such activity are two sides of the same principle of sustainable development".

23. Thus it is mandatory on the part of the authorities to apply the principle of Sustainable Development and therefore any person applying for undertaking mining operations for both major and minor minerals is required to take prior EC from the authority concerned i.e. MoEF at the central level or State Environment Impact Assessment Authority (SEIAA) at the State level. Hence in future if ML is going to be granted over the land in question after the prospecting is done, the authorities shall take into account of the issues raised by the Applicant in this OA along with the EIA report.

24. With the above observations we have no hesitation to dismiss the OA and accordingly the OA stands dismissed. In the facts and circumstances of the case we direct no order as to costs.

25. However, the Applicant has got full liberty to approach the appropriate forum/ authority/court of law if ML is granted to the Respondent No. 6 based on the outcome of the prospecting of mineral in violation of any law.

Sri Dibakar Bhoi vs. District Magistrate & Collector, Mayurbhanj (Odisha) & Ors.

ORIGINAL APPLICATION NO. 14 OF 2014
NATIONAL GREEN TRIBUNAL, PRINCIPAL BENCH
21.04.2014
CORAM: DR. P. JYOTHIMANI AND M.S. NAMBIAR, JJ. WITH
DR. GK PANDEY, PROF. (DR.) PC MISHRA, AND RANJAN CHATTERJEE
CITATION: 2014 SCC ONLINE NGT 1046

SUMMARY

The petitioner filed an application for restitution of public property including gochar lands and forest lands in Jhatiada Gram Panchayat. He alleged that the respondent State government has illegally transferred the forest lands to non-tribals, some of whom are also arrayed as respondents. It was argued by the applicant that the allocation of forest land to the non-tribals led to misuse causing injury, danger and nuisance. Accordingly, he sought directions to the District Administration, including the police, to take preventive measures for avoiding public nuisance under the Indian Penal Code.

The petitioner argued that the indiscriminate allotment of forest land was not only resulting in environmental degradation, but also in grabbing of properties by persons who are not entitled in law.

The Divisional Forest Officer (respondent no. 4) argued that there is no destruction of public property in forest land and standing trees and the Gram Sabha, which is empowered under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA), has been taking lawful decisions. In addition, the Superintendent of Police, Vigilance (respondent no. 5) submitted an affidavit that required action was taken under the Odisha Prevention of Land Encroachment Act, 1962, whereupon it was found that pattas were issued to the said tribal persons under the FRA. Therefore there is no illegal occupation of land.

The Tribunal examined the provisions of the FRA to the effect that the recognition of forest rights is not only for tribals but also for other traditional forest dwellers. It found no reason not to believe the statements made by the DFO and the SP on

affidavit. It was of the view that any remedy against allocation of forest rights to ineligible persons must be sought in accordance with the FRA by the petitioner. Accordingly, the petition was dismissed.

It appears that during the course of the proceedings the Tribunal had issued bailable warrants against some of the right-holders on condition that they be released upon a security of Rs. 25,000. With this judgment, the warrants were cancelled and the security amount was directed to be refunded to the right-holders.

EDITOR'S NOTE

This is an important judgment coming from the Principal Bench, in light of previous orders passed by the regional benches that the National Green Tribunal does not have jurisdiction on matters arising out of the FRA since the statute is not included in the Schedule to the National Green Tribunal Act, 2010. Some of these orders are extracted elsewhere in this compendium.

ORDER

1. This Application has been filed under Section 14, read with Section 18(2) (e) of the National Green Tribunal Act, 2010 by the applicant praying for settlement of dispute and pass appropriate orders for restitution of all public property including Gochar lands and Forest lands as well as standing trees and cutting of trees from the control of Respondent No. 11, 12 and 13 and agents, as well as restitution of green environment for Jhatiada Gram Panchayat for the survival of all domestic animals and also for children of Jhatiada Anganwadi centre. The contention of theApplicant is that the forest lands are being transferred illegallyand by corrupt manner by the officers of the Government not onlyto the tribal people in the forest but also others who are actuallynot entitled for such transfer of lands.

2. The Applicant has come forward with a case that in thename of MGNREGS, the people who have been allotted lands aremisusing and causing injury, danger and nuisance to the childrenthereby causing public nuisance as contemplated under Section268 of the Indian Penal Code. It is also his case that the District Administration, Mayurbhanj including the police are to takepreventive measures under the provisions of the CriminalProcedure Code in order to avoid this public nuisance. To supporthis contention, he would rely upon the judgment of the Hon'ble Supreme Court reported in (2011) 13SCC 335 wherein the Hon'ble Supreme Court has heavily come down against the public authorities in allowing the nuisance to be perpetuated. Theapplicant has ultimately stated that by virtue of this indiscriminate allotment of forest land, it is not only resulting in environmental degradation but also resulting in grabbing of theproperties by the persons who are not entitled in law. With theabove said grounds, the applicant has filed the presentapplication with the prayer as stated above.

3. It is also relevant to point out that the Respondent No. 4 (Divisional Forest Officer) in his affidavit has also clearly statedthat there is no destruction of public property in forest land anddamage so far and destruction of standing trees on the aforesaidland.

   "From the enquiry it revealed that all the above 10 personsagainst whom encroachment cases were booked and rest 21persons out of the list of 31 specific instances filed later by thesaid petitioner himself (copy enclosed), had been granted Forest Right Pattas under

Forest Right Act-2005. As per the provisions of the Forest Right Act, the right of these tribal persons who had been occupying the Forest lands as above, had been enquired and recommended by the Gram sabha (empowered under the Act) of the respective villages to the District Forest Right Committee through the Sub-Divisional Forest Right Committee for recognition of the traditional forest right of these tribal persons. Accordingly Forest Right Pattas (Shironama) were issued in their namesduring the year 2011 by the District Forest Right Committeeconstituted under the Act."

4. The respondent no. 5 (Superintendent of Police, Vigilance) who is responsible for preservation of lands has filed a reply. Inthe reply, he has in categoric terms stated that the application isnot only without any basis but is also with ulterior intention, hehas stated as follows:
    1. "There is no destruction of public property including Gochar and forest lands;

    2. Ten numbers of encroachment cases were booked againstunauthorized occupiers of forest lands. Assessment and penalty were imposed with order to vacate the land as per the provisions of the Odisha Prevention of Land Encroachment Act, 1962;

    3. Enquiry reveals that all the ten persons against whom theencroachment cases were booked had been granted Forest Right Pattas under the Forest Right Act, 2005. These persons were tribal persons who have a rightful claim over the forest lands andwere legally recognized as per the provisions of the Forest RightAct.

    4. No Government land can be sold by any private person in theregistration office and no such instance has ever come to thenotice of the office of the Tehsildar.

    5. With regard to the question of destroying the Gochar land near the Jhatiada Anganwadi centre, the same was also enquired into by the Revenue Inspector and it reveals that in the Palli Sabha a proposal was mooted by the villagers to excavate a tank under the MGNREGS (Mahatma Gandhi National Rural Employment Guarantee Scheme) Programme for employment generation of the local unemployed. The enquiry reveals that the Gram Panchayat stated that the proposal had been dropped and no permission hasbeen issued by the Tehsildar for the purpose. On enquiry it was found that no permission to carry any such project on the land will be permitted since the land where the proposed tank was to be constructed is adjacent to the ICDS (Integrated Child Development Scheme) Centre.

    6. No green trees or forest has been cut down/cleared for thispurpose.

    7. The reports further reveals that the Applicant in the two years oftenure of service of the Tehsildar at Rasgobindapur had never approached the Tehsildar bringing to his notice the concerns/allegations for redressal. A true copy of the letter of the Tehsildar dated 20.02.2014 is annexed herewith and marked as Annexure D."

5. Therefore, a reference to the said categorical reply filed by the responsible officers show and meets all the allegations of theapplicant. We have no hesitation to come to a conclusion that theprivate persons are not allotted any forest land and the trees havenot been degraded, apart from the fact that Gochar land has not been destroyed by anyone. In fact, the officer has clearly statedthat the public property including Gochar and forest land has notbeen destroyed at all. He would also state that ten number of tribals were issued pattas under the Forest Rights Act, 2005 andthese persons were the tribal persons who have right over theforest land originally claimed and legally recognized under the

Forest Rights Act, 2005.

6. In the light of the categorical stand taken by theresponsible officers, there is no reason for this Tribunal to suspect the conduct except to observe that the officers shall continue topreserve the forest land as it is in accordance with law.

7. However, the Learned counsel appearing for applicantwould vehemently contend that the statement of the police, namely, the respondent no. 5 (Superintendent of Police, Vigilance) as stated above is far from the truth. He has stated that as it is seen in the report of the Tehsildar dated 20.02.2014, it is not only ten persons who are stated to have encroached, against whom cases were booked but also 21 persons were also given forest land pattas as per the Forest Rights Act, 2005. Therefore, according tohim in the light of the Tehsildar's statement, the reply ofrespondent no. 5 should be ignored. He would also rely upon theprovisions of the Scheduled Tribes and other Traditional ForestDwellers (Recognition of Forest Rights) Act, 2006.

8. On reference to the said Act which is relied upon by thelearned counsel appearing for the applicant especially underSection 4 (3), it states as follows:

   4.3. "The recognition and vesting rights under this Act tothe forest dwelling Scheduled Tribes and to othertraditional forest dwellers in relation to any State orUnion territory in respect of forest land and theirhabitat shall be subject to the condition that suchScheduled Tribes or tribal communities or othertraditional forest dwellers had occupied forest landbefore the 13th day of December, 2005."

9. It is made very clear that the recognition of the forest rightand dwelling rights is not only for the tribals but also for the othertraditional forest dwellers.

10. If really the other 21 persons who are stated in the report of the Tehsildar are unauthorised persons and not forming partof the other traditional forest dwellers, it is for the applicant towork out his remedy in accordance with the Scheduled Tribes andother Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. Without availing any remedy available under this Act, the applicant has chosen to approach this Tribunal which in ourconsidered view is inappropriate.

11. Be that as it may, now that the relief claimed for by theapplicant has been clearly met by the responsible officer of theGovernment, respondent no. 4 & 5, in our view there is absolutelyno grievance subsisting for the application. The applicant cannot be expected to go beyond his pleadings. Accordingly, we are of theview that the applicant has no grievance as on date and the application is liable to be dismissed, however, with liberty to the applicant to work out his remedy in accordance with theScheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, in the event of granting of any forest patta to the persons who are unauthorised and arenot entitled. With above observations, the application stands dismissed.

12. During the course of the hearing, we have issued Bailable Warrants against Respondent no. 11 to 13 on a condition thatthey can be released by the arresting officer based on the securitygiven by them to the extent of Rs. 25000/-. It is seen that thesaid three respondents have been released on the security of Rs.25000/-. In view of the disposal of the main application, the bailable warrants issued by this Tribunal stand released.

13. If any amount is deposited by Respondent No. 11 to 13 byway of security for releasing on the bail, the said amount shall berefunded to the concerned persons forthwith and on productionof the copy of this order.

14. In such view of the matter no further orders are necessaryin this application and the application stands disposed of accordingly.

15. All the miscellaneous applications filed in this applicationare closed since the main application is disposed of.

Ajay Kumar Negi & Ors. vs. Union of India & Ors.

ORIGINAL APPLICATION NO. 183 (THC) OF 2013
NATIONAL GREEN TRIBUNAL, PRINCIPAL BENCH, NEW DELHI
07.07.2015
CORAM: SWATANTER KUMAR, J. (CHAIRPERSON) AND M.S. NAMBIAR, J. (JUDICIAL MEMBERS) WITH A.R. YOUSUF, AND BIKRAM SINGH SAJWAN

SUMMARY

This application was originally filed as a writ petition before the High Court of Himachal Pradesh, pointing out a range of statutory violations in the ongoing Tidong-I Hydro Electric Power Project (100 MW) in District Kinnaur of Himachal Pradesh. While challenging the environmental clearance and the forest clearance to the project, the petitioner also pointed out that there are numerous violations of the Panchayats (Extension to Scheduled Areas) Act, 2006 (PESA) and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA). The petition described the enormous damage to the environment, the river, and the forests in the region by the project proponent, in complete violation of the conditions of the clearances, including extensive damage to the endangered chilgoza trees, which are an important source of livelihood for the tribal people in this high-altitude region. It was also pointed out that the affected villages have never consented, except one village which gave an "NOC" which is contrary to law, and even subsequently the repeated complaints and representations of the villages made through their elected representatives, have been ignored.

The writ petition was transferred to the National Green Tribunal. The tribunal took a preliminary decision that it would only consider the prayers of the applicant relating to environmental damage, the violations under PESA and FRA being outside its scope.

In the detailed judgment below, the Tribunal has examined the extensive evidence of environmental damage, and also observed that it is not merely the project proponent which must take the responsibility, but it is also clear that the state authorities have demonstrated a casual supervisory approach, and it cannot be said they have discharged their duties with utmost care and caution.

However, with regard to the argument of the petitioners that the public hearing as part of the Environmental Impact Assessment (EIA) was not conducted in accordance with law, the Tribunal found no merit in this contention (see para 17).

The Tribunal set up an Expert Committee to visit the project site and submit a comprehensive report to the Tribunal, specifically stating whether the conditions of the forest clearance and the environmental clearance are being complied with, and recommending ameliorative measures. Specifically the Committee was asked to make recommendations regarding the adverse economic impact of the project on the affected villages. It also directed the project proponent to stop all construction activity until the inspection report is complete, and also directed it to pay Rs. 5 crores towards environmental conservation and compensation of losses resulting from damage to chilgoza trees.

EDITOR'S NOTE

At the time of writing, the Inspection report of the Expert Committee appointed by the Tribunal through this judgment had been submitted, and objections to the same had been filed by the Applicant. The matter is pending consideration of the Tribunal at the present time[80].

Although the matter has not reached a final conclusion, there are important learnings which emerge from these proceedings. We find there continues to be a certain diffidence in the National Green Tribunal to enter into issues which are outside the purview of its jurisdiction as laid down in the Schedule to the National Green Tribunal Act, 2010, even in a case such as this where the writ petition has been transferred to the NGT by order of the High Court.

This has far reaching consequences in cases where complex environmental, social and economic issues are intertwined, since the Tribunal finds itself restricted to examining the situation before it within the framework of a handful of statutes, while the constitutional framework and other statutory laws, such as those protecting the rights of Scheduled Tribes and forest dwellers, are not considered. This leads to a fragmentation of issues as well as of rights, which is not conducive to meeting the ends of justice in a holistic manner.

In the present case, we find that while approaching the High Court, the applicant had raised a plethora of interconnected issues, including under PESA and FRA. This would include the stringent provisions under both laws regarding consultation and decision-making of the Gram Sabhas before allowing such development projects to proceed. However, the NGT in deciding at an early stage not to enter into the protective statutes which directly relate to this issue at an early stage, subsequently examined the issue of "public hearing" within the narrow compass of the 1994 EIA notification. Having restricted itself in this manner, it is not surprising that the Tribunal then found the applicant's argument unconvincing.

It must be pointed out that the matter continues to remain pending, and there is nothing to prevent the NGT from expanding the ambit of its examination, as it has

[80] *Ajay Kumar Negi vs. Union of India & Ors.* M.A. Nos. 701, 1052 & 1084 of 2015 in Original Application No. 183 (THC) of 2013, National Green Tribunal, Principal Bench, New Delhi; pending.

done in other cases pending before it.

JUDGMENT

(the Judgment of the Tribunal was delivered by Swatanter Kumar, J. (Chairperson))

1. A Writ Petition (Civil Writ Petition No. 8171 of 2011) was filed before the High Court of Himachal Pradesh at Shimla with the following prayers:

> "i. That the respondent No. 3 may be directed to prepare comprehensive damage report caused to the forest land, trees and other forest wealth.
>
> ii. That the Memorandum of Understanding dated September 23, 2004 signed between the respondent state and respondent No. 8 may be quashed and set aside.
>
> iii. That the Environmental Clearance dated September 9, 2007 may be ordered to be quashed and set aside.
>
> iv. That the respondent No. 1 may be directed to cancel the Tidong-I Hydro Electric Project.
>
> v. That an inquiry may be ordered against the official department who forwarded the proposal for forest diversion to the respondent No. 1 in violation of the provisions Panchayat (Extension to Scheduled Areas) Act, 1996. That the Hon'ble Court may be pleased to monitor the inquiry.
>
> vi. That an inquiry may be ordered into the acts of omission and commission against the officer of the various department who failed to initiate appropriate action against the respondent No. 8 for executing the Tidong-I HEP in violation of the laws.
>
> vii. That the official and Board of Directors of the Company (respondent No. 8) responsible for execution of the Tidong-I HEP in Kinnaur in gross violation of the laws may be order to be prosecuted in accordance with law.
>
> viii. That applying the principle polluter pays petitioners and other who have suffered a perpetual loss of livelihood may be ordered to be compensated by the respondents.
>
> ix. That the entire record may be called for.
>
> x. That the petition may be allowed with exemplary costs and further any other relief deemed fit and proper may also be granted in favour of the petitioners."

2. We may concisely notice the facts as averred by the applicant limiting to the above prayers. A Memorandum of Understanding (for short, 'MoU') was signed between the State of Himachal Pradesh, respondent No. 2 and M/s. Nuziveedu Seeds Power Generation Pvt. Ltd., respondent No. 8 on 23rd September, 2004. The MoU stated that respondent No. 8 is desirous of setting up a Tidong - I Hydro Electric Power Project (100 MW) in District Kinnaur of Himachal Pradesh on River Tidong. This proposal was accepted by respondent No. 2 and they were also permitted to conduct an investigation under the MoU. The company was also required to submit a Detailed Project Report for establishing Techno Economic Viability within a period of eighteen months which the government was to examine and process within a maximum period of 90 days from the date of its

submission. Upon acceptance of the said Techno Economic Viability report and after being convinced that all statutory clearances could be obtained from the Competent Authorities, an Implementation Agreement was to be signed between the Company and the Government. Thereafter the company was to commence its project and it was to be allotted to the company for a period of 40 years from the date of commercial operation of the project. Various steps were taken by respondent No. 8 and finally on 28th July, 2006, Implementation Agreement was signed between the parties. On 15th March, 2007, the proposal for grant of Environmental Clearance was sent from State Government to the Ministry of Environment, Forest and Climate Change (for short 'MoEF') in reference to which Environmental Clearance was granted in favour of respondent No. 8 for the project in question on 7th September, 2007. Even Forest Clearance for the project was granted on 18th June, 2008. Undated representation of protest was also submitted by the petitioner against the illegal execution of the Tidong-HEP. Respondent No. 8 wrote a letter to the President, Gram Sabha, wherein the said respondent admitted that they had not obtained No Objection Certificate (for short 'NOC') from the Gram Sabha, Rispa. Still the respondent No. 8 constructed the road from Up-mohal of Ruwang, Gram Panchayat, Moorang. On 28th March, 2009 the Vice President of Gram Panchayat, Rispa passed a resolution to issue the NOC with the concurrence of the Gram Sabha to allow the project. On 10th June, 2009, the District Panchayat Officer, Kinnaur submitted an enquiry report with the remarks that the resolution passed by the Gram Sabha, Rispa was null & void and is in contradiction with the provisions of the Himachal Pradesh Panchayati Raj Act, 1994. On 8th May 2009, the Range Forest Officer, Morang at Akpa issued a fresh enumeration of 4815 trees likely to be damaged during execution of work in addition to the already sanctioned 1261 trees in the Forest Clearance. Against this, the petitioner submitted a representation to the official respondents bringing to their notice that large tracts of forests have been damaged by respondent No. 8 while constructing the road to the surge shaft site. The representation also stated that respondent No. 8 has violated terms and conditions of the Environmental Clearance & Forest Clearance granted to the respondent. There was huge damage caused to the Chilgoza trees which is an endangered species. On 2nd December, 2009, Range Forest Officer issued a letter to respondent No. 8 to stop the construction work in the compartment No. 192 and 193 till the final spot report is sent by the committee headed by the Additional District Magistrate, Pooh, failing which legal action was contemplated to be taken against respondent No. 8. However, despite such a direction, the Project Proponent continued with the construction activity. Additional District Magistrate, Pooh submitted a report to the Deputy Commissioner, Kinnaur intimating him about the gross violation of the forest laws in execution of Tidong-I HEP by respondent No. 8. He was thereafter directed by respondent No. 6 to ensure that respondent No. 8 does not take up any construction activity or developmental work till the time land is not given on lease to the company. A damage report was issued, quantifying the damage caused to the forest area to be Rs. 77,11,033/- and Rs. 5,82,420/- as damage bill for illegal dumping of muck. On 3rd April 2010, a representation was moved by the residents to the Chief Minister of Himachal Pradesh praying that the clearances should be revoked for the execution of the project as it is causing extensive damage to the forest and the residents of the village are being deprived of their right to livelihood. On 24th May, 2010 a meeting was held under the Chairmanship of the Additional District Magistrate, Pooh between the residents of the village Rispa and respondent No. 8. The respondent No. 8 therein took a stand that the work was executed strictly as per the MoU and various other permissions granted. At one point of time, respondent No. 8 partially complied with the directions by stopping the construction work in the areas where the residents of Gram Panchayat, Rispa protested. Again in June, 2011, the Project Proponent started construction work and caused extensive damage to the forest areas situated in the Gram Panchayat, Rispa. The primary grievance of the petitioner in their petition to the Chief Minister was related to the construction of the project in that area. It was further averred that the

construction work was being carried on and the construction debris were being dumped in violation of the permissions and were causing serious damage to the environment and ecology of the area. There was heavy blasting and the construction of road was done in an unscientific manner, the environment was getting polluted and causing loss of livelihood to the applicants as the Chilgoza trees, which fetch high income to the residents, were being damaged indiscriminately. The applicant had a specific grievance against respondent No. 8 that it had been carrying on construction activity despite orders from the authorities to stop the construction. Various reports had also indicated that construction activity was undertaken without any forethought on the part of the authorities and the proposal for forest diversion was prepared without keeping the topography of the project area in mind and this has resulted in massive damage to the forest area.

3. The petitioner inter alia primarily challenged the project on account that it was in violation to the environmental laws and was causing serious damage to the forest wealth. The Project Proponent has violated the conditions of the Environmental Clearance and Forest Clearance. It is the case of the applicant that the regional office of respondent No. 1 is under an obligation to monitor the project activity and that the proposal for diversion of forest land was prepared without proper application of mind. There were procedural and other legal infirmity committed by the authorities concerned by granting the Environmental Clearance and Forest Clearance. The applicants have made specific reference to the damage being caused to the Chilgoza trees. Firstly, the trees now being proposed to be felled has gone up to more than 4000 in number while the Forest Clearance granted to the Project Proponent was only for felling a maximum of 1261 trees. Furthermore in addition to the felling of trees, because of improper and indiscriminate dumping of construction material and debris, huge damage has been caused to the Chilgoza trees in adjoining forest land. According to the applicant even the Environmental Impact Assessment Report had specifically stated that out of 30 species of trees present in the project area of Tidong, Chilgoza is a rare species, which is economically very important. Therefore, an effort should be made to cause minimum damage to the Chilgoza trees. Scanning of the status of shrubs present in the project area it has been found that one shrub species (Zanthoxylumalatum) is of threatened category and eight species (Berberisaristata, B. lyceum, Desmodiumdichotomum, Hypericumchoisianum, H. lysimachioidessyn H. dyeri, Oleaferruginea, Rosa sericea and Salix hastate) of shrubs are rare. It was further felt that an Environmental Management Plan for the protection and rehabilitation of these rare and threatened species should be prepared. The loss of biomass was expected to affect an area of 39.2 ha and there would be wood loss also. For dealing with muck generation, it was stated that, nearly, 6,41,000 cum. muck is estimated to be generated from the project activities, out of which 45 per cent shall be used for backfill and other construction works. The remaining quantity of muck shall be disposed at pre-identified sites. The EIA report further provided that the disposal sites if not designed and managed properly may cause mass movement of soil, blocking the natural drainage and causing other sequential problems. There should be proper transportation of muck and construction material. According to the petitioner, there has been violation of these conditions thus, resulting in great damage to the environment and ecology and particularly to the Chilgoza trees. Different set of respondents have filed their replies to the Writ Petition No. 8171 of 2011.

4. Respondent No. 1 in its reply has taken the stand that it is the sole responsibility of the State to ensure compliance to the conditions incorporated in the Forest Clearance accorded by the Ministry. It is stated that during the consideration of the project on 16th July, 2007 by the Expert Appraisal Committee, it was noted that only one season data was collected while conducting Environment Impact Assessment (for short 'EIA') study and the Project Proponent was asked to submit three season data. Revised

information was provided by the Project Proponent on 7th August, 2007, which was again considered and finally grant of Environmental Clearance was recommended by EAC on 16th August, 2007. A project proposal for diversion of 39.0546 ha of the forest land in favour of the Project Proponent had been approved by the Northern Regional Office of the MoEF at Chandigarh under Forest Conservation Act, 1980 and accepted by the MoEF vide its letter dated 18th June, 2008. The petitioners were given an opportunity to raise objections in the public hearing held on 21st July, 2006 near diversion weir in village Lumber, Moorang and near powerhouse site in village Rispa, Moorang. The grant of the permission according to MoEF does not suffer from any infirmity and hence the application should be dismissed.

5. A joint reply had been filed on behalf of respondent No. 3, 4 & 7. They had taken a preliminary objection that National Green Tribunal Act, 2010 having been come into force and National Green Tribunal having been established under this Act, the Writ Petition is not maintainable and deserves to be dismissed. The forest land in question belongs to the State and for that reason no acquisition proceedings were undertaken and there is no law which provides for grant of compensation to right holders of forest in lieu of their rights, hence the petitioners are not liable to be compensated on that account.

   On merits, it is stated that the Government of India, MoEF vide letter dated 18th June, 2008 has accorded its approval that minimum number of trees and in any case not more than 1261 trees will be removed. As per the directions of Conservator of Forests, Rampur dated 22nd December, 2008, the Range Forest Officer, Moorang had reported that 4815 trees are likely to be damaged during the construction of road to surge shaft and conveyed to him on 15th July, 2009 and the Conservator of Forests, Rampur had stopped the construction of road in compartment No. 192 and 193. On 14th December, 2009 the Divisional Forest Officer, Forest Range at Akpa, requested the S.H.O., Police Station, Moorang to lodge an F.I.R in relation to the damage to the trees by and against the erring company. The Conservator of Forests, Rampur vide its endorsement dated 11th December, 2009 reported the details of damage caused to trees, illegal dumping and that damage realization from the erring company has been initiated. He reported that the user agency has damaged total 636 number of trees during the construction of road to the surge shaft and a bill for Rs. 1,70,62,733/- has been raised to user agency against which an amount of Rs. 77,11,033/- has been realized and a detailed report to this effect was also submitted. It has been stated that no extra trees except 1261 trees has been removed during said construction of the road. The trees likely to be damaged are expected to be 4815, out of which 636 has already been damaged. The department has to take an action on illegal dumping and penalize the user agency. It was stated that whenever the user agency was found violating the conditions of approval of Government of India, it was being penalized. The company had been permitted to remove not more than 1261 trees but the damage report for 636 trees damaged during the construction of the road has been issued out of total 4815 trees, which are likely to be damaged. Later Project Proponent was permitted to raise the construction, by the Principal Chief Conservator of Forests, Himachal Pradesh, vide its letter dated 3rd December, 2010 to the Conservator of Forests, Rampur and in compliance of which a Dy. Ranger was also deputed to monitor the construction of the project.

6. A separate reply was filed on behalf of respondent No. 5 and 6, who submitted that land acquisition proceedings were initiated in accordance with the provisions of the Land Acquisition Act, 1894 and there is no violation of the Scheduled Tribes and Other Traditional Forest Dwellers (Protection of rights) Act, 2006 that has come to the notice of said respondents. The complaints have been received from the Gram Panchayat, Rispa, on the basis of which, District Panchayat Officer, Kinnaur inquired the matter

and wherein it was reported that the company had agreed to compensate the affected villagers with Rs. Two crores, Rs. Three lakhs for repair and maintenance of Temple and installation of 20 street lights, the demands for which were put forth by the Gram Sabha, in return for Gram Sabha to withdraw all old demands. NOC had been issued by the Gram Panchayat, Moorang on 1st April, 2009 for the project in question. They have stated that as and when the complaints were received, an enquiry was conducted and reports were submitted to the Competent Authority. With the approval of the Government of India, land admeasuring 34-62-26 ha was released in favour of the company for construction of 100 MW Tidong Hydro Electric Project vide letter dated 12th October, 2010.

7. Respondent No. 8, filed a detailed reply before the High Court. It was submitted that the project envisaged the construction of an un-gated Spillway, gated Under-sluice, Head Regulator, Desilting Basins, Storage Reservoir and a 8.46 km long Head Race Tunnel (HRT) culminating in a surge shaft. A pressure shaft partly inclined and partly horizontal will convey the water to the Pelton Turbines to generate 100 MW of power in surface Power House. No displacement of human population is involved in acquisition of 3.2011 ha of private land and diversion of 39.0546 ha of forest land for construction of the project. Out of 11.80 kmstotal length of road involved for various project components, 9.8 kmshad been constructed leaving a balance 2 kmsroad to Adit-2 of HRT, which is at present under construction. The construction work of this project is progressing very well. The excavation for diversion channel is complete and part of concreting has been done. The construction of tunnel would start in full swing as major equipment for excavation like Boomer, Schaeff Loader & Crushing Plant as well as Batching & Mixing Plant and Alimak Raise Climber amounting to Rs. 10 crores had already been ordered and would be delivered shortly. Similarly, equipment costing to Rs. 10 crores has been deployed at site and Tidong-I was scheduled for commissioning in September, 2014. The cost of the project was as per the approved DPR in 2007, was above Rs. 543.15 crores and the company had already incurred an expenditure of about Rs. 168 crores and paid to the various Government Departments amounting to Rs. 27.71 crores. This amount had been paid on account of compensation, afforestation, catchment of area treatment work, cost of trees to various Government Departments for the development of damaged sites and payment to various Gram Panchayats. It was also stated by the respondent No. 8 that forest area has been demarcated by fixing Boundary Pillars and the enumerated 1261 trees standing thereon have been checked and enumerated by the department. The private land measuring 3.2011 ha was acquired and the possession was taken after the payment of compensation of Rs. 258.291 Lac to the interest holders through the Government. 39.0546 ha of forest land has been diverted by MoEF vide its letter dated 18th June, 2008. The consultations of Gram Sabha and Gram Panchayats were complied with and consent of Gram Sabha for conversion and diversion of forest land have been obtained. Gram Panchayat, Rispa and Tidong Valley Environment Conservation Development Samiti in its note dated 5th January, 2007 had put forth exorbitantly high demands for Rs. 6 crores for issuance of NOC and the respondent therein asked for justifications of the same vide letter dated 1st February, 2007 to which, the Gram Panchayat failed to furnish any details thereto. After numerous meetings, an agreement for issuance of NOC was signed with the Gram Panchayat on 30th March, 2009, wherein the main demand of Rs. 2 crores was accepted and accordingly NOC was issued by the Gram Panchayat, Rispa on 5th April, 2009. A Social Impact Assessment study was required to be carried out in the project affected area, which involved involuntary displacement of 400 or more family enmass in plain area, 200 or more family enmass in tribal hilly area as per clause 4.1 of National R&R Policy, 2007 but since the present project involved only 29 project affected families, none of them were displaced or adversely affected and therefore, the Social Impact Assessment study was not applicable for the project. The R&R Plan was submitted to the Government of Himachal Pradesh on 17th March, 2007

and the same was received back with certain objections in August, 2007. They were again reported to the Government on 22nd March, 2010 and finally on 28th June, 2011, the approval of which is still awaited. Public hearing for the project was fixed on 21st July, 2006 in village Rispa but the Gram Panchayat boycotted the hearing. The Project Proponent made a payment of Rs. 1.68 crores towards the cost of 1261 trees to the Forest Department on August 12, 2008. The company claims that it was constrained to take up the construction on 21st June, 2009 of the approach road to surge shaft in the portions where there were no trees and consequently some unavoidable damage to adjoining trees occurred due to very tough and steep terrain for which the Project Proponent has already deposited an amount of Rs. 83.934 Lakhs against six damage bills so far raised by the Forest Department. An FIR was filed on 7th January, 2010 stating damage to another 217 trees mainly relating to construction of top most flank of road, after which Project Proponent stopped construction activity on 28th October, 2009 and the damage report thereto, has still not been supplied to the answering respondent. It was further averred that, a massive landslide took place from the region above top most flank of the road on 27th September, 2009 damaging about 50m portion of constructed road as well as the trees down below and the rolling boulders had hit the opposite bank of Tidong Khad and completely crushed a tractor-trolley with narrow escape for three laborers sleeping inside a hutment. After a lot of persuasion of Government/Forest Department levels work got resumed on 9th December, 2010 under the directions of Principal Chief Conservator of Forests, Himachal Pradesh vide his letter dated 3rd December, 2010. The Project Proponent has also averred that it has undertaken almost all precautions by resorting to well controlled blasting under the supervision of the Deputy Ranger deputed by the Forest Department and excavated muck is being properly disposed at the dumping sites located at the foothill by means of excavator and tippers. At best, 460 trees will be damaged which is even less than 10 per cent of the estimated figure of 4815 trees projected by the forest department, as well as wrongly contested by the petitioners, which according to the Project Proponent is totally baseless. This respondent denied the receipt of the letter dated 3rd April, 2010 from the Environment and Forest Conservation Samiti, Rispa and also denied that it had violated the existing laws or the conditions of Environmental Clearance & Forest Clearance. The muck was being dumped properly at the designated dumping sites mechanically. Further according to the Project Proponent, the Gram Panchayat had already been given more than adequate benefits i.e. demand of Rs. 2 crores each to the Gram Panchayat, Rispa and Thangi and another sum of Rs. 1 Crore to Gram Panchayat, Moorang which had already been paid by the Project Proponent in three instalments, compensation for private land acquired had been paid in 2009, preference in employment was also given to the persons of project affected Panchayats by employing 53 persons. Preference in awarding works including PRW's for main work was also given to the local contractors of the project affected Panchayats and preference to locals had already been given in various activities.

8. Respondent No. 9 - Himachal Pradesh State Pollution Control Board (HPPCB) has also filed a separate reply. The Board has not dealt with the major part of the petition but had primarily confined its reply to the averments of pollution resulting from the muck storage and transportation and that due public hearing was provided to the applicants herein to enable them to raise their objections. According to the Board, the muck disposal in proper protected dumping areas has to be ensured and in this regard it has directed adequate protection measures and this is being monitored by the Board. The muck dumping sites have been identified and earmarked by the Forest Department. The Forest Clearance is also subject to stipulation for proper muck disposal at the Designated Sites. The concerned Regional Officer of the State Board monitors that adequate protection measures are provided and the same is being monitored through physical inspection and pictorial power-point presentation based on photo monitoring and whenever any violation is observed the same is communicated to the

Project Proponent and appropriate action is taken. So far as public hearing is concerned, according to the State Board it had conducted public hearing on 21st July, 2006 as per the provisions of the Notification of MoEF, Govt. of India, No. SO-318(E) dated 10th April 1997, at Lumber village, Tehsil Moorang, District Kinnaur and near village Rispa for the proposed/upcoming respondent project. It was to integrate the public suggestions, views, comments and objections from the interested persons on the proposal with a view to have maximum public participation. The notices for public hearing were also published in two Hindi and two English newspapers. It is denied that no efforts were made to bring affected people on board. The Rispa Panchayat, besides others, was specifically informed vide letter dated 19th June, 2006 about the public hearing that was being organized on 21st July, 2006. Therefore according to the Board, the petitioners had ample opportunity to forward their objections and views at the time of public hearing. Vide letter dated 1st September, 2006, the public suggestions, views, comments and objections recorded during public hearing were sent to the State Government for taking further action. The recommendations of SEIAA and Monitoring Committee were forwarded by the State Government to the MoEF vide letter dated 15th March, 2007 for consideration of Environmental Clearance.

It has been specifically denied that respondent Board has not carried its responsibilities and duties in accordance with the prescribed procedure in terms of the Notification of 1994 in so far as it has discharged its obligation to conduct public hearing in accordance to the Notification. Lastly, it is submitted that the project sites near intake and powerhouse sites were monitored and dust level and SPM (Suspended Particulate Matter) were found within the prescribed limit. The alleged damage to the agricultural and horticulture produce was to be looked into and assessed by the Committee constituted by Deputy Commissioner, Kinnaur for payment of compensation. The Pollution Control Board had also filed certain photographs showing the dumping sites and the site of the project in question.

9. The applicant has filed rejoinder to all the replies filed by the respective respondents. In the rejoinder, the applicant inter alia has raised the specific plea that the execution of the project is illegal and in violation of the mandatory conditions. Firstly, the condition requires that the debris will not be allowed to roll down the slopes of the mountains and secondly, that no damage would be caused to the adjoining forests. From the documents on record and even pleadings of the parties, it is clear that both these conditions have been violated. Respondent No. 8 has used heavy and unscientific blasting and has rolled the debris along with boulders downhill, causing extensive damage to the trees in the slope of the mountains and no details have been supplied in relation to the settlement of community or individual claims required to be settled under the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Tribes) Act 2006. The respondents have not provided adequate mechanism to prevent the ecological damage and for compensation and afforestation of the anticipated damage of 4815 trees, in addition to the trees mentioned in the Forest Clearance. It is also averred by the applicant that majority of the land required for surface activity is situated in the protected forest and that from the documents placed on record, it is clear that respondent Nos. 3, 4, 7 were aware of the facts that the trees likely to be damaged in execution will be much more than the number of trees enumerated. Yet, they still allowed the user agency to continue with the illegal execution of the project. The forest wealth lost or damaged includes rare and endangered trees of Pinusgerardiana also known as Chilgoza pine which is a pine native to the North Western Himalaya and grows at elevations between 1800-3350 meters. According to the applicant, the EIA report of the project prepared by Rites Ltd. states that 39.2 hectares of forest land is required by the Project Proponent and that on an average nearly 355 trees per hectare of the land will be affected. It would mean that 13,916 trees would be damaged during the execution of the activities of the

project in the forest area. Whereas, the Forest Clearance only required 1261 trees to be felled and there is no explanation as to the difference in the project requirement and the clearance granted, which also explains the resultant damage to the trees during the execution and construction of the project, to the tune of 5000 to 6000 trees. Since NOC was not obtained according to the provisions of the law therefore, they are invalid and therefore, the agreement dated 5th January, 2007 between the Gram Panchayat, Rispa and Project Proponent is also invalid. According to the applicant, the Project Proponent had even submitted wrong information in order to secure various clearances. It is further averred that damage to 50 trees in a 2 km stretch as stated by respondent No. 8 in his reply, is an ample proof of lack of application of mind and likely damage to ecology. There was complete lack of comprehensive planning and foresight. The EIA/EMP were defective and even the land of the site was handed over by the State without executing proper conveyance deed. It is further alleged that various violations which were committed by the Project Proponent were also noticed by the One Man Committee in furtherance to the direction passed in Civil Writ Petition No. 24 of 2009 before the Hon'ble High Court of Himachal Pradesh.

10. We may notice here that the Project Proponent had filed an M.A. No. 707 of 2013 for placing on record before the Tribunal, subsequent facts and developments as had happened after the transfer of the Writ Petition No. 8171 of 2011 to the Tribunal, which was allowed.

11. We may notice here that M.A. No. 191 of 2014, was filed by the applicants before us for appointing a Commission to conduct local investigation for the purpose of enumeration/ assessment of the loss of the forest wealth as well as impacts of the loss and damage to the livelihood of the locals and to suggest measures for restoration of damage to the ecology and to mitigate the losses suffered by the local residents.

    To this, the Project Proponent has filed a reply affidavit on 20th August, 2014. In his reply the Project Proponent has stated that during the construction of the approach road to the surge shaft and Adit-I, a few trees in the forest land adjacent to the road alignment and on valley side got damaged inadvertently due to rolling down of the debris from the construction activity. Then the company had stopped construction activity for a year. It is only after taking necessary precaution to mitigate loss of trees and any further damage to environment, that it had started the work again. A representation had been made by the Kalyan Samithi to the Deputy Commissioner, Kinnaur on 15th July, 2011, and a Committee was constituted therein to assess and evaluate the number of damaged trees and loss of income. After conducting extensive survey and inspections on 18th & 21st July, 2011 and 11th August, 2011, the Committee submitted a final report on 28th August, 2012. After due negotiations between both the parties, the Company formally vide its letter dated 30th October, 2012 agreed to compensate the loss of income for 40 years as per the accepted productivity figure for fully damaged trees on an annual basis. This affidavit has a clear admission for damage to the trees and loss to ecology by the Project Proponent.

12. Another M.A. being M.A. No. 1056 of 2013 had also been filed by the applicant for placing additional documents on record with respect to Writ Petition No. (PIL) 24 of 2009 which was taken up by the Hon'ble High Court of Shimla, suo moto, acting on a news item published in Indian Express Newspaper in August, 2009. The news item pertain to damage to large tracts of forests/trees attributable to the construction of number of Hydro Electric Projects in the State of Himachal Pradesh.

    We may notice here that M.A. No. 707 and M.A. No. 1056 were allowed in as much as the additional documents were permitted to be placed on record and arguments

heard with reference to such documents. In fact, the order of the Tribunal dated 3rd December, 2014 dealt with these applications. Consequently, both M.A.'s 707 and 1056 of 1056 stands allowed. However, M.A. No. 191 of 2014, application for appointing a local Commissioner and for certain other directions does not survive for separate consideration in view of the operative part of this judgment. Resultantly, M.A. No. 191 of 2014 is disposed of as having become infructuous.

13. Having noticed the contents of the case advanced by the respective parties before us in their pleadings, and before we deliberate upon the issues involved on merits, we may notice that this Tribunal stricto sensu would have jurisdiction to grant or refuse the prayer Nos. (i), (iii) and (viii) made by the applicant. The other prayers would fall beyond the jurisdiction of the Tribunal. When the proceedings were pending in Writ Petition No. 8171 of 2011 before the Hon'ble High Court, the parties were directed to complete their pleadings. Upon completion of such pleadings, this Writ Petition No. 8171 of 2011 came to be transferred to this Tribunal vide order dated 15th July, 2013 and upon transfer was registered as Original Application No. 183 of 2013.

14. First and foremost, we should notice one important fact that the Hon'ble High Court of Himachal Pradesh taking note of the news article titled "Legalised plunder: Hydel projects erase 10 lakh green trees in HP" published in Indian Express on 18th November, 2009, suo moto issued notice to the State of Himachal Pradesh and other concerned authorities. In this Writ Petition, it was noticed that various important environmental issues have arisen and one such major issue amongst them is that most of the projects have not made adequate provisions for discharging of 15% of the mean annual flow as environmental flow into natural bed of the rivers/streams and therefore, the penalty for deviation from this requirement should be very high. There should be compensatory afforestation at least 10 times of the number of trees damaged and the Project Proponent should be directed to pay maintenance of this new plantation for at least five years. The Court also noticed the recommendations of the Committee appointed by it in the Writ Petition No. 24/2009 that the present practice of indiscriminately allotting hydel projects all over the State by the State Government without any consideration of their larger impacts on the environment - which mere EIAs/EMPs cannot address - is short sighted, unplanned and could result in serious depletion of the State's natural resources in the long run. After noticing various observations of the Committee, the court also observed that on some rivers, one project after other is being set up without any linear distance left between the tail race of one project and intake of the next. While accepting the recommendations of the Committee, the Court further directed the learned Advocate General and Assistant Solicitor General to ensure that appropriate steps are taken by the concerned authorities and it also issued notice to the newly added respondents, viz. CAMPA, and other authorities of the State Government and MoEF. It is worth mentioning here that the project in question was a subject matter of that Writ Petition. Various other orders were passed in this Writ Petition No. 24/2009 on different dates and the Hon'ble High Court vide its order dated 22nd June, 2012 even noticed that very little attention is paid to the negative economic impacts of the projects as opposed to the minimum benefit of the project. It again emphasized the need for wider impact studies and to consider the other adverse effects on the social lifestyle of the people of the project affected area. On 20th May, 2013, the Hon'ble High Court disposed of the Writ Petition by passing the following order:

> "In view of the latest affidavit filed by the Chief Secretary dated 2nd April, 2013, coupled with the assurance given by the learned Advocate General across the Bar that the State Government would take all necessary measures to take the recommendation made by the one man Committee forward after due examination by the board based Committee of experts constituted by the State Government, nothing more requires to be done in this petition. The assurance given by the State

through the learned Advocate General is accepted. The petition is disposed of. The Court expresses a word of gratitude for the able assistance given by the learned amicus curiae. 2. The pending applications, if any, are also disposed of."

15. At this stage, it will be relevant to refer to the findings recorded in the report of the One Man Committee which was directed to monitor environmental compliance of various hydel projects in the State of Himachal Pradesh. Tidong Hydroelectric Project being one of the projects for consideration of the Hon'ble High Court, One Man Committee had submitted the following observations about the project:

"Tidong-I (100MW), Kinnaur

This project, situated in the remote Charang khad 10 kms Beyond Thangi, was visited on 17.06.2010. Its environment clearance was received on 7.9.2007 and forest clearance on 18.6.2008. The total forest land approved for diversion is 39.05 ha., not including the land for the transmission line, which case is yet to be finalized. The total number of trees to be felled/removed is 1261, of which as many as 807 fall in the alignment of the road to the surge-shaft. 751 trees belong to the Chilgoza species which is now almost an endangered species in this district, the only area in the state where this tree is found.

The project is compliant in making timely and full payment of the various amounts required to be deposited under various clearances. It has deposited the entire amounts for CAT Plans, CA, NPV, Cost of trees, and reclamation of dumping sites totaling Rs. 14.78 crore. Since this money was deposited in CAMPA it was not actually available for spending till last year hence no expenditure has been incurred either under CAT plan or CA heads. The forest deptt. has made no provision for expenditure in the current year also. This is surprising and not acceptable as funds from CAMPA have now started flowing to the state and Rs. 36.00 crore has been released to the state forest deptt. The Principal CCF should review this matter and provide at least Rs. 25.00 lakhs for CA and Rs. 50.00 lakhs under CAT Plan in the current year keeping in view the fact that the project is slated for completion in 2013.

Our physical inspection of the whole project site starting from the intake to the powerhouse has revealed that there is a major problem of muck dumping in this project. The unscientific manner in which excavation and cutting is being done on the surge shaft road as well as the road to Adit-I, and the callous manner in which the resultant debris is being dumped in the forest areas, is taking a huge toll of trees, and will ultimately lead to soil erosion on a large scale. (It is surprising that this has not been noted, let alone acted upon by either the Regional Office of MoEF or the State PCB during their inspection). According to the project estimates the total quantity of muck to be generated will be 4.14 lakh cu.m. of this 1.43 lakh cu.m. is expected to be utilized and 2.70 lakh cu.m. to be dumped in 4 DSs. Of this 3 DSs have been developed so far and are in use, while the fourth DS (near the power house) shall be developed later. Our inspection of the three DSs revealed that none of them have adequate protection structures-they all need to have proper RCtoe walls of sufficient height and also have to be developed in benches with inter mediate retaining walls. The debris from the cutting of road form intake to Adit-I has also been rolled down to the stream bed indiscriminately, and even where a dumping site has been developed (DS-2) the protection provided is very skeletal and totally incapable of preventing spillage into the stream.

The much bigger problem which we observed, however, is the unscientific construction of the two roads and the indiscriminate rolling down of the huge quantities of debris leading to damage to uprooting of hundreds of trees outside the

diverted areas. The road to Adit-I has been completed, and 1.8 km of the 6.2 km surge shaft road has been carved out. In the process 590 additional trees not approved for felling have been irretrievably damaged. The DFO Kinnaur has taken cognizance of this gross violation and has raised six damage reports against the company levying a penalty of 83.39 lakhs (which has been paid), and has also registered an FIR on 7.1.2010 against the management in the court of the CJM Kinnaur under relevant provisions of the Indian Forest Act. He has also stopped any further construction of the surge shaft road on 2.12.2009. This last has been done primarily because an assessment carried out by his staff has resulted in the enumeration of an additional 4815 trees which are likely to be damaged if construction of the surge shaft road continues. Of this number as many as 2803 are Chilgoza trees which, as already noted, are highly endangered.

The issue confronting the project and the state govt. here is one of massive environmental implications. The damage already caused by road cutting, and the even more damage likely to be caused in the future, is environmentally unsustainable and unacceptable. To recapitulate, the project has approval to fell 1261 trees (in itself a very large number). It has already illegally destroyed 590 more trees and in the assessment of the deptt. will inevitably destroy another 4815 trees; in other words it shall destroy 5405 more trees than what has been approved-400% more than the sanctioned number. This makes a mockery of the original DPR of the project or the FCA application. It also raises the question whether the deliberately understand the number of trees in their application in order to get FCA approval-had the govt. or the forest deptt. been aware that the number of tees involved was 6666 rather than 1261 it may not have given approval for the project at all.

I have not slightest doubt that this kind of terrain-hardly any top soil, loose soil cover, extremely steep slopes-cannot sustain the loss of tree cover on such a massive scale. Even if the assessment of the forest deptt. is reduced by fifty percent it is still sustainable. In the normal course the committee would have recommended that the approval for the project should be reviewed with a view to cancelling it; however, this may not be practical considering the work already done on it and the investment already made (about Rs. 50.00 crore according to the GM of the project). Therefore, the committee instead recommends that (a) approval for the surge shaft road (and the forest land and trees diverted for it) should be withdrawn as the damage it is causing and will cause is just too massive; and (b) the company should be directed to install a rope-way instead for accessing the surge shaft and HRT. This is already being done by some hydel projects in the state and is technically feasible. It will probably delay the project commissioning by a few months and push up costs, but this is a small price to pay for preserving what remains of this pristine and fragile environment. And in any case the project developers are themselves responsible for this situation by not preparing a proper DPR and by adopting environmentally hostile road cutting practices."

16. It appears that despite the above recommendations, the authorities did not consider it appropriate to enforce the condition of ropeway as suggested by the Committee and permitted the industry to construct the road for carriage of material or muck. There is nothing on record before us to show that any of the recommendations of the Committee had been complied with. Be that as it may, the fact of the matter is that this Project Proponent was permitted to carry on its construction and allied activities. It now has progressed considerably. The reply affidavit has been filed by the respondent No. 8 in 2011 and now further period of more than 4 years have gone by, during which the construction of the project has substantially progressed. Respondent No. 8 claims that the recommendations made by the One Man Committee have been taken care

of. The Project Proponent filed a further affidavit being M.A. No. 707 of 2013, before the Tribunal stating the subsequent events. They are as follows:

"The status of the progress of the Tidong Hydroelectric Project (100 MW) is as under:

a. At Diversion intake site where Spillway, Undersluices, Intake Structure, Desilting Chamber and Reservoir are located, excavation of 270,000 cum has been finished and concreting of 13,500 cum has been done in Diversion Channel, Spillway &Undersluices.

b. Out of the total length of 8.54 km of Head Race Tunnel, 3.6 km has already been excavated.

c. 800 in of Pressure Shaft out of the total length of 1176 in has also been excavated.

d. In Power House complex, excavation of 86,000 cum has been completed and now concreting is in progress. 2250 cum out of 9600 cum of concreting has also been done.

e. The Transmission line work is in progress and detailed survey has already been completed.

f. Against the approved cost of Rs. 543.15 crores as per the detailed project report, the expenditure till the end of June, 2013 is Rs. 332.64 crores.

g. The cost of the Project is, however under revision due to the delays that have occurred in its execution."

17. In relation to the prayers for setting aside the Forest Clearance and Environment Clearance, the plea raised by the applicant is that there was no public hearing done, no application of mind in granting clearance to the project and incorrect information being furnished by the Project Proponent to the authorities in relation to the project. So far as the question of public hearing is concerned, it is the mandate of the Notification of 1994. According to the Pollution Control Board, it had issued due notice for holding of the public hearing which was published even in the newspapers. According to the District Administration, a letter in that behalf had also been issued, requiring the concerned Gram Panchayat to participate in the public consultation and raise their views and objections for establishment of the project. This hearing was proposed to be held on 21st July, 2006. However, particularly, the Gram Panchayat, Rispa had boycotted the public hearing. This has also been specifically averred by the respondents in their reply which has been admitted in the rejoinder filed by the applicant. Thus, there is no merit in this contention of the applicants. Furthermore, the application is entirely vague in relation to how the authorities have not applied their mind while granting Environmental Clearance and Forest Clearance. It is not disputable and authorities have also pleaded that the procedure contemplated under the Notification of 1998 as issued under the Forest (Conservation) Act, 1980 has been followed and appropriate permission with due safeguards has been issued. Similarly, no particulars have been stated or alleged relating to incorrect or false information being furnished by the Project Proponent to the authorities concerned. There appears to be some ambiguity in relation to the trees likely to be affected; the trees which are required to be felled for the purposes of the project in the forest land (their number being 1261) and the trees which are likely to be damaged because of the project activity (their number being 4815). According to the Project Proponent only 398 trees have been damaged. The Department anticipated damage to 4815 trees while according to the Project Proponent, not more than 1261 trees are likely to be damaged because of the construction activity of the project. There appears to be some drawback on the part of the concerned authorities

in clearly visualizing this aspect and providing due safeguards and cautions that the Project Proponent is required to take and what remedial measures are required to be taken for remedying and restituting the damage done to the environment and ecology. Similarly, there seems to be an error on the part of the authorities in exactly contemplating the extent of muck that would be generated from the tunnelling, making of the road and other construction activities at the site. They have also not exactly dealt with the carriage of this muck/construction debris, its transportation, dumping and maintenance thereof. Photographs have been placed on record to show that these dumping sites are not being adequately maintained by the Project Proponent. These two defects which are post the grant of the Environmental Clearance and the Forest Clearance would not vitiate per se, the grant of Environmental Clearance to the Project Proponent, particularly in light of the fact that subsequently work of the project has already been completed incurring huge costs and largely due to the fact that damage to environment and ecology has already been done. What actually is required at this stage are remedial and restitution steps which should be taken by the concerned authorities, the State Government and the Project Proponent for completely preventing any further damage to the environment, ecology and forest area and also to the lives of the people at the project site. The Project Proponent should be called upon to pay all such amount that would be needed for such purpose.

18. Now, we must examine the worse environmental and ecological impacts that have appeared during the progress of the project and post grant of Environmental Clearance. It appears that these impacts and there extent probably was overlooked by concerned authorities at the initial stage. Either way, the damage to the ecology, particularly upon the forest area comprising of rare and endangered species of Chilgoza trees and on the livelihood of the people living in the vicinity of the project sites, cannot be disputed and is quite serious. Firstly, looking into the damage to the trees, it cannot be disputed that Chilgoza pine is a rare species and is facing a threat to its existence even in that area. It is a plant which comes at a height of 1800 - 3350 meters and takes years to grow. The Forest Department had given Forest Clearance to the Project Proponent for felling 1261 trees in total and that too with the condition of afforestation of ten times the felled trees. There is no evidence before us that this condition has been complied with by the Project Proponent. The Department seems to be quite ignorant of compliance to the conditions of the Forest Clearance and to add fuel to the fire, to the indiscriminate dumping of muck and boulders down the slope as a consequence of heavy blasting which has damaged large number of trees of the adjoining forest. According to the Project Proponent, it has only damaged 398 trees. This figure does not find support from the official respondents. According to the official respondents, the number of trees likely to face the damage as a result of construction of the project and its allied activities, would be near about 4815, which is clear from the enumeration done by Range Forest Officer, Moorang. According to the applicant more than 13000 Chilgoza trees and other rare species trees are likely to be destroyed and/or damaged as is also evident from the EIA report of the project. The case of the applicant to some extent finds support from the admission of the Project Proponent as well as by the official respondents. It is admitted on record that on various occasions, penalty and remedies have been imposed upon the Project Proponent for damaging the trees and the ecology of the area. On some occasions, amounts were also paid for the damage bills raised by the concerned authorities. According to the Project Proponent, he has paid a sum of Rs. 83.31 Lakh on this account. Other authorities have also stated that damage has been caused due to non-maintenance of proper dumping sites and rolling down of the boulders, which obviously have been thrown into the flood plain as well as in the Tidong river.

19. Another serious aspect is with regard to the damage being done by construction of the

road, as already noticed by the One Man Committee which recommended before the Hon'ble High Court the construction of a ropeway for the remaining part of the project for reducing the damage to the ecology and environment by construction of roads, which would include felling and damaging the trees. Sadly, it found no favour from the State Authorities and the Project Proponent continued with the construction of the road with the consent of the authorities concerned. Firstly, we fail to understand why the concerned authorities did not alter or change the conditions of the Environmental Clearance and even of the Forest Clearance for that matter, particularly in view of the changed circumstances.

Referring to the contents of the One Man Committee report which we have already reproduced above, it has been clearly pointed out that out of 1261 trees that have been permitted to be felled; nearly 751 trees belong to the Chilgoza species, which are endangered species of trees. The report also refers to unscientific manner in which the excavation work is being done on the road to the surge shaft as well as road to Adit-I and the callous manner in which the resultant debris is being dumped in the forest areas which has taken a huge toll on trees. Debris from cutting of the road from the intake of Adit-I has also being rolled down to the stream bed indiscriminately and even at DS-2 the protection provided is very skeletal and totally incapable of preventing spillage into the stream. The Project Proponent had been asked to stop further construction work of the surge shaft road on 2nd December, 2009, which was for the reason that there was enumeration of additional 4815 trees which were likely to be damaged (out of which 2803 trees were Chilgoza trees), if the constructions of surge shaft road continued. An important feature of the ecological damage that has been referred to by the One Man Committee is that keeping in view the kind of the terrain-hardly any top soil, loose soil cover, extremely steep slopes - it cannot sustain the loss of tree cover on such a massive scale. Even if the assessment of the Forest Department is reduced by fifty percent, it is still unsustainable. None of the 3 DSs have adequate protection structures-they all need to have proper RCtoe walls of sufficient height and also have to be developed in benches with intermediate retaining walls. The Committee besides pointing out the defects, made general recommendations, particularly made comments in relation to basin-wide EIA study for all river basins where hydroelectric projects were likely to come up and some minimum riparian distance (at least 5 km) to be maintained between the projects.

The above details of the One Man Committee report demonstrates beyond doubt that there have been serious adverse impacts upon the environment and ecology, particularly upon the Chilgoza trees which are endangered species of trees. It cannot be disputed that plantation and growing of Chilgoza trees is a difficult and time consuming process.

20. The above state of affairs is largely attributable to the Project Proponent and the callousness adopted by the Company in carrying on its various activities. It can also not be said that the regulatory authority and the supervising authority over the project, including the various departments of the Government of Himachal Pradesh, have discharged their duties and responsibilities with utmost care, caution and sincerity. The casual supervisory approach of the authorities is evident from the records before the Tribunal. It was expected of the regulatory authority to impose much more severe conditions in the interest of environment and ecology and ensure that no damage was done, particularly from the manner and method in which the construction activity of the project was going on. Having stopped the work on 2nd December, 2009, the authorities should have ensured that all precautionary steps have been taken by the Project Proponent before permitting it to restart its construction activity. Wherever the authorities opted to impose some conditions, they were more on paper rather than

on practice at the project site. It is an eco-sensitive area at a quite high altitude and this area requires greater attention of the authorities concerned and more stringent supervisory roles. A road is not built in days or weeks. It is unquestionable before us that the cutting of hills for the purpose of construction of road caused serious damage to the ecology and particularly to the Chilgoza trees. Where 1261 trees were required to be felled for the entire project for which the Forest Clearance was granted, there, the anticipated damage in addition to such trees was 4815 (i.e. nearly four times). For repeated faults and damage to the trees and to the ecology, the company has been directed to pay penalties and damages from time to time. On most of the occasions payments had even been made by the Company. We really wonder if the penalties imposed by the authorities upon the respondent company are sufficient for the damage caused and for restoration. A very serious question arises is whether the damage caused is at all capable of being restored or restituted. The top soil having been widely eroded all over the hill, whether plantation of trees particularly Chilgoza pine trees is at all possible now? Destruction of nature and ecology at this level is easy but restoration thereof is not only difficult but in most cases could even be improbable. As we have already noticed, substantial damage has already been done, huge amount of money have been spent on the projects and major construction activity including concretization and construction of tunnels are more or less complete. In these circumstances, it would be very difficult for the Tribunal to arrive at the conclusion that the Environmental Clearance granted to the project should be recalled and the project activity be closed. It obviously would lead to tremendous wastage of public money, while damage to the nature and ecology will still persist. Thus, applying the Principle of Sustainable Development and Precautionary Principle, we have to adopt a balanced approach. In the facts of the present case, the relevancy of the Precautionary Principle has been considerably reduced. Major part of the project has already come up and serious environmental damage has already occurred but even at this stage, it is an appropriate case where we should bring into service the Precautionary Principle to grant completion of the remaining work of the project, as to a larger extent, it is a case of fait accompli. Precautionary Principle is a pro-active method of dealing with the environment, based on the idea that if costs of the current activities are uncertain but are potentially both high and irreversible, then society should take action before the uncertainty is resolved. The intent is to avert major environmental problems before the most serious consequences and side effects would become obvious. It works as "do-no-harm" principle stricto sensu. It is difficult for the society to carry on development activity, which is one of its essential needs, without some kind of damage to nature environment and ecology. The Precautionary Principle is a tool for making better health and environmental decisions. It aims to prevent harm from the outset rather than manage it after the fact has occurred. In common language, this means "better safe than sorry". The Precautionary Principle denotes a duty to prevent harm, when it is within our power to do so. Even the Rio-declaration from the 1992 United Nations Conference on Environment and Development in its declaration states:

> "There are two widely referred definitions of the Precautionary Principle. One of the most important expressions of the Precautionary Principle internationally is in the Rio Declaration from the 1992 United Nations Conference on Environment and Development, also known as Agenda 21. The declaration stated: 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation'.
>
> 'Precautionary Principle' plays a significant role in determining whether developmental process is sustainable or not. 'Precautionary principle' underlies sustainable development which requires that the developmental activity must be

stopped and prevented if it causes serious and irreversible environmental damage. The emergence of Precautionary Principle marks a shift in the international environmental jurisprudence- a shift from assimilative capacity principle to Precautionary Principle.

Assimilative Capacity to Precautionary Principle - A Shift: The uncertainty of scientific proof and its changing frontiers from time to time have led to great changes in the environmental concepts during the period between the Stockholm Conference of 1972 and the Rio Conference of 1992. A basic shift to the approach to environmental protection occurred initially between 1972 and 1982. Earlier the concept was based on the assimilative capacity rule as revealed from Principle 6 of the Stockholm Declaration. So, Precautionary Principle is a principle which ensures that a substance or activity posing threat to the environment is prevented from adversely affecting it, even if there is no conclusive scientific proof lining that particular substance or activity to the environmental damage. The words 'substance' and 'activity' imply substance or activity introduced as a result of human intervention."

21. Under environmental jurisprudence, the Precautionary Principle is statutorily recognized. Section 20 of the National Green Tribunal Act, 2010, obliges the Tribunal to decide cases and settle disputes while applying the three well known principles of environmental jurisprudence i.e. Sustainable Development, Precautionary Principle and Polluter Pays Principle. As a result thereof, to all environmental laws in India these principles would have to be unavoidably applied. Restitution and restoration again as part of the environmental jurisprudence would be applied, in aid to the Precautionary Principle where the circumstances, like the present case, demands. 'Restitution' is an act of making good or giving the equivalent for any loss, damage or injury while 'restoration' is the act of restoring, renovating or re-establishing something close to its original condition, like restoring a damaged habitat.

22. In the recent times a serious challenge that has appeared before the courts more often than not, is the basis on which the Precautionary Principle is to be applied. While making such decisions, best possible scientific information, analysis of risk, ecological impacts and indication of costs, are the factors to be considered. A person who does not take precaution to protect the environment can be called upon to pay for restitution. All these ingredients are conspicuous by their very absence on the records before us, particularly in relation to the point of time when the clearances for the project were granted.

The liability of a Project Proponent to make good the loss is not a matter res integra any longer. Various judgments of the Hon'ble Supreme Court of India as well as of this Tribunal has not only declared but applied the Polluter Pays Principle. The Polluter Pays Principle takes within its ambit the cost of restitution and restoration of environment and ecology as well. In the case of *MC Mehta vs. Kamal Nath and Ors.*, (2000) 6 SCC 213, the Hon'ble Supreme Court held as under:

"12. "POLLUTER PAYS PRINCIPLE has also been applied by this Court in various decisions. In *Indian Council for Enviro Legal Action vs. Union of India* [1996] 2 SCR 503, it was held that once the activity carried on was hazardous or inherently dangerous, the person carrying on that activity was liable to make good the loss caused to any other person by that activity. This principle was also followed in *Vellore Citizens Welfare Forum vs. Union of India* and Ors. AIR 1996 SC 2715 which has also been discussed in the present case in the main judgment. It was for this reason that the Motel was directed to pay compensation by way of cost for the restitution of the environment ecology of the area. But it is the further direction why pollution fine,

in addition, be not imposed which is the subject matter of the present discussion.

24. Pollution is a civil wrong. By its very nature, it is a Tort committed against the community as a whole. A person, therefore, who is guilty of causing pollution has to pay damages (compensation) for restoration of the environment and ecology. He has also to pay damages to those who have suffered loss on account of the act of the offender. The powers of this Court under Article 32 are not restricted and it can award damages in a PIL or a Writ Petition as has been held in a series of decisions. In addition to damages aforesaid, the person guilty of causing pollution can also be held liable to pay exemplary damages so that it may act as a deterrent for others not to cause pollution in any manner. Unfortunately, notice for exemplary damages was not issued to M/s. Span Motel although it ought to, have been issued. The considerations for which "fine" can be imposed upon a person guilty of committing an offence are different from those on the basis of which exemplary damages can be awarded. While withdrawing the notice for payment of pollution fine, we direct a fresh notice be issued to M/s. Span Motel to show cause why in addition to damages, exemplary damages be not awarded for having committed the acts set out and detailed in the main judgment. This notice shall be returnable within six weeks. This question shall be heard at the time of quantification of damages under the main judgment."

We may also refer to the judgment of the Tribunal in the case of *Krishan Kant Singh vs. National Ganga River Basin Authority*, 2014 ALL (I) NGT Reporter (3) (Delhi) 1, where the Tribunal took a view that besides penal liability of the polluter, some civil consequences are bound to flow, particularly in relation to restitution, restoration and remedying the damage caused by the pollution. The Tribunal held as under:

"51. It is not possible to assess exact environmental damage and the cost of restoration thereof in view of the long period involved in the present case and the fact that the statutory Boards empowered to prevent and control pollution have not performed their statutory duties in accordance with the spirit and object of the environmental Acts and jurisprudence. This unit is responsible for causing great environmental pollution of different water bodies including Phuldera drain, the Syana Escape canal, the River Ganga and even the groundwater in and around the area of this industrial unit. Besides scientific data of inspection by the Expert teams, officers of the Pollution Control Board, analysis report and the fact that the water in the Phuldera drain had turned brown, even to the naked eye, demonstrates the extent of pollution caused by this unit. Considering the magnitude of the pollution caused by the unit, its capacity and prosperity, responsibility of the unit to pay compensation cannot be disputed on any plausible cause or ground. The Supreme Court in the case of *Sterlite Industries (India) Ltd. vs. Union of India & Ors.* (2013) 4 SCC 575, enunciated the principle that a company which has caused the damaged to the environment and for operating the plant without valid renewal of consent for a fairly long period would obviously be liable to compensate by paying damages. While relying upon the judgment of the Constitution Bench of the Supreme Court in the case of *MC Mehta vs. Union of India* (1987) 1 SCC 395, the Court further stated that the plea of reasonable care and that the damage to environment occurred without specific negligence on the part of the unit is not a sustainable defence to a direction for payment of compensation for causing environmental damage. The court further held that magnitude, capacity and prosperity of the unit are the relevant considerations for determining the extent of the liability in such case. Applying these principles to the facts of the present case, there can hardly be any dispute that it is a polluting unit. It is also beyond controversy that this unit has operated without consent of the Boards from 1974 till the year 1991, thereafter, it committed

default in compliance of the conditions of the consent right up to the year 2000. Even thereafter, it did not strictly comply with the conditions and directions issued by the respective Boards. This unit is a direct source of polluting River Ganga.

The unit is a profit making unit. No record has been produced before the Tribunal to establish anything to the contrary. Though, it may not be possible to determine with exactitude the exact amount of compensation payable on account of damage to environment because of the long period involved and also for the reason that even scientifically the extent of damage and amounts required for restoration and restitution thereof cannot be determined at this stage now. Cleaning and removal of sludge from Phuldera drain, treatment of other pollutants flowing in the said drain, preventing any discharge into the Syana Escape Canal and making River Ganga pollution free are the basic needs which require attention of the Expert bodies particularly, in the facts and circumstances of this case. We fix a compensation of Rs. 5 crores which shall be deposited with the UPPCB and shall be spent for that purpose alone by and joint team of CPCB, UPPCB, MoEF including for removal of sludge and all pollutants in the Syana Escape Canal till it joins river Ganga. This amount shall also be used for preventing ground water pollution.

The unit has caused serious pollution persistently. There is sufficient material before the Tribunal to establish both direct and indirect pollution being caused by this unit. The unit has even intentionally failed to comply with the directions and conditions of the consent order passed by the respective Boards. Not even submitting an application to the Board for obtaining consent to operate shows complete disregard towards law and its statutory obligations by the unit. It is not a only case where it is a threat to cause environmental pollution but is a case of causing environmental pollution, in fact. Right to carry on business cannot be permitted to be misused or to pollute the environment so as to reduce the quality of life of others. Risk to harm to environment or to human health is to be decided in the public interest according to 'a reasonable person's test'. The man's perception with reference to the facts of this case cannot return a finding any different than the one recorded by us."

Reference can also be made to another judgment of *Rayons-Enlighting Humanity & Anr. vs. Ministry of Environment & Forests*, 2013 ALL (I) All India NGT Reporter (2) (Delhi) 79, held as under:

"44.1 Thus, we have no hesitation in holding that both the Respondents No. 4 and 5 have violated the orders of the Tribunal and thus have committed offence which would invite the rigours of Section 26 of the NGT Act read with Order XXXIX, Rule 2-A of the CPC. The violation of the orders of the Tribunal has resulted in environmental degradation, health hazards and prejudice to the public health at large. Another very important aspect of this case is the restitution of environment at the site in question and its surroundings. Adverse impacts of this municipal solid waste have been dealt with by us in great detail in the judgment dated 18th July, 2013 as well as in this order. Before it results in irretrievable damage to environment and public health, we must also take recourse to passing certain directions with reference to the 'precautionary principle' aspect. In other words, the Tribunal must not only punish the person violating the orders but also should direct taking all measures which are necessary for the purpose of restoration of environment and precautions which would help in preventing further degradation of environment and damage to public health. Still another aspect of the case is that the polluter should pay for the pollution caused by him and for the period during which such pollution was caused. Contamination of water, pollution of ambient air, release of pungent smell and breeding of flies and other vectors resulting in various diseases

are the inevitable after-effects of violation of the orders of the Tribunal by the respondents-authorities as well as their actions, which were indirect conflict with the orders of the Tribunal. These included dumping of municipal solid waste on the national highway-24 and digging of pits in a most unscientific way as afore-stated. Consequently, the respondents must incur the liability for violation non their part in relation to these three aspects. This is the very premise and scheme of sections 15 and 17 read with section 26 to the NGT Act.

44.2 Environmental Pollution has been caused, is an undisputable fact. However, its extent may lose its significance in view of the admitted position on record. A polluter must pay for its acts and deeds, resulting in pollution. As already held above, the permission as required under law was not obtained by the Respondent -Nigam (consequently, by the respondent Nos. 4 and 5). The dumping of municipal waste was being done in a most unscientific manner and had commenced the construction of the plant and dumping of municipal waste without prior permission even of the Pollution Control Board. We have also found that grant of permission by the Board at a subsequent stage was an arbitrary exercise of powers. Thus, for causing pollution over the long period and particularly when it was in violation to the orders of the Tribunal, we must hold the Nigam liable to pay compensation for restitution and restoration of the environment. The amount so directed should be used for remedying the wrong as well as to prevent future damage. The report of the local commissioner also clearly establishes the pollution resulting from the activity carried out by the respondent Nos. 4 and 5 to contamination of ground water and other environmental pollution. At this stage, it may be appropriate for us to refer to a recent judgment of the Hon'ble Supreme Court in the case of *M/s. Sterlite Industries India Ltd. vs. Union of India & Ors.* (2013)1 All India NGT Report page-35), Where the Hon'ble Supreme Court having found that the Sterlite had operated without renewal of the consent of the Tamil Nadu Pollution Control Board for a fairly long period and having polluted the environment held the Sterlite Industries liable for payment of compensation to the extent of Rs. 100 crores. We follow this principle and apply it to the present case without any legal impediment. Following this principle, we are of the considered view that a sum of Rs. 1 Lakh per day would be an appropriate direction for restoration of the site to its original condition as well as on account of preventing further damage to the environment. For this purpose, we would also appoint a Committee which shall ensure compliance and proper spending of the amount so deposited."

23. In the present case, it is not only the case of the applicant, but even the Project Proponent has admitted to the damage to the environment and ecology. According to the Project Proponent, it was unintentional and bona fide and he even does not dispute that a number of trees have been damaged as a result of construction of the road, which are beyond 1261 trees in the forest area for which he had obtained permission to fell. As already discussed above, the Precautionary Principle may lose its material relevancy where the projects have been substantially completed and even irreversible damage to environment and ecology has already been caused. The situation may be different when invoking this principle in cases of partially completed projects, where it would become necessary to take immediate remedial steps for the protection of environment without any further delay.

    In the present case, it may still be possible to take steps at this stage, while any further delay would render them absolutely impracticable. The Precautionary Principle is a proactive method of dealing with the likely environmental damage. The purpose always should be to avert major environmental problems before the most serious consequences and side effects would become obvious. In some cases, this principle

may have to be applied with greater rigor, particularly when the faults or acts of omission and/or commission are attributable to the Project Proponent. The Principle of Sustainable Development by necessary implication requires due compliance to this precautionary principle as well as to the doctrine of balancing. It is only such an approach that could really protect the interest of environment and ecology.

24. As a cumulative result of the above discussion, while declining to quash the Memorandum of Understanding dated 23rd September, 2004 and the Environmental Clearance dated 9th September, 2007 we are still of the considered view that it is necessary for the Tribunal to issue certain directions to protect the environment and ecology of the concerned area, particularly in regard to its restoration and restitution, as well as collection of relevant data and material, before Project Proponent could carry its activity any further, in the facts and circumstances of the case. We, therefore, pass the following orders and directions:

1. We hereby constitute an Expert Committee of:

(a) Additional Chief Secretary, Environment & Forest, State of Himachal Pradesh.

(b) Member Secretary, Himachal Pradesh State Pollution Control Board.

(c) An Officer not below the rank of Director in the relevant field as nominated by the MoEF.

(d) A representative of Himalayan Forest Research Institute, Shimla.

(e) Director and/or his nominee from the concerned field from the Punjab Engineering College, Chandigarh.

(f) Principle Chief Conservator of Forest or his nominee not below the rank of Chief Conservator of Forest, State of Himachal Pradesh.

2. The above Committee shall visit the project site and submit a comprehensive report to the Tribunal within 45 days from the date of passing of this judgment.

3. The Committee shall specifically comment on the adequacy or otherwise of maintaining 15% flow of the river as environmental flow and if there is need for any variation in that regard.

4. The Committee in its report shall bring out clearly whether the conditions stated in the Forest Clearance and in Environmental Clearance have been strictly complied with or not by the Project Proponent. Progress in that behalf and particularly with regard to biodiversity conservation and management plan, compensatory afforestation, setting up a Musk Deer Farm and implementation of the CAT Plan shall also be reported.

5. How many trees have been felled/cut by the Project Proponent from the forest area? The number of trees that have been otherwise damaged by the construction activity of the project and if the figure of 4815 trees likely to be damaged from construction activities as given by the Forest Department, is correct or not in that regard.

6. What are the damages, specifically to environment, ecology and other damage caused by the construction activity of the project? What part of such damage is capable of being restored and how much damage is irreversible?

7. Its recommendations with regard to restoration, restitution of the damage already done.

8. It will also make recommendations on what are the adverse economical impacts on the life and livelihood of the people around the site area and also has there been compliance of the R&R Policy?

9. The Project Proponent shall deposit a sum of Rupees Five crores with the Forest Department, Government of Himachal Pradesh as an initial deposit for environment conservation subject to final adjustments. We also make it clear that the Project Proponent shall also be entitled to the adjustment of the amounts paid for destruction of trees, so far upon final settlement of accounts, as per orders of the Tribunal. These amounts shall be utilized exclusively for restitution and restoration of environment and ecology and for such other purposes as may be directed by the Tribunal. This amount shall also be utilized for the purposes of payments to people who have lost income because of divestment of the Chilgoza Trees because of road construction or other project activities, further directions would depend upon the submission of the report by the committee.

This amount should be deposited within four weeks from the date of pronouncement of the Judgment.

10. The Project Proponent shall not carry out any construction activity for a period of 45 days or till the inspection is completed by the Expert Committee, whichever is earlier.

11. After the expiry of the 45 days, the Project Proponent can carry-out construction activity in accordance with law, unless otherwise directed to stop such activity by the Tribunal.

12. The Project Proponent shall carry on its activity after the expiry of 45 days only in accordance with and upon taking such remedial measures as are suggested by the Committee afore-stated and the orders of the Tribunal as may be passed in future.

13. It is undisputed that the Project Proponent is obliged to plant at or around the project site at least ten-times of the uprooted/damaged trees. The forest department along with the Project Proponent and a representative from the Himalayan Forest Research Institute, Shimla shall ensure and be responsible of the afforestation of the trees and the plants of local species or other recommended species particularly Chilgoza Tress. They shall be responsible to maintain and protect the plants so planted. The time-bound action plan shall be prepared by these persons and submitted to the Tribunal within 30 days from passing of this Judgment.

14. The Additional Chief Secretary, State of Himachal Pradesh shall be the Nodal Officer for compliance of this order. We direct the Officer to take immediate steps for compliance of this order.

15. The MoEF, within three days from today, shall inform its nominee to the Additional Chief Secretary, State of Himachal Pradesh. All expenses of the Committee shall be borne by the Project Proponent.

16. The Committee shall submit its report to the registry of the Tribunal within 45 days from today which then shall be placed before the Tribunal by the registry for issuance of such further directions as the Tribunal may deem fit and proper in the

circumstances of the case."

25. With the above directions, the Original Application No. 183/2013 and M.A. No. 191 of 2014 stand partly allowed and M.A. Nos. 707 of 2013, 1056 of 2013 stand allowed without any orders as to costs.

DISTRICT AND MAGISTRATES' COURTS

TABLE OF JUDGMENTS AND ORDERS

State vs. Pabitra Rava & Ors.

GR NO. 404 OF 2013; FIR NO. 30/2013 POLICE STATION KALCHINI
ADDITIONAL CHIEF JUDICIAL MAGISTRATE, ALIPURDUAR
03.04.2013
CORAM: A.S. MUKHAPADHYAY, ACJM IN CHARGE, ALIPURDUAR

SUMMARY

The accused persons are forest dwellers who had gathered together to draw attention to certain wrongdoings[81] of the local forest officials, for which purpose they had also invited media persons to be present.

The forest department registered an FIR against them (being FIR No. 30/2013) for various crimes under the Indian Penal Code, including Section 341 (wrongful restraint), Section 353 (assault or criminal force to deter public servant from discharge of his duty), Section 506 (criminal intimidation) read with Section 34 (acts done in furtherance of common intention).

The accused, who voluntarily surrendered in Court, filed application for grant of bail (being GR No. 404/2013), which was disposed of by the present order.

The accused/applicants argued that they are members of the Gram Sabha in terms of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) and are entitled to point out the wrongdoing of the forest officials. They argued that instead of recognising the legal position, the forest officials have registered a criminal case against them.

The Additional Public Prosecutor, on the other hand, argued that this is an irrelevant contention with regard to the commission of the crimes.

The Court took into account the argument of the accused/ applicants and also the fact that they had voluntarily surrendered before the Court, and accordingly decided to grant them bail, on the submission of bail bond and surety for the sum of Rs. 500 (rupees five hundred) each. The bail bonds were submitted on the same day, and the accused were immediately released from custody.

[81] Discussion with counsel for the accused revealed that the "wrongdoing" of the forest officials related to felling of trees within the community forest resource, which was opposed by the Gram Sabha.

EDITOR'S NOTE

Being an order passed by a Magistrate's Court, this order does not have precedent value. It is significant, however, for the reason that it reflects the contested nature of legality and illegality, and the consequent alteration in the balance of power between the village community and the State. Therefore, acts such as felling of trees according to the working plan, which were par for the course before, could fall foul of the Gram Sabha's plans to conserve and manage their community forest resources (in terms of Section 5 and Section 3(1)(m) of FRA). On the other hand, actions which were defined as forest offences under the pre-existing forest law regime, such as the Indian Forest Act, 1927 and the Wildlife Protection Act, 1972, may now fall within the framework of forest rights protected and recognised under the FRA. That the forest dwellers and rights holders have started using the FRA in order to assert their lack of culpability under the pre-existing forest law regime, while asserting their powers under FRA, is a very significant development.

ORDER SHEET

District - Jalpaiguri
In the Court of the Addl. Chief Judicial Magistrate, Alipurduar
G.R. No. 404/13
Ref: Kalchini P.S. Case No. 30/13 dt. 2.3.13
u/s 341/353/506/34 I.P.C.
State - Versus - Pabitra Rava and others

Dated: 3.4.2013

1. Record is put up by petition. Accd. (1) Sampu Minz, (2) Bir Rava (3) Arun Basumata and (4) Subash Rava, are surrendered by petition. Seen the accd. persons and taken into custody.

2. To 17.4.2013 for production. Bail petition filed for the accused persons.

3. Heard. Considered.

4. It has been submitted by Ld. lawyer for the accused persons that the accused persons are members of Gram Sabha in terms of Scheduled Tribes and Other traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and they only prayed before the forest officials to act in conformity with the provisions of said Act but even taking into consideration their prayer, the present complaint was lodged against them. It has also been submitted by him that forwarding report itself reveals that media persons were called by the accused persons which shows that they did not intend to commit offence but only wanted to exposes the wrong doing of the forest officials.

5. Ld. A.P.P. submitted that such contention is not relevant for the purpose of the present case and necessary order may be passed in this respect.

6. Considered the submission.

7. After considering the submission of both sides and taking into account nature of the alleged offence and the fact that all the accused persons voluntarily surrendered before the Court, prayer for bail is allowed. Accused person may find bail for bond of Rs. 500/- each with one surety of like amount i.e. to J.C to date.

Sd/

Later: Bail Bonds are furnished by the Advocate surety Kallol Nag for the accd. namely (1) Arun Basumata (2) Bir Rava, (3) Subash Rava and (4) Sampu Minz.

Bail Bonds are found fit and accepted. To release them from custody.

Sd/-

A.S. Mukhapadhyay
A.C.J.M. in charge,
J.M. 1st Court. Alipurduar.

Forest Range Officers vs. Unknown

APPLICANT: SECY HOSAPODU GRAMA SABHA
FOC NO 05/2013-14
JUDICIAL MAGISTRATE FIRST CLASS, CHAMARAJANAGAR (KARNATAKA)
23.05.2013 (INTERIM ORDER)

SUMMARY

The Forest Department had seized honey collected from the forest by "unknown" forest dwellers, and registered a forest offence (being FOC No 05/2013-14) which came up for further proceedings before the JMFC.

An application was moved under Section 457 the Criminal Procedure Code by the Secretary Hosapodu Grama Sabha seeking the release of 1,150 kgs of honey seized, into his personal interim custody until disposal of the criminal case.

The applicant stated that the members of the Hosapodu Gram Sabha have been collecting honey as per the law and also under customary right. It relied upon the "hakku patra" issued to them, as well as the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA), the bills of Value Addition Centre, and the judgment of the Supreme Court in the *Niyamgiri case*[82].

The prosecutor representing the State Forest Department objected to this application, arguing that if the honey is released, the nature of the honey can be altered or the applicant may even dispose of it, which would adversely affect the trial.

The Court reviewed the Hakku Patra issued by the Deputy Commissioner to members of Hosapodu Gram Sabha, and also the evidence that members of the Hosapodu village have formed a "Sampige Value Addition Centre" which has been collecting honey from its members as well as issuing the bills of the payments made at the time of collecting honey. The Court arrived at the conclusion that the tribal people are empowered to collect minor forest produce for their livelihood, including honey, as per law and customary rights. Accordingly, the Court held that the applicants are authorized to collect the honey, and therefore the objections of the Forest Department do not stand.

[82] *Orissa Mining Corporation vs. Ministry of Environment and Forests & Ors.* (2013) 6 SCC 476.

Therefore, the Court directed the release of the honey to the interim custody of the applicant Hosapodu Gram Sabha. This order was made subject to execution of an indemnity bond of Rs. 20,000. The Range Forest Officer was directed to conduct proper panchanama for handing over the honey to applicant, to take colour photographs of all articles from all angles for identification, as well as draw a mahazar to that effect, and produce photos of honey along with mahazar and final report.

EDITOR'S NOTE

One of the few judgments available from criminal courts at the District level, this case provides a rare insight into how the use of FRA in a criminal proceeding, initiated under pre-existing forest legislations, can shift the balance of power between the State and the forest dwellers, albeit one step at a time. It is also admirable how well prepared the counsel for the applicants was, submitting for the examination of the Court not only a copy of the FRA but also the notification dt. 1.1.2008 bringing it into force, as also as the *Niyamgiri case* (supra) judgment which had been pronounced only a few weeks previously by the Supreme Court.

FOC. NO. 05/2013-14

ORDERS ON APPLICATION FILED BY THE APPLICANT U/S 457 OF CR.P.C.

This application is filed by the applicant by name Sri Madesha B who is the secretary of Hosapodu Grama Sabha, for release of Honey seized in FOC No. 05/13-14 to his interim custody till the disposal of the case.

2. The Learned APP has filed objects to the application.

3. Heard the argument, perused the materials placed on record. The applicant has produced the xerox copy of the Hakku pathra issued by the Hon'ble Deputy Commissioner to the members of the Hosapodu Grama Sabha, the Gazette of India dated 02.1.2007 (The Schedule Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006), notification dated 01.01.2008, Judgment in WP No. 180/2011 of Hon'ble Supreme Court of India, Xerox copies of the hills of Sampige Value Addition Center.

4. After perusal of the materials on record, it appears to this Court that the members of the Hosapodu village Punajanuru post, Chamarajanagar Tq., have formed a Sampige Value Addition Center and collecting the honey from its members and issuing the bills regarding payment made at the time of collecting the honey. After perusal of Hakku pathra issued by the Hon'ble Deputy Commissioner to the members of the Hosapodu Grama Sabha, it appears to this Court that the Tribal peoples are empowered to collect the minor Forest produce for their livelihood. In the Gazette dated 02.01.2007, The Government of India has authorised the Tribal people to collect the minor Forest produce including the honey. In the instant case the applicant has clearly stated that the members of the Hosapodu Grama Sabha have collected the honey as per the law and also under customary right. The materials on records reveals that the RFO of Punajanuru has seized the said honey. Though it is not the stage to discuss in merits of the case, it appears that the applicant and others have collected the honey in accordance with law. In the interest of the Tribal peoples, this Court is of the opinion that the honey seized

in the said FOC No. 05/2013-14 has to release to the applicant for the livelihood of the members of the said Hosapodu.

5. The Ld. APP has filed objections and thereby objected on the ground that if the said honey is released to interim custody of the applicant, then he may alter the nature of the honey and also dispose the same which in turn affect the trial. When the applicant has produced the materials to show that they are authorised to collect the honey and also to use the same as their livelihood, the objections of the Ld. APP cannot be considered.

6. If the honey is allowed to stand for a long time in the custody of the Forest officials then it becomes unworthy and also lost its original character. Keeping the seized honey in the custody of the Forest officials no purpose will be served.

7. It is relevant to refer the ratio laid down by the Hon'ble Apex Court of India which is reported in AIR 2003 SUPREME COURT 638 (*Sunderbahi Ambalal Desai vs. State of Gujarat* and *CM Mudaliar vs. State of Gujarat*) wherein it has held as under:

> "Criminal P.C. (2 of 1974), S.451-Disposal of property pending trial - Powers of court - Powers under S.451 should be exercised expeditiously and judiciously - Court to pass appropriate orders immediately and articles are not to be kept for a long time at police station, in any case, for not more than 15 days to one month - Procedure for disposal of seized valuable articles and currency notes, vehicles, seized liquor and Narcotic drugs suggested".

8. This court has carefully perused the ratio laid down in the above said case. By applying the ratio to the facts on hand, this Court is of the opinion that before handing over the possession of the above said honey a direction can be issued to the RFO, Punajanuru for conducting proper panchanama for handing over the said honey to the applicant. By issuing this direction to the RFO, the apprehension of the Prosecution may be met out. Hence, I proceed to pass the following:

ORDER

The Honey seized by the RFO, Punajanuru in FOC No. 05/2013-14 is ordered to be release to the interim custody of the applicant subject to following

CONDITIONS

1. The applicant shall execute an indemnity bond for Rs. 20,000/-

2. The RFO, Punajanuru shall take colour photographs of the Honey and other articles from all angels so as to identify the same.

3. The RFO, Punajanuru shall draw the Mahazar to that effect and shall produce the photographs of the honey so taken before the Court along with Mahazar and final report.

Sd/- 23/5/13
I/C Add Civil Judge JMFC,
Chamarajanagar.

Mr. R.C. Rohmingthanga vs. State of Mizoram & Ors.

DECLARATORY SUIT NO. 10 OF 2010 (UNREPORTED)
SENIOR CIVIL JUDGE -3, AIZAWL DISTRICT, AIZAWL, MIZORAM
8.11.2010
CORAM: DR. H.T.C. LALRINCHHANA, J.

SUMMARY

The plaintiff filed a civil suit for declaration as owner of the land in question, seeking further directions to evict the defendants (who are the State Forest Department officials), as well as make them pay rent for the period of occupation, and damages for the inconvenience caused to the plaintiff.

The plaintiff argued that defendants were wrongly trying to dispossess him on the ground that land was within the Tuirial Riverine Reserve Forest. The plaintiff argued that the land revenue department of the State, which is the competent authority, had issued a valid land document to the plaintiff which invested ownership rights in him. He also argued that the concept of Riverine Reserve Forest was irrelevant in Mizo culture and custom, where most of the people dwelt within half a mile on either side of the main rivers, running Village Council administrations like in the Tuirial village. Therefore, the notification declaring the Tuirial Riverine Reserve Forest was "ultra vires" and not in consonance with the traditional lifestyle and livelihood of the Mizos.

The Court examined at length the law relating to forests, forest conservation and sustainable development as laid down in various judgments of the Supreme Court and also statutory law. The Court determined a preliminary issue before commencing the suit proceedings, namely, whether this Court is the appropriate/ proper forum for the adjudication of this suit in light of the enactment of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA).

The Court held that instead of adjudication of the dispute in this Court, the proper forum under the aegis of the FRA is the Village Level Committee, and Sub-division and District level committees thereafter. The Court noted that the Mizoram Legislative Assembly has adopted the FRA in terms of Article 371-G of the Constitution of India, and specific notifications establishing the Committees under

FRA at the Village, Sub-division, District and State level have been issued by the State government of Mizoram. Thus the hierarchy of authorities under the said Act, which are the proper forum for examining this claim, are in place.

Accordingly, the plaintiffs were advised to approach the Forest Rights Committee under Rule 11 of the FR Rules. In addition, the defendants were directed not to take any steps to the "detriment of the plaintiff in any form to evict or diminish the possession of the suit land by the plaintiff except status quo". The executive machinery was directed to enforce and implement laws, particularly social legislations like the FRA, bearing in mind the maxim *causa proxima, non remota spectator*, that is, the proximate and not the remote cause must be looked into.

EDITOR'S NOTE

A remarkably erudite judgment emerging from the Court of a Civil Judge, this decision approaches the issue of a cause of action under the FRA within the technical rigour of the Civil Procedure Code while laying the context of the constitutional framework within which the suit needs to be examined. This is more than many constitutional courts have done, as is evident from many of the preceding decisions. It is also a rare ability in a Judge to be able to render a technically sound decision without allowing technicalities to stand in the way of rendering justice.

JUDGMENT

PRESERVATION OF FOREST AND ECOLOGICAL BALANCE: NEED OF THE HOUR

JUDICIAL INTERVENTION

1. Amongst a series of observations and judgments, let us take only few case dealing the necessity of environmental protection and its importance to our eco-system. Very recently in the case of *Sansar Chand vs. State of Rajasthan* decided on 20 October, 2010 in connection with Criminal Appeal No. 2024 of 2010 (Arising out of Special Leave Petition (Crl) No. 5599 of 2009), their Lordship of Hon'ble Supreme Court has apprised preservation of ecological balance that-

> "11. Preservation of wildlife is important for maintaining the ecological balance in the environment and sustaining the ecological chain. It must be understood that there is inter linking in nature. To give an example, snakes eat frogs, frogs eat insects and insects eat other insects and vegetation. If we kill all the snakes, the result will be that number of frogs will increase and this will result in the frogs eating more of the insects and when more insects are eaten, then the insects which are the prey of other insects will increase in number to a disproportionate extent, or the vegetation will increase to a disproportionate extent. This will upset the delicate ecological balance in nature. If we kill the frogs the insects will increase and this will require more insecticides. Use of much insecticide may create health problems. To give another example, destruction of dholes (wild dogs) in Bhutan was intended to protect livestock, but this led to greater number of wild boar and to resultant crop devastation causing several cases of abandonment by humans of agricultural fields. Destruction of carnivorous animals will result in increase of herbivorous animals, and this can result in serious loss of agricultural crops and other vegetation.

12. It must be realized that our scientific understanding of nature, and in particular of the ecological chain and the linkages therein is still very primitive, incomplete and fragmentary. Hence, it is all the more important today that we preserve the ecological balance because disturbing it may cause serious repercussions of which we may have no idea today.

13. As ready stated above, the wild life in India has already been considerably destroyed. At one time there were hundreds of thousands of tigers, leopards and other wild animals, but today there are only about 1400 tigers left, according to the Wildlife institute.

14. Until recently habitat loss was thought to be largest threat to the future of tigers, leopards etc. However, it has now been established that illegal trade and commerce in skins and other body parts of tigers, leopards etc. has done even much greater decimation. Poaching of tigers for traditional Chinese medicine industry has been going on in India for several decades. Tigers and leopards are poached for their skins, bones and other constituent parts as these fetch high prices in countries such as China, where they are valued as symbols of power (aphrodisiacs) and ingredients of dubious traditional medicines. This illegal trade is organised widespread and is in the hands of ruthless sophisticated operators, some of whom have top level patronage. The actual poachers are paid only a pittance, while huge profits are made by the leaders of the organized gangs who have international connection in foreign countries. Poaching of wild life is an organized international illegal activity which generates massive amount of money for the criminals.

15.Interpol says that trade in illegal wild life products is worth about US$ 20 billion a year, and India is now a major source market for this trade. Most of the demand for wildlife products comes from outside the country. While at one time there were hundreds of thousands of tigers in India, today according to the survey made by the Wildlife Institute of India (an autonomous body under the Ministry of Environment and Forests), there were only 1411 tigers left in India in 2008. There are no reliable estimates of leopards as no proper census has been carried out, but the rough estimates show that the leopard too is a critically endangered species.

16. There is virtually no market for the skins or bones of tigers and leopards within India. The evidence available points out that tigers and leopards, poached in the Indian wilderness, are then smuggled across the border to meet the demand for their products in neighbouring countries such as China. When dealing with tiger and leopard poachers and traders, it is therefore important to bear in mind that one is dealing with transnational organized crime. The accused in these cases represents a link in a larger criminal network that stretches across borders. This network starts with a poacher who is most cases is a poor tribal and a skilled hunter. Poachers kill tigers and leopards so as to supply the orders placed by a trader in a larger city centre such as Delhi. These traders are very wealthy and influential men. Once the goods reach the trader, he then arranges for them to be smuggled across the border to his counterpart in another country and so on till it reaches the end consumer. It is impossible for such a network to sustain itself without large profits and intelligent management".

2. In the case of *MC Mehta vs. Union of India & Ors.* decided on 11/10/1996 reported in 1997 (1) SCALE 4, the Supreme Court has further held that:

"The Precautionary Principle" has been accepted as a part of the law of the land. Articles 21, 47, 48A and 51A (g) of the Constitution of India give a clear mandate to the State to protect and improve the environment and to safeguard the forests

and wild life of the country. It is the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures. "The precautionary Principle" makes it mandatory for the State Government to anticipate, prevent and attack the causes of environment degradation. We have no hesitation in holding that in order to protect the two takes from environment degradation it is necessary to limit the construction activity in the close vicinity of the lakes."

3. In the case of *T.N. Godavarman Thirumulpad vs. Union of India & Ors.* in connection with Writ Petition (civil) 2002 of 1995 decided on 26.09.2005 and reported in 2005 AIR 4256, 2005 (3) Suppl. SCR 552, 2006 (1) SCC 1, 2005 (7) SCALE 562, 2005(8) JT 588, the Supreme Court has observed that:

   "Forests are a vital component to sustain the life support system on the earth. Forests in India have been dwindling over the years for a number of reasons, one of it being the need to use forest area for development activities including economic development. Undoubtedly, in any nation development is also necessary but it has to be consistent with protection of environments and not at the cost of degradation of environments. Any programme, policy or vision for overall development has to evolve a systemic approach so as to balance economic development and environmental protection. Both have to go hand in hand.

   In ultimate analysis, economic development at the cost of degradation of environments and depletion of forest cover would not be long lasting. Such development would be counterproductive. Therefore, there is an absolute need to take all precautionary measures when forest lands are sought to be directed for non-forest use."

4. The Hon'ble Supreme Court in *Vellore Citizens Welfare Forum vs. Union of India & Ors.* JT 1996 (7) SC 375 elaborately discussed the concept of "sustainable development" which has been accepted as part of the law of the land. It would be useful to quote the relevant part:

   "The traditional concept that development and ecology are opposed to each other, is no longer acceptable. "Sustainable Development" is the answers. In the International sphere "sustainable Development" as a concept came to be known for the first time in the Stockholm Declaration of 1972...

   During the two decades from Stockholm to Rio "Sustainable Development" has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting eco-systems. "Sustainable Development" as defined by the Brundtland Report means "Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs". We are, however, of the view that "The Precautionary Principle" and "The Polluter Pays" principle are essential features of "Sustainable Development". The "Precautionary Principle" in the context of the municipal law - means:

   (i) Environmental measures by the State Government and the statutory authorities must anticipated, prevent and attack the causes of environmental degradation.

   (ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a Season for postponing measures to prevent environmental degradation.

   (iii) The "Onus of proof" is on the actor or the developer/ industrialist to show

that his action is environmentally benign ...

> In the view of the above mentioned constitutional and statuary provisions we have no hesitation in holding that the precautionary principle and the polluter pays principle are part of the environmental law of the country even otherwise once these principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law. It is almost accepted proposition of law that the rule of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law. To support we may refer to Justice H.R. Khanna's opinion in *Addl, Distt, Magistrate Jabalpur vs. Shivakant Shukla* (AIR 1976 SC 1207), *Jolly George Varghese's case* (AIR 1980 SC 470) and Gramophone Company's case (AIR 1984 SC 667)."

5. The most powerful judicial court in this globe, viz. Supreme Court of India also constituted Forest Bench dealing the matters connected with our eco system by invoking judicial discretionary power or judicial governance / judicial activism which is overburdened on today to meet the global challenged.

INTERNATIONAL SCENARIO

6. The well-known 'Copenhagen Accord' is resolute in the Conference held on 7-18 December, 2009, Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol) was also reached in the year 1998. The United Nations Framework Convention on Climate Change was adopted in New York on 9 May 1992. United Nations Conference on Environment and Development' (Stockholm Conference) held at Rio De Janeiro, Brazil on June 3-14, 1992. Intergovernmental Panel on Climate Change was established in 1988 jointly by the World Meteorological Organization and the United Nations Environment Programme. Montreal Protocol on Substances that Deplete the Ozone Layer [Montreal Protocol] was also adopted in Montreal on 16 September 1987, 'United Nations Conference on the Human Environment [Earth Summit] held at Stockholm, Sweden on June 5-16, 1972. Those were few milestones which this Planet had undergone amongst others to mitigate the ugly Ozone depletion, Green House Gases, Global/ Local Warming etc. inviting a collective work in this high time.

INDIAN EXPERIENCE

7. The legendary Silent Valley Movement in respect of Silent Valley Hydro Electric Project (SVHEP) organised by the Kerala Sasthra Sahithya parishad (KSSP) and Chipko Movement outburst on March 26, 1974, 'The Road to Copenhagen' dt. 27.2.2009 published by the Public Diplomacy Division, Ministry of External Affairs, Govt. of India were some amongst others.

8. The above holistic views is expected to enrich the horizon in the instant case to deal the crux prudently and cautiously witnessed that ecological balance and environmental protection is our common problems and very alarming task in the global, regional and municipal areas.

RESPONSE IN MIZORAM

9. By making enactments and promulgating rules, regulations etc. this isolated land lock hilly terrain also gearing up through the following:
    1. The Mizoram (Forest) Act, 1955

2. The Lushai Hills District (Jhumming) Regulation, 1954.
3. The Mizoram Minor Minerals Concession Rules, 2000.
4. Village Forest Development Committee (VFDC) Dt. 5th November, 2001 (For the first time)
5. Forest Development Agencies (FDS) Dt. 5th November, 2001 (For the first time)
6. The Mizoram (Prevention & Control of Fire in the Village Ram) Rules, 2001
7. The Mizoram Air (Prevention & Control of Pollution) Rules, 2002
8. The Mizoram Water (Prevention & Control of Pollution) Rules, 2002
9. Mizoram Sale of Produce Mahals Rules, 2002
10. Guidelines of felling of Tyres from Non-Forest Areas Dt. 8th February, 2002
11. Authority of D.F.O/D.C.F and above to evict any person from Govt. Reserve Forest etc Dt. 18th January, 2007
12. Guidelines for issue of arms license, Dt. 20th July, 2006 etc. etc.

GENESIS OF THE CASE

10. The plaintiff namely - Mr. RC Rohmingthanga S/o Chuhthanga as submitted in the plaint is the holder of Periodic Patta No. 103101/10/558 of 2006 issued u/s. 4 (2) of the Mizo District (Agricultural Land) Act, 1963 under Memo. No. K. 53011/54/02-REV dt. 3.5.2005 located the said Agricultural land at "Turiiralkawnghnuai, Zemabawk" and its validity as per No. S-11037/15/10-LSC/DTE (REV), dt. 2.6.10 is extended upto 2010-2014 under Survey No. 260 and the boundary in the North is "Kawrte" in the South is "Kawrte" in the east is "Lalhmingliani" and in the West in NH- 54 'A' with an area of 2 Ha. The plaintiff is a farmer running Agro based industry having registration under No. 15/03/00167 and 15/03/00601 in the office of Industries Department, Govt. of Mizoram residing nearby the suit land. With the consent of the plaintiff, the defendants had constructed Workers Shed (in Assam type) in the year 2003 meant for stop gap arrangement within the suit land. Later on 17.5.2010, the defendants had constructed another Bamboo Workers Shed within the suit land dispossessing about 600 (six hundred) square feet by the plaintiff. Hence prayed to declare that (i) the plaintiff as the owner of the suit land (ii) to evict the defendants from the suit land (iii) to declare that the defendants are liable to pay rental charges at Rs. 4/- per Sq. foot during the period of occupation (iv) the defendants are liable to pay Rs. 1.00 (rupees one lakh) for inconvenience, mental anxiety and distress (v) costs of the suit. Indeed, the plaintiff used to occupy the suit land since 20.9.1999 when transferred to him by Smt. Zathiangi, Tuirial Ainawan Veng in consideration of Rs. 4000/- put in a written form as annexed in the plaint.

11. The defendants in their written statements contended that the suit laid is within the Tuirial Riverine Reserved Forest as notified under No. DC. XIV (A)-3/65 dt. 8th April, 1965 Vide, the Assam Gazette No. 8, Shillong May 19, 1965, 29th Vaisakha 1887 S.E. and issued the said Periodic Patta in contravention of the provisions of the Forest (Conservation) Act, 1980.

PRELIMINARY ISSUES

12. After filing of documents, discovery and admissions are already conducted, parties appeared the court through Counsels on 02.11.2010. Based in *Major S.S. Khanna vs. Brig. F.J. Dillon* decided on 14.08.1963 reported in 1964 AIR 497, 1964 (4) SCR 409, it was held that:

> "Under Or. 14, r.2, where issues both of law and fact arise in the same suit and the court is of the opinion that the case, or part thereof could be disposed of on the issues of law only, it shall try those issues first, and for that purpose, may, if it thinks fit, postpone settlement of the issues of fact until after the issues of law have been

determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone, but the Code of Civil Procedure confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issues.

Normally, all issues in the suit should be tried by the Court, not to do so, especially when the decision on issues even of law depends upon the decision of issues of fact, would result in a lop-sided trial of the suit."

13. Upon hearing of both parties and on perusal of case records, preliminary issue is framed that:

"Whether the suit is appropriate/ proper to adjudicate in this court in the light of the provisions of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 or not"

POINTS OF RIVALRY

14. Per contra, Mr. R. Lalremruata, Ld. AGA appeared for the defendants had submitted that the suit land is within the Tuirial Riverine Reserved Forest as notified under No. DC., XIV (A) 3/65 dt. 8th April, 1965 vide, the Assam Gazette No. 8, Shillong May 19, 1965, 29th Vaisakha 1887 S.E. and issued the said Periodic Patta in contravention of the provisions of the Forest (Conservation) Act, 1980 and no locus standi in favour of the plaintiff is arose. The defendants further relied in the judgments of Hon'ble Supreme Court in the case of *T.N. Godavarman Thirumulkpad vs. Union of India & Ors.* decided on 12.12.1996 in connection with WP (C) No. 171/1996. Also illuminated under letter No. F.No. 6-1/207-RO(HQ), dt. 8th May, 2007 issued by the GoI, Ministry of Environment & Forests stating that no Land Settlement Certificate/ Passes shall be valid on any forest area plus felling of plantations on forest shall be in terms of the approved working plan/ working scheme prescriptions only. The issuance of Period of Patta in the suit land is violative of S.2 of the Forest (Conservation) Act, 1980.

15. Mr. H. Lalremsanga, Ld. Counsel for the plaintiff argued that the defense ground of the defendants is baseless as the competent authority in land revenue administration in the state issued a valid landed documents to the plaintiff which invested ownership and rights of the plaintiff. Furthermore, riverine reserve is irrelevant in the Mizo livelihood where most of the peoples dwelled within half a mile on either side of the main rivers running Village Council administrations like in the Tuirial village. He concluded that the notifications of Riverine Reserved is ultra virus not in consonance with the traditional lifestyle and livelihood of the Mizo.

16. Upon hearing of both parties and on perusal of case records, the admitted position of the suit even at this stage can be summarized that:

(i) The suit land is located within half a mile of the Tuirial river which is riverine reserved area.

(ii) The plaintiff is the holder of Periodic Patta No. 103101/10/558 of 2006 issued u/s. 4 (2) of the Mizo District (Agricultural Land) Act, 1963 valid upto 2014 but traditionally occupied the suit land since 20.9.1999.

(iii) The defendants also constructed a shed within the suit land without the consent of the plaintiff.

FINDINGS AND REASONS

17. Admittedly, notification under No.DC XIV. (A)-3/.65 Dt. 8th April, 1965 Vide, the Assam Gazette No. 8, Shillong May 19, 1965, 29th Vaisakha 1887 S.E. in respect of riverine reserved is remaining valid in respect of:
(a) Tlawng (Daleswari)
(b) Tut (Gutur)
(c) ....
(d) ....
(e) ....
(f) ....
(g) ....
(h) ....
(i) ....
(j) Tuirial
(k) ....
(l) ....
(m) ....
(n) ....
(o) ....
(p) ....

18. So is the factual matrix, I could not avoid to vigil on the laws which governs the suit land. In *T.N. Godavarman Thirumulkpad vs. Union of India & Ors.* decided on 12.12.1996 and reported in 1997 AIR 1228, 1996 (9) Sppl. SCR 982, 1997 (2) SCC. 267, 1996 (9) SCALE 269, 1997 (10) JT 377, it was held thus:

> "It has emerged at the hearing, that there is a misconception in certain quarters about the true scope of the Forest Conservation Act, 1980 (for short the 'Act') and the meaning of the word "forest" used therein. There is also a resulting misconception about the need of prior approval of the Central Government, as required by Section 2 of the Act, in respect of certain activities in the forest area which are more often of a commercial nature. It is necessary to clarify that position.
>
> The Forest Conservation Act, 1980 was enacted with a view to check further deforestation which ultimately results in ecological imbalance, and therefore, the provisions made therein for the conservation of forests and fore matters connected therewith, must apply to all forests irrespective of the nature of ownership or classification thereof. The word "forest; must be understood according to its dictionary meaning. This description cover all statutorily recognised forests, whether designated as reserved, protected or otherwise for the purpose of Section 2 (i) of the Forest Conservation Act. The term "forest land" occurring in Section 2, will not only include "forest" as understood in the dictionary sense, but also any area recorded as forest in the Government record irrespective of the ownership. This is how it has to be understood for the purpose of Section 2 of the Act. The provisions enacted in the Forest Conservation Act, 1980 for the conservation of forests and the matters connected therewith must apply clearly to all forests so understood irrespective of the ownership or classification thereof. This aspect has been made abundantly clear in the decisions of this Court in Ambica Quarry Works and ors. versus State of Gujarat and ors. (1987 (1) SCC 213), Rural Litigation and Entitlement Kendra versus State of U.P. (1989 Suppl: (1) SCC 504), and recently in the order dated 29th November, 1996 in W.P. (C) No. 749/95 (Supreme Court Monitoring Committee vs. Mussorie Dehradun Development Authority and ors). The earlier decision of this Court in State of Bihar vs. Banshi Ram Modi and ors. (1985 (3) SCC 643) has, therefore, to be understood in the light of these subsequent decisions. We consider it necessary to reiterate this settled position emerging from the decisions of this court to dispel the doubt, if any, in the perception of any State Government or authority. This has become

necessary also because of the stand taken on behalf of the State of Rajasthan, even at this late stage, relating to permissions granted for mining in such area which is clearly contrary to the decisions of this court. It is reasonable to assume that any State Government which has failed to appreciate the correct position in law so far, will, forthwith correct its stance and take the necessary remedial measure with any further delay.

We further direct as under:

I. General.

1. In view of the meaning of the word "forest" in the Act, it is obvious that prior approval of the Central Government is required for any non forest activity within the area of any "forest". In accordance with Section 2 of the Act, all on going activity within any forest in any State throughout the country, without the prior approval of the Central Government, must cease forthwith. It is, therefore, clear that the running of saw mills of any kind including veneer or ply wood mills, and mining of any mineral are non forest purposes and are, therefore, not permissible without prior approval of the Central Government. Accordingly, any such activity is prima facie violation of the provisions of the Forest Conservation Act, 1980. Every State Government must promptly ensure total cession of all such activities forthwith.

2. In addition to the above, in the tropical wet evergreen forest of Tirap and Changlang in the State of Arunachal Pradesh, there would be a complete ban on felling of any kind of trees therein because of their particular significance to maintain ecological balance needed to preserve bio diversity. All saw mills, Veneer mills and plywood mills in Tirap and Changlang in Arunachal Pradesh and within a distance of 100 kms from its border, in Assam, should also be closed immediately. The State Governments of Arunachal Pradesh and Assam must ensure compliance of this direction.

3. The felling of trees in all forests is to remain suspended except in accordance with the Working Plans of the State Governments, as approved by the Central Government. In the absence of any Working Plan in any particular State, such as Arunachal Pradesh, where the permit system exists, the felling under the permits can be done only by the Forest Department of the State Government or the State Forest Corporation.

4. There shall be a complete ban on the movement of cut trees and timber from any of the seven North eastern States to any other State of the Country either by rail, road or water-ways. The Indian Railways and the State Governments are directed to take all measures necessary to ensure strict compliance of this direction. This ban will not apply to the movement of certified timber required for defence or other Government purpose. This ban will also not affect felling in any private plantation comprising of trees planted in any area which is not a forest.

5. Each State Government should constitute within one month an Expert Committee to:

   (i) Identify areas which are "forests", irrespective of whether they are so notified, recognised or classified under any law, and irrespective of the ownership of the land of such forest;

   (ii) Identify areas which were earlier forests but stand degraded, denuded or cleared; and

(iv) Identify areas covered by plantation trees belonging to the Government and those belonging to private persons.

6. Each State Government should within two months, file a report regarding:
(i) the number of saw mills, veneer and plywood mills actually operating within the State, with particulars of their real ownerships;

(ii) the licensed and actual capacity of these mills for stock and sawing;

(iii) their proximity to the nearest forest,

(iv) their source of timber.

7. Each State Government should constitute within one month, an Expert Committee to assess:
(i) the sustainable capacity of the forests of the State qua saw mills and timber based industry.

(ii) the number of existing saw mills which can safely be sustained in the State.

(iii) the optimum distance from the forest, qua that State, at which the saw mill should be located.

8. The Expert Committees so constituted should be requested to give its report within one month of being constituted.

9.Each State Government would constitute a Committee comprising of the Principal Chief Conservator of Forests and another Senior Officer to oversee the compliance of this order and file status reports."

19. As also submitted by the defendants, by virtue of section 29E of the Mizoram Forest Act, 1955 (Act No. IV of 1955), the Governor of Mizoram authorized all Forest Officers not below the rank of DFO/DCF under Environment & Forest Department, Govt. of Mizoram to evict any person from a Government Reserve Forest and also to sell, confiscate or destroy any crop raised or any building or other construction erected by such person without authority with immediate effect, unless such person has been lawfully authorized to settle in such Government Reserve Forest since a time prior to the date of commencement of the Forest (Conservation) Act, 1980 or allowed to remain in possession of such land under any order of a competent court of law as notified under No. D 12012/5/94 FST, the 18th January, 2007 (Vide, the Mizoram Gazette, Extra Ordinary; Vol. XXXVI, 02-02-2007, Issue No. 12].

20. However, as per ADC, supple to the Assam Gazette, May 19, 1965 25 Forest reserve in the Tuirial riverine under Aizawl Forest division is 66.5 km length = 43.30 Sq. km. I must therefore take another resort in the case of *Rural Litigation & Entitlement Kendra vs. State of U.P.* decided on 30.08.1988 reported in 1989 Air 594, 1989 SCC Supl. (1) 537, their lordship of Hon'ble Supreme Court went on that:
"Scientists came to realise that forests play a vital role in maintaining the balance of the ecological system. They came to know that forests preserve the soil and heavy humus acts as porous reservoir for retaining water and gradually releasing it in a sustained flow. The trees in the forests draw water from the bowls of the earth and release the same into the atmosphere by the process of transpiration and the same is received back by way of rain as a result of condensation of clouds formed out of the atmospheric moisture. Forests thus help the cycle to be completed. Trees

are responsible to purify the air by releasing oxygen into the atmosphere through the process of photosynthesis. It has, therefore, been rightly said that there is a balance on earth between air, water, soil and plant Forests hold up the mountains, cushion the rains and they discipline the rivers and control the floods. The sustain the spinning, they break the winds, they foster the bulks they keep the air cool and clean. Forest also prevent erosion by wind and water and preserve the carpet of the soil. In the second half of the 19th Century felling of trees came to be regulated. In 1858, the Department of Forestry was set up and in 1864 the first Inspector General of Forests was appointed. In the following year the first Indian Forest Act came into the Statue book to be followed by another Act in 1878 and yet another in 1927 which is still in force providing measures of regulation. This Act has been amended in the various States and presently reference shall be made to the relevant amendments in Uttar Pradesh."

21. In this direction, Riverine forest reserved will also be for the sole purpose of maintenance and preservation of river streams which is very essential for all living creatures. Likewise, the rights of forests dwellers is not also oblivious as held in the case of *Pradeep Krishen vs. Union of India & Ors.* decided on 10.05.1996 and reported in 1996 AIR 2040, 1996 (2) Suppl. SCR 697, 1996 (8) SCC 599, 1996 (4) SCALE 566, 1996 (5) JT 181, the Hon'ble Apex Court has held the rights of villagers / tribal's that :

"The petitioner contends that the forest cover in the State of Madhya Pradesh is gradually shrinking. As pointed out earlier, there is a shrinkage to the extent of 145 sw. kms between 1991 and 1993. In our country, the total forest cover is far less than the ideal minimum of one third of the total land. We cannot, therefore, afford any further shrinkage in the forest cover in our country. If one of the reasons for this shrinkage is the entry of villagers and tribals living in and around the Sanctuaries and the National parks, there can be no doubt that urgent steps must be taken to prevent any destruction or damage to the environment, the flora and fauna and wildlife in those area. If the only reason which compels the State Government to permit entry and collection of tendu leaves is it not having acquired the rights of villages/ tribal's and having failed to locate any area for their rehabilitation, we think that inter alia in this behalf cannot be tolerated."

22. In the case of *Yamkhomang Haokip vs. State of Manipur and Ors.* decided on 12 July, 2000 reported in (2003) 3 GLR 409, Hon'ble Gauhati High Court has observed that:

"In view of the exiting facts and circumstances of the case, this Court require the State respondents to examine the present matter by giving preference to it as the matter involves the right to life and this Court hope and trust that the State respondents shall protect the petitioner and his co-villagers by providing them their accommodation at the present place or to provide alternative accommodation at a suitable site so as to enable these poor villages to earn their livelihood and that their present occupation and possession over the land shall not be disturbed until the matter is settled by the component authority so that a common man may think that a human problem has been solved by the State respondents. This Court further requires the State respondents to keep in their mind the differences between the need of an animal and human being for shelter, as for the animal, it is the bare protection of the body and for good food, and for a human being a suitable accommodation or shelter which would allow him to go in other aspects - physically, mentally and intellectually with good food, clothing for survival on this earth."

23. Again, in *Narmada Bachao Andolan v. Union of India and Ors.* (2000) 10 SCC 664 disposed of the said writ petition upon issuing various directions. The Court inter alia opined that:

"i) displacement of the tribal's and other persons would not per se result in violation

of their fundamental or other rights;

ii) on their rehabilitation at new locations they would be better off than what they were;

iii) at the rehabilitation sites they will have more and better amenities than those they enjoyed in their tribal hamlets, and

iv) the gradual assimilation in the mainstream of the society would lead to betterment and progress."

24. In the case of *Rural Litigation & Entitlement Kendra vs. State of U.P.* decided on 30 August, 1988 reported in 1989 AIR 594, 1989 SCC Supl. (1) 537, it was held that:

"The problem of forest preservation and protection was no more to be separated from the life style of tribals. The approach required a shift from the dependence on law and executive implementation to dependence on the conscious and voluntary" participation of the masses. This required educating the masses as well as appropriate education of the departmental employees.

... There was some controversy as to whether some of the mines were located in the reserved forests. We have not made any attempt to resolve that controversy here as, in our opinion, whether the mines are within the reserved forests or, in other forest area, the provisions of the Conservation Act apply.

... There is no dispute that continuance of mining operations affects environment and ecology adversely and at the same time creates a prejudicial situation against conservation of forests. It is, therefore, necessary that each of these working mines shall have to work with an undertaking given to the Monitoring Committee that all care and attention shall be bestowed to preserve ecological and environmental balance while carrying on mining operations.

... Indisputably displacement has been suffered by these lessees and the sudden displacement must have upset their activities and brought about substantial inconvenience to them. The Court has no other option but to close down the mining activity in the broad interests of the community. This, however, does not mean that the displaced mine owners should not be provided with alternative occupation. Pious observation or even a direction in that regard may not be adequate, what is necessary is a time frame functioning if rehabilitation is to be made effective. It is therefore, necessary that a Committee should be set up to oversee the rehabilitation of the displaced mine owners."

25. As the above were the legal position of the suit, it is now impel to turn into the entity of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (hereinafter referred to as 'Forest Rights Act') (Act No. 2 of 2007) Dt. 29th December, 2006 is published in the Gazette of India, Extra Ordinary, Part II Section 1, No. 2, January 2, 2007 / PAUSA 12, 1928 and 31st December, 2007 is appointed as the date of the provision of the Act shall come into force under Notification No. S.O. 2224 (E) New Delhi, the 31st December, 2007 Vide, the Gazette of India, Extra Ordinary; Part-Ii Section 3 Sub Section (ii) No. 1614 December 31, 2007/PAUSA 10, 1929. The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007 is also again chalked out. Firstly look into the provisions of Article 371 G of the Constitution of India, it reads thus:

"**371 G- Special provision with respect to the State of Mizoram.**

Notwithstanding anything in this Constitution,:

(a) no Act of Parliament in respect of:
(i) religious or social practices of the Mizos,

(ii) Mizo customary law and procedure,

(iii) Administration of civil and criminal justice involving decisions according to Mizo customary law,

(iv) ownership and transfer of land, shall apply to the State of Mizoram unless the Legislative Assembly of the State of Mizoram by a resolution so decides;

Provided that nothing in the clause shall apply to any Central Act in force in the Union territory of Mizoram immediately before the commencement of the Constitution (Fifth third Amendment) Act, 1986;

(b) the Legislative Assembly of the State of Mizoram shall consist of not less than forty members"

26. In this domain, the entity of the Forest (Conservation) Act, 1980 and the Forest Rights Act, 2006 shall remain precedence over to state land and revenue laws as 'Forest' is appended under entry 17A of List III (Concurrent List) of the Constitution of India inserted by the Constitution (Forty second Amendment) Act, 1976.

27. As well known, needless to say is that since some towns and villages in the state terrain is within riverine reserved forest area and other forest reserved areas (most of the occupants / dwellers holds valid landed documents from the Govt. of Mizoram itself like LSC etc), it enthralled me to pay strenuous efforts and judiciously vigil on the disputes.

28. In Mizoram perspective, consequent upon the Official Resolution passed by the Mizoram Legislative Assembly in its session held on 29th October, 2009 as required under Article 371G of the Constitution of India, the Government of Mizoram has been appointed 31.12.2009 as the date on which the provisions of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and its Rules of 2007 came into force in the state of Mizoram as notified under No. A. 14014/35/09-SWD, the 3rd March, 2010 (Vide, the Mizoram Gazette, Extra Ordinary, Vol. XXXIX, dated 09.03.2010 Issue No. 66). It is therefore obviously require to examine the efficacy of the said Forest Rights Act.

29. Clause (c) of section 2 of the Forest Rights Act defines 'Forest dwelling Scheduled Tribes' that:
"(c) "forest dwelling Scheduled Tribes" means the members or community of the Scheduled Tribes who primarily resides in and who depend on the forests or forest lands for bona fide livelihood needs and includes the Scheduled Tribe pastoralist communities."

30. Construing sub-section (3) of section 4 of the Forest Rights Act, it reads that:
"(3) The recognition and vesting of forest rights under this Act to the forest dwelling Scheduled Tribes and to other traditional forest dwellers in relation to any State or Union territory in respect of forest land and their habitat shall be subject to the condition that such Scheduled Tribes or tribal communities or other traditional forest dwellers had occupied forest land before the 13th day of December, 2005"

31. Cogently, the Enactment of Forest Rights Act is neither meant to degradation of environment nor to devastate forest and its ecology but merely consolidated the simple traditional means of livelihood and lifestyle of forest dwellers and preservation of forests were no other alternative mode is available in the over population of the country. Various strata of authorities under the Forest Rights Act may be sum up in reference to the state of Mizoram as follows:

Forest Rights Committee (Gram Sabha) at Village level

Organisation

32. The Government of Mizoram under Notification No. A. 14014 / 35/07-SWD Dated Aizawl, the 25th March, 2008 constituted Gram Sabha to be convened by the President of each Village Councils and authorized to elect / select amongst its members for Forest Rights Committee.

33. In suppression of the above, the Government of Mizoram under Notification No. A. 14014/35/07-SWD/1, dated Aizawl, the 5th May, 2010 constituted Gram Sabha to be convened by the President of each Village Councils and authorized to elect/ select amongst its members for Forest Rights Committee. (Vide, the Mizoram Gazette, Extra Ordinary, Vol. XXXIX, 13.5.2010, Issue No. 147)

Functions [R.4 (1) of Forest Rights Rules].

34. The Gram Sabha shall:

(a) initiate the process of determining the nature and extent of forest rights, receive and hear the claims relating thereto;

(b) prepare a list of claimants of forests rights and maintain a register containing such details of claimants and their claims as the Central Government may by order determine;

(c) pass a resolution on claims on forest rights after giving reasonable opportunity to interested persons and authorities concerned and forward the same to the Sub Divisional Level Committee;

(d) consider resettlement packages under clause (e) of sub section (2) of section 4 of the Act and pass appropriate resolutions; and

(e) constitute Committees for the protection of wildlife, forest and biodiversity, from amongst its members, in order to carry out the provisions of section 5 of the Act.

Sub-Divisional level Committee

Organisation

35. The Government of Mizoram under Notification No. A. 14014/35 (i)/ 07 - SWD dated Aizawl, the 25th March, 2008 constituted Sub-Divisional Level Committee chaired by SDO (C) with other three members including member secretary as the CDPO or any Officer of Social Welfare Department posted in the Sub-Division or nearest place of posting.

Functions [R.6 of Forest Rights Rules]

36. The Sub-Divisional Level Committee (SDLC) shall:

(a) provide information to each Gram Sabha about their duties and duties of holder of forest rights and others towards protection of wildlife, "forest and biodiversity with reference to critical flora and fauna which need to be conserved and protected;

(b) provide forest and revenue maps and electoral rolls to the Gram Sabha or the Forest Rights Committee;

(c) collate all the resolutions of the concerned Gram Sabhas;

(d) consolidate maps and details provided by the Gram Sabhas;

(e) examine the resolutions and the maps of the Gram Sabhas to ascertain the veracity of the claims;

(f) hear and adjudicate disputes between Gram Sabhas on the nature and extent of any forest rights;

(g) hear petitions from persons, including State agencies, aggrieved by the resolutions of the Gram Sabhas;

(h) co-ordinate with other Sub-Divisional Level Committee for inter sub-divisional claims;

(i) prepare block or tehsil wise draft record of proposed forest rights after reconciliation of government records;

(j) forward the claims with the draft record of proposed forest rights through the Sub-Divisional Officer to the District Level Committee for final decision;

(k) raise awareness among forest dwellers about the objectives and procedures laid down under the Act and in the rules;

(l) ensure easy and free availability of proforma of claims to the claimants as provided in Annexure-1 (Forms A & B) of these rules;

(m) ensure that the Gram Sabha meetings are conducted in free, open and fair manner with requisite quorum.

District Level Committee

Organisation

37. The Government of Mizoram under Notification No. A. 14014/35 (ii) / 07 - SWD dated Aizawl, the 25th March, 2008 constituted District Level Committee chaired by the Deputy Commissioner with other three members including DSWO or CDPO of SWD posted in the district headquarters or nearest place of posting.

Functions [R.8 of Forest Rights Rules].

38. The District Level Committee shall:

(a) ensure that the requisite information under clause (b) of rule 6 has been provided to Gram Sabha or Forest Rights Committee;

(b) examine whether all claims, especially those of primitive tribal groups, pastoralists and nomadic tribes, have been addressed keeping in mind the objectives of the Act.

(c) consider and finally approve the claims and record of forest rights prepared by the Sub-Divisional Level Committee;

(d) hear petitions from persons aggrieved by the orders of the Sub-Divisional Level Committee;

(e) co-ordinate with other districts regarding inter district claims;

(f) issue directions for incorporation of the forest rights in the relevant government records including record of rights;

(g) ensure publication of the record of forest rights as may be finalized, and

(h) ensure that a certified copy of the record of forest rights and title under the Act, as specified in Annexures II & III to these rules, is provided to the concerned claimant and the Gram Sabha respectively;

State Level Monitoring Committee

Organisation

39. The Government of Mizoram under Notification No. A. 14014/35 (iii)/07 - SWD. Dated Aizawl, the 25th March, 2008 constituted State Level Monitoring Committee chaired by Chief Secretary and other members including Commissioner, SWD as the Member Secretary. In suppression of the above, the Government of Mizoram under Notification No. A. 14014/35 (iii)/09-SWD/2 dated Aizawl, the 20th May, 2010 constituted State Level Monitoring Committee chaired by Chief Secretary and other members including Commissioner/ Secretary, SWD as the Member Secretary, (Vide, the Mizoram Gazette, Extra Ordinary, Vol. XXXIX, 26.5.2010, Issue No. 178).

Functions [r.10 of Forest Rights Rules].

40. The State Level Monitoring Committee shall:

(a) devise criteria and indicators for monitoring the process of recognition and vesting of forest rights;

(b)monitor the process of recognition, verification and vesting of forest rights in the State;

(c)furnish a six monthly report on the process of recognition, verification and vesting of forest rights and submit to the nodal agency such returns and reports as may be called for by the nodal agency;

(d)on receipt of a notice as mentioned in section 8 of the Act, take appropriate actions against the concerned authorities under the Act;

(e)monitor resettlement under sub-section (2) of section 4 of the Act.

CONCLUSION

41. The above detail discussions and analysis clearly enumerated that instead of adjudication of the dispute in this court, the proper forum lies in the aegis of the Forest Rights Act to be initiated by the village level authorities as initiated by the giant Parliament and its adaptation of Mizoram Legislative Assembly with efforts made by the State Govt. of Mizoram through various notifications to constitute the hierarchy of authorities under the said Act and also as held in the case of *Noor Mohd. Khan Ghouse Khan Soudagar & Anr. vs. Fakirappa Bharmappa Machena Halli & Ors.* decided on 28 April, 1978 reported in 1978 AIR 1217, 1978 SCR (3) 789, it was observed that:

> "It is settled law that the exclusion of the jurisdiction of the Civil Court is not to be lightly inferred. Such exclusion must either be explicitly expressed or clearly implied. The law was laid down by the Privy Council in 67 Indian Appeals (page 222) and has been since affirmed by this Court in several decisions. In Dhulabhai vs. State of M.P., (1) this Court held that exclusion of jurisdiction of the Civil Court is not to be readily inferred. This view was followed in the State of West Bengal vs. The Indian Iron & Steel Co. Ltd. [1971] I S.C.R. 275, and affirmed in the Union of India vs. Tara Chand Gupta & Bros., [1971] 3 S.C.R. 557. The Privy Council in 67 I.A. 222 approving of the principles laid down in the well known judgment of *Willes J. in Wolverhampton New Water Works Co. vs. Hawkesford* which was approved of in the *House of Lords of Neville vs. London "Express" Newspaper* stated the law thus;
>
> "Where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it with respect to that class it has always been held that the party must adopt the form of remedy given by the statute."
>
> In order to determine whether the jurisdiction of the Civil Court was expressly or by necessary implication excluded, the provisions of the relevant enactments will have to be considered."

42. And in the case of *Abdul Gafur vs. State of Uttarakhand* reported in 2008 (10) SCC 97, it was held that:

> "Section 9 of the Code provides that the civil court shall have jurisdiction to try all suits of a civil nature excepting the suits of which their cognizance is either expressly or impliedly barred. To put it differently, as per Section 9 of the Code, in all types of civil disputes, the civil courts have inherent jurisdiction unless a part of that jurisdiction is carved out from such jurisdiction, expressly or by necessary implication by any statutory provision and conferred on other tribunal or authority. Thus, the law confers on every person an inherent right to bring a suit of civil nature of one's choice, at one's peril, however frivolous the claim may be, unless it is barred by a statute".

43. To epitomize and found axiomatic as lessoned from the magna carta introduced in the discussions, it is expected to meet justice by leaving the suit/ dispute to placate within the ambit of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and the rules made thereunder as the plaintiff appears traditionally occupied the suit land since 20.9.1999 by taking evidence as imposed under sub rule (1) of rule 13 of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007. Otherwise, menace of complexity, chaos which will leads inimical to existing laws.

ORDER

44. Upon hearing of both parties by giving an ample time and as per the findings and observations of the above, by virtue of O. VII R. 10 r/w O.VII rr. 10A & 11 (d) of the Code of Civil Procedure, 1908, the plaint (filed in the court on 16.06.2010) with its Annexure shall be returned to the plaintiff but shall be kept Xerox copy of plaint with its Annexure in the case record. The plaintiff is therefore advised to approach 'Forest Rights Committee' at Tuirial village chaired by the President, Village Council / Court. Tuirial by a prescribed Claim Form for rights to Forest Land' under rule 11 (1) (a) of Forest Rights Rules, 2007 (Viz. FORM-A in the Annexure).

45. Meanwhile, before disposal of the claim and its process to be preferred by the plaintiff from Village level to a District Level Committee in accordance with the provisions of the Forest Rights Act, the defendants are directed not to detriment of the plaintiff in any form to evict or to diminish the possession of the suit land by the plaintiff except status quo.

46. By taking advantage of this onerous task towards 'Rule of law' which is the basic elements of the charming good governance, the political executives (as it is Indian democratic polity), bureaucrats and other executive machineries even in the state of Mizoram may kindly remind themselves to enforce and implement the laws particularly social legislations like the 'Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest rights), Act 2006' bearing mind the recognized, Latin maxim namely - 'Causa proxima, non remota spectator' (The immediate, and not the remote cause is to be considered) as urged in the case of *M.C. Mehta vs. Union of India & Ors* in connection with Writ Petition (civil) 4677 of 1985 decided on 16.02.2006 reported in 2006 AIR 1325, 2006 (2) SCR 264, 2006 (3) SCC 399, 2006 (2) SCALE 364, 2006 (2) JT 448, the Supreme Court has directed to enforce existing laws stating that:

> "Despite passing of the laws and repeated orders of the High Court and this Court, the enforcement of the laws and the implementation of the orders are utterly lacking. If the laws are not enforced and the orders of the courts to enforce and implement the laws are ignored, the result can only be total lawlessness. It is, therefore, necessary to also identify and take appropriate action against officers responsible for this state of affairs. Such blatant misuse of properties at large scales cannot take place without connivance of the concerned officers. It is also a source of corruption. Therefore, action is also necessary to check corruption, nepotism and total apart apathy towards the rights of the citizens. Those who own the properties that are misused have also implied responsibility towards the hardship, inconvenience, suffering caused to the residents of the locality and injuries to third parties. It is, therefore, not only the question of stopping the misuser but also making the owners at default accountable for the injuries caused to others. Similar would also be the accountability of errant officers as well since, prima facie, such large scale misuser, in violation of laws, cannot take place without the active connivance of the officers. It would be for the officers to show what effective steps were taken to stop the misuser.
>
> ... Rule of law is the essence of Democracy. It has to be preserved. Laws have to be enforced. In the case in hand, the implementation and enforcement of law to stop blatant misuse cannot be delayed further so as to await the so called proposed survey by MCD. The suggestions would only result in further postponement of action against illegalities."

47. Since the plaintiff has paid in full of requisite court fees at Rs. 30/- while presenting the plaint and engaged with lawyers should be with fees, no order as to costs of the suit.

The case including Civil Misc. Appln No. 151 of 2010 shall stand disposed of.

Give this order copy to both parties and all concerned.

CENTRAL INFORMATION COMMISSION

TABLE OF JUDGMENTS AND ORDERS

D. Suresh Kumar vs. PIO, Ministry of Environment, Forests & Climate Change

CIC/SA/A/2015/000034
CENTRAL INFORMATION COMMISSION
25.08.2015
CORAM: PROF. M. SRIDHAR ACHARYULU (MADABHUSHI SRIDHAR)
CITATION: 2015 SCC ONLINE CIC 5845

SUMMARY

The applicant filed an application dated 21.10.2014 under the Right to Information Act, 2005 (RTI Act) before the Forest Conservation Division, Ministry of Environment and Forests (MoEF) seeking information about the implementation of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) in the villages in the submergence area of the Indira Sagar Polavaram Project (ISPP). The Public Information Officer sent a reply that the information was already sent to the applicant through a reply to a previous application. An appeal filed before the First Appellate Authority received no response and accordingly the applicant approached the Central Information Commission (CIC).

The applicant had sought detailed information relating to Circular dated 3.8.2009 (bearing F.No.11-9/1998-FC (pt.)) issued by the MoEF in relation to forest clearance granted to the ISPP. Seeking a clause-by-clause report on compliance, the applicant sought certified copies of letters submitted by concerned Gram Sabhas stating that all processes and formalities under the FRA have been carried out, and certifying that they have agreed to the proposed diversion, certified copy of the letter submitted by State government of Andhra Pradesh certifying that the diversion of forest land under Section 3(2) of FRA have been completed and the concerned Gram Sabhas have consented to it, that rights of the Primitive Tribal Groups and pre-agricultural communities have been specifically safeguarded, and so on.

After careful study of all records, the CIC found that the information sought had not, in fact, been provided to the applicant in his previous application. Therefore, the CIC directed the Forest Conservation Division of MoEF to give point-wise reply to all points sought in the RTI application and provide necessary information within two months.

EDITOR'S NOTE

While this decision does not explicate any substantive question of law, it illustrates the difficulty in obtaining the necessary preliminary information required before commencement of a legal challenge regarding non-implementation of the FRA, particularly in a high profile project such as the Polavaram dam or ISPP.

ORDER

PARTIES PRESENT

1. Both the parties were physically present before the commission.

FACTS

2. The Appellant Mr. D. Suresh Kumar filed a RTI application to Forest Conservation Division, Ministry of Environment and Forests on 21.10.2014 seeking information about Forest Rights Act in submergence villages of Indira Sagar Polavaram Project (ISPP). The reply was received from Public Information Officer on 29.10.2014 stating the requested information was sent to appellant for his previous RTI application filed on 12.6.2014. Aggrieved by the decision, the appellant filed First Appeal on 8.11.2014 and since no reply from FAA was received, he filed second appeal on 23.12.2014.

   Details of Information sought:

   "Attached supporting document (office memorandum/ circular (F.No.11 9/1998 FC (pt) was issued by this division. Please provide following information relating to implementation of said office memorandum/circular in relation to Forest Clearance granted to Indira Sagar Polavaram project coming up in Andhra Pradesh State.

   (i) Certified copy of letter submitted by State government of Andhra Pradesh (the then united government) along with certified copy of record of all consultations and meeting held, as specified in point A of the said office memorandum/ circular(ii)Certified copy of letter submitted by Government of Andhra Pradesh stating that proposal for diversion of forest was placed before the each concerned gram sabha which is eligible for rights enshrined under Forest Rights Act (FRA), as specified in point B of the said office memorandum/ circular.

   (iii) Certified copies of letter submitted by concerned Gram Sabhas stating that all processes and formalities under the FRA have been carried out and they have agreed for the proposed diversion, as specified in point C of the said office memorandum/circular.

   (iv) Certified copy of the letter submitted by state government of Andhra Pradesh certifying that the diversion of forest land for facilities managed by Government as required under section 3(2) of Forest Rights Act have been completed and the concerned gram sabhas have consented to it, as specified in point D of the said office memorandum/ circular.

   (v) Certified copy of the letter submitted by State Government of Andhra Pradesh certifying that the discussions and decisions relating to forest diversion for Polavaram project have taken place only when there was quorum of minimum 50% of members of the Gram Sabha present, as specified in point E of said office

memorandum/circular.

(vi) Certified copies of all the written consents or rejections of concerned gram sabhas submitted by state government of Andhra Pradesh, as specified in point F of the said office memorandum/circular.

(vii) Certified copy of the letter submitted by State Government of Andhra Pradesh certifying that the rights of Primitive Tribal Groups and Pre-Agricultural communities have been specifically safeguarded as per 3 (1) (A) of Forest Rights Act, as specified in point g of said office memorandum/circular.

(viii) Any other information submitted by State Government of Andhra Pradesh which has bearing on operation of Forest Rights Act in relation to Indira Sagar Polavaram Project as specified in point H of said office memorandum/circular".

Ministry of Environment and Forests, New Delhi's Office Letter No. F.No.11-9/1998-FC(pt) dated 30.07.2009 addressed to Chief Secretary/Administrator (All State/UT Governments except J&K) regarding Diversion of forest land for non-forest purposes under the Forest (Conversation) Act, 1980 ensuring compliance of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006:

"Accordingly, to formulate unconditional proposals under the Forest (Conversation) Act, 1980, the State/UT Governments are, wherever the process of settlement of Rights under the FRA has been completed or currently under process, required to enclose evidences for having initiated and completed the above process, especially among other sections, Sections 3(1)(i), 3(1)(e) and 4(5). These enclosures of evidence shall be in the form of following:

a. A letter from the State Government certifying that the complete process for identification and settlement of rights under the FRA has been carried out for the entire forest area proposed for diversion, with a record of all consultations and meetings held; b. A letter from the State Government certifying that proposals for such diversion (with full details of the project and its implications, in vernacular/ local languages) have been placed before each concerned Gram Sabha of forest dwellers, who are eligible under the FRA;

c. A letter from each of the concerned Gram Sabhas, indicating that all formalities/ processes under the FRA have been carried out, and that they have given their consent to the proposed diversion and the compensatory and ameliorative measures if any, having understood the purposes and details of proposed diversion. d. A letter from the State Government certifying that the diversion of forest land for facilities managed by the Government as required under section 3(2) of the FRA have been completed and that the Gram Sabha have consented to it.

e. A letter from the State Government certifying that discussions and decisions on such proposals had taken place only when there was a quorum of minimum 50% of members of the Gram Sabha present;

f. Obtaining the written consent or rejection of the Gram Sabha to the proposal. g. A letter from the State Government certifying that the rights of Primitive Tribal Groups and Pre-Agricultural Communities, where applicable, have been specifically safeguarded as per section 3(1)(e) of the FRA.

h. Any other aspect having nearing on operationalisation of the FRA. The State/UT Governments, where process of settlement of Rights under the FRA is yet to begin, are required to enclose evidences supporting that settlement of rights under FRA

2006 will be initiated and completed before the final approval for proposals.

This is issued with the approval of Minister of Environment and Forest".

PROCEEDINGS BEFORE THE COMMISSION

3. The appellant submitted that he has not received any information till date. The respondent authority submitted that whatever information that they had in relation to Forest Clearance granted to Polavaram Project was sent to him as a reply to previously filed RTI on 12.06.2014.

4. The appellant contended that the information sought by him for his previous application dated 12.6.2014 is different from information sought in present application. He stated that he asked for the information pertaining to a circular no. F. No. 11 9/1998 FC (pt) issued by Forest Conservation Division of Ministry of Environment and Forests. Appellant further submitted that this circular prescribed documents which need to produce by the companies as evidence to show that Forest Rights Act is implemented in the Forest area which is proposed for diversion for their projects. But, in the information provided to him as reply to his previous RTI application dated 12.6.2014, none of the above records were sent to him. He therefore pleaded the Commission to direct the respondent authority to provide him the documents listed in the above circular in relation to Forest diverted for Polavaram Project.

5. The Commission after careful perusal of all the records finds that the information provided by the Ministry of Environment and Forests for his previous application dated 12.06.2014 did not contain any information sought by the appellant in his present application.

6. The Commission therefore orders the Forest Conservation Division of Ministry of Environment and Forests to give point wise reply to all the points of information sought by the appellant and provide necessary information within a period of 2 months from the date of receipt of this order.

D. Suresh Kumar vs. PIO, Ministry of Environment, Forests & Climate Change

CIC/SA/A/2015/000297
CENTRAL INFORMATION COMMISSION
18.09.2015
CORAM: M. SRIDHAR ACHARYULU
CITATION: 2015 SCC ONLINE CIC 8184

SUMMARY

The applicant filed an RTI application dated 10.11.2014 in the Forest Conservation Division, Ministry of Environment and Forest (MoEF) seeking information regarding action taken by it on the numerous complaints & representations sent by affected villages protesting grant of Stage-II forest clearance to the Indira Sagar Polavaram Project (ISPP). In particular these representations relate to failure to vest rights under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) in the villages earmarked for submergence.

However, the applicant did not get any reply to the application or to the first appeal. The applicant thus approached the Central Information Commission (CIC) by way of a statutory second appeal. As in the previous case, the PIO, MoEF argued that this information had already been supplied to the appellant, a fact the appellant refuted categorically.

The Commission discussed the difference between the pre-Independence Indian Forest Act, 1927 and the FRA of 2006, which was enacted to recognise the rights of forest dwellers and to correct historical injustice. The Commission observed that in order to compensate or rehabilitate the displaced tribals, conferring forest rights as per the FRA is essential before the forest clearance is given to the ISPP. Further, the Commission also discussed various other protective legislations such as the Environmental Protection Act, 1986, the Panchayats (Extension to Scheduled Areas) Act, 1996, and so on. Emphasizing the urgent need for the kind of information sought by the appellant, the Commission observed:

> **"20. It is surprising that some PIOs and other officers of the Ministry of Forests & Environment are not implementing the right to information of the tribals and others in forests guaranteed by legislations and continuing their functioning**

under pre-Independence laws which did not serve interests of forest dwellers and thus denying their rights both under Forest related laws and RTI. They have a duty to inform under all legislations, regulations, notifications and circulars as explained above to inform the tribals and other forest dwellers. Especially when there is a threat of displacement, the victims of so called development are entitled to recognition and certification of their rights under the FRA, and information about which cannot be denied or delayed. If this information is delayed beyond the replacement, it amounts to denial of information and their right to live in forest etc. also."

The Commission accordingly directed the PIO, MoEF to give point-wise reply to the applicant as sought by him within one month and also inform the current status of the project.

The Commission observed that the state has a duty to inform all the villagers in the 276 villages who are going to be deprived of rights accrued under the FRA, which they must do immediately. Similar directions were also issued to the Government of Andhra Pradesh.

Making its displeasure apparent, the Commission directed that delay in providing information to the applicant beyond the period of one month would attract the penalty provision of Rs. 250/- per day, which may extend to the maximum penalty. It further issued show cause notice to the PIO, MoEF to respond within 21 days why penalty should not be imposed upon him and compensation be given to the applicant.

EDITOR'S NOTE

The Commission acknowledged that for the implementation of the FRA, information must reach the eligible person or community. This becomes imperative when a development project is going to deprive the tribals and other traditional forest dwellers of their rights under FRA.

Although the decision of the CIC has little precedent value, and limited persuasive value for its cognate benches, the explication of the nature of rights under FRA and the consequences of denial of information upon the most marginalized sections of society, is extremely valuable. It also demonstrates how the Commission was anguished to the extent of invoking the penalty clause under Section 20 of the RTI Act, something which the CIC does very rarely.

DECISION

1. The Appellant Mr. D. Suresh Kumar and concerned PIO Mr. H.C. Choudhury were present before the Commission in New Delhi.

FACTS

2. The Appellant Mr. D. Suresh Kumar filed a RTI application to Forest Conservation Division, Ministry of Environment and Forests on 10.11.2014 seeking detailed information about Forest Clearance granted to Indira Sagar Polavaram Project (ISPP). Relevant portion of

the information sought by him is as follows:

"1) Pursuant to grant of Stage-II Forest Clearance for Indira Sagar Polavaram project, the MoEF has received various representations from the affected villages of Polavaram project complaining about the non-implementation of Forest Right Act. On this, the ministry after various communications with stage government of AP about the non-implementation of FRA, on 2nd February, 2011, sent a letter (annexure 2) to AP government stating that the Director General of Forest & Secretary (DGF&SS) will shortly visit the area/villages affected by the said project to have on the spot assessment of the matter. In this regard, please provide me the following information.

a) Certified copy of the report submitted by the official who visited the area/ affected villages

b) Certified copy of action taken report of this Ministry based on the report of the official who visited the affected villages

c) Certified copies of all the communications between this ministry and state government of AP on the above subject until the matter has been finally decided by the Ministry.

d) Certified copies of all the note sheets and file notings on the above subject.

e) Certified copy of the action taken report submitted by the government of AP on the subject mentioned above.

f) Certified copies of all the communications from the ministry to all the affected villages which have written to it about the non-implementation of Forest Rights Act.

2) Certified copy of the action taken report based on Mr. Swarup Bhattacharya's letter dated 2nd September, 2010 (Annexure-3) and copies of all the communications from the ministry to Mr. Swarup Bhattacharya relating to his letter dated 2nd September, 2010.

3) Please provide me copy of all the Forest Clearance related documents/files of Indira Sagar Polavaram Project from 26th April, 2011 to till date."

3. Since no reply was received from Public Information Officer, he filed First Appeal on 16.12.2014 requesting to provide information. On the non-receipt of information even after that, Second Appeal was filed on 21.02.2015.

PROCEEDINGS BEFORE THE COMMISSION

4. The appellant submitted that he has not received any information till date. The respondent authority submitted that whatever the information that they have in relation to Forest Clearance granted to Polavaram Project, the same has been sent to him as a reply to the RTI previously filed by him on 12.06.2014.

5. The appellant contended that the information sought by him for his previous application dated 12.6.2014 does not correspond to any information that he sought in this application. It is in fact a follow-up RTI, based on the information received in previous RTI filed on 12.6.2014. He has further explained that after the Forest Clearance for Polavaram Project was granted, the ministry received many complaints from local villages about non-

compliance of Forest Rights Act, whose compliance is mandatory before granting Forest Clearance. Based on these complaints, the Ministry of Environment and Forests on 2nd February, 2011 sent a communication to Andhra Pradesh government stating that Director General of Forests & Secretary (DGF&SS) would shortly visit the area to have on-the-spot assessment of the matter. He contended that the information pertaining to what happened further after the visit of the said official is neither in the information received by him for his previous RTI application nor is in public domain anywhere, including the website of Ministry of Environment and Forests. Therefore, he had to resort to the usage of RTI which unfortunately has not been disposed of even after 8 months now. He prayed the Commission to direct the Public Authority to provide him information as soon as possible.

6. The responding authority perused through the records sent to the appellant for his previous application. The authority then submitted that they will relook into the matter and provide the necessary information within 2 months.

7. Prior to 2006 Forest Rights law, in pre-Independence era, the Indian Forest Act, 1927, main forest law, was made to serve the British need for timber. It sought to override customary rights and forest management systems by declaring forests state property and exploiting their timber. The law says that, at the time a "forest" is declared, a single official (the Forest Settlement Officer) is to enquire into and "settle" the land and forest rights people had in that area. They are the supreme judges to decide the rights of the forest dwellers, who do not know how to approach courts and lawyers and never tried to enforce their right to possession and live in areas which are declared as forests by the Governments. There is a strong criticism that the Independent Indian Governments have continued to exploit this draconian law which was never a will of the native Indians, though this law denies all the rights of all the tribals with one stroke, and that this law was not made and used to protect the forest but to convert it into colonies after driving out the aboriginal families who dwelled there since centuries.

8. The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 shortly known as Forest Rights Act (FRA), is hailed as a step towards recognising the rights of forest dwellers, and was made to correct historic/dynamic injustice done to tribals, as crores of people live in forest lands for several generations without having any legal rights to their homes or lands or to forest produce. The Government claims all powers over forests against the people living in it. Under different 'development' schemes/projects several lakhs of tribal forest dwellers were driven out of forests. The then Commissioner for Scheduled Castes and Scheduled Tribes, in his 29th Report, said that "The criminalisation of the entire communities in the tribal areas is the darkest blot on the liberal tradition of our country." This Forest Rights Act for the first time recognised forest dwellers' rights and made conservators more accountable.

9. The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 is expected to perform following essential functions:
   - "Granting legal recognition to the rights of traditional forest dwelling communities, partially correcting the injustice.

   - Giving tribal communities and the public statutory space and voice in conservation of forest and wildlife in their vicinity."

10. No one gets rights to any land that they have not been cultivating prior to December 13, 2005 (section 4(3)) and that they are not cultivating right now. Those who are cultivating land but don't have document can claim up to 4 hectares, as long as they are cultivating the land themselves for a livelihood (section 3(1)(a) and 4(6)). Those

who have a patta or a government lease, but whose land has been illegally taken by the Forest Department or whose land is the subject of a dispute between Forest and Revenue Departments, can claim those lands (section 3(1)(f) and (g)). The land cannot be sold or transferred to anyone except by inheritance (section 4(4)).

USE RIGHTS

11. This historic & truly Independent Indian law provides for rights to use and/or collect the following: a. Minor forest produce things like tendu patta, herbs, medicinal plants etc. "that has been traditionally collected (section 3(1)(c)). This does not include timber. b. Grazing grounds and water bodies (sections 3) c. Traditional areas of use by nomadic or pastoralist communities i.e. communities that move with their herds, as opposed to practicing settled agriculture.

12. Section 6 of the FR Act provides a transparent three step procedure for deciding on who gets rights. First, the gram sabha (full village assembly, NOT the gram panchayat) makes a recommendation - i.e. who has been cultivating land for how long, which minor forest produce is collected, etc. The gram sabha plays this role because it is a public body where all people participate, and hence is fully democratic and transparent. The gram sabha's recommendation goes through two stages of screening committees at the taluka and district levels. The district level committee makes the final decision (section 6(6)). The Committees have six members - three government officers and three elected persons. At both the taluka and the district levels, any person who believes a claim is false can appeal to the Committees, and if they prove their case the right is denied (sections 6(2) and 6(4)). Finally, land recognised under this Act cannot be sold or transferred.

13. If these rights are not recognized and given as per above referred procedure before the tribals are displaced from villages threatened to be submerged for ISPP, there is no possibility of compensating or rehabilitating them by providing similar rights at relocated places. Hence the conferring Forest Rights as per this law is essential before the forest clearance is given to ISPP as per law. It is apprehended that any attempt to drive them out without conferring these rights will place the Independent democratic Indian Government in the same shoes of British Colonial Government.

14. The Commission after perusal of all the records finds that the information provided by the Ministry of Environment and Forests for appellant's previous application dated 12.06.2014 did not contain complete information sought under present RTI application. As contended by the appellant, his present application is a follow-up of another application filed by him, seeking further information pertaining to the subject of Forest Rights Act implementation and Forest Clearance granted for Polavaram Project.

15. Several legislations and rules have provided right to information besides RTI Act. The EIA notification, 2006, which was given under Environmental Protection Act, in Section 7 deals with Public Hearing, which says: Whenever any developmental project is proposed in a given area, the project have to first place all the project information and environmental and social impact of the project before the local community which will be affected. Only after this information is placed before them and their views and concerns of the project have been taken, the project will be appraised by the concerned authorities. Under this EIA notification 2006, III Stage (3) - Public Consultation is prescribed. It says: (i) "Public Consultation" refers to the process by which the concerns of local affected persons and others who have plausible stake in the environmental impacts of the project or activity are ascertained with a view to taking into account all the material concerns in the project or activity design as appropriate.

16. As per Panchayat Raj act, whenever revenue lands are marked for other purposes like compensatory afforestation, leasing to an industry, etc. the Panchayat consultation is desirable (but not mandatory) which means that Panchayat has to be provided with information about proposed diversion.

17. For all the proposals for diversion where the FRA compliance required, the consultation with full information of the proposed project and the their written consent is required, as per the circular F. No. 11-9/1998-FC (pt), Government of India, Ministry of Environment and Forests, (FC Division) dated 30.07.2009.

18. Provisions of the Panchayats (Extension to the Scheduled Areas) PESA Act, 1996, from section 3 (e) to 3 (m), every provision need to be understood from the requirement of Right to Information. Every Gram Sabha shall approve of the plans and projects for social and economic development before implementation of such projects, it shall be responsible for the identification or selection of persons as beneficiaries under the poverty alleviation and other programs. The Gram Sabha or Panchayat shall be consulted before making the acquisition of land in the Scheduled Areas for development projects.

19. FRA Act, Section 4(2)(e) says: the free informed consent of the Gram Sabhas in the areas concerned to the proposed resettlement and to the package has been obtained in writing.

20. It is surprising that some PIOs and other officers of the Ministry of Forests & Environment are not implementing the right to information of the tribals and others in forests guaranteed by legislations and continuing their functioning under pre-Independence laws which did not serve interests of forest dwellers and thus denying their rights both under Forest related laws and RTI. They have a duty to inform under all legislations, regulations, notifications and circulars as explained above to inform the tribals and other forest dwellers. Especially when there is a threat of displacement, the victims of so called development are entitled to recognition and certification of their rights under the FRA, and information about which cannot be denied or delayed. If this information is delayed beyond the replacement, it amounts to denial of information and their right to live in forest etc. also. The Commission therefore orders the Forest Conservation Division of Ministry of Environment and Forests to give **point-wise** reply to the appellant and inform him current status of action taken under FRA within a period of one month from the date of receipt of this order. In fact, the state has a duty to inform all the villagers in 276 villages going to be deprived of rights accrued under Forest Rights Act even before they have been accrued and accredited. Hence the Ministry has to take necessary steps immediately to inform the affected villagers about their recognized rights under this law, before they are displaced.

21. The Commission also directs respondent Authority and Government of Andhra Pradesh to provide information about the action taken on various representations from the people of affected villages of Polavaram project complaining about non-implementation of Forest Rights Act, copy of report submitted by any officer visiting the affected areas/villages in pursuance of order dated 2nd February 2011, and action taken thereon, communication about this between Ministry and Government of AP, with certified copies, copies of all correspondence relating to Forest Clearance, etc. to the applicant within one month from the date of receipt of this order. Delay beyond a month will attract penalty provision of Rs. 250/- per day which might extend to the maximum penalty.

22. The Commission directs the PIO to show cause why penalty should not be imposed

against him for not furnishing information despite the order of First Appellate Authority and compensation be given to appellant, within 21 days from the date of receipt of this order. With these observations and directions, the appeal is disposed of.

Acknowledgements

Lawyers in particular, and legal professionals in general, are hoarders by nature. We store information and ideas and arguments and judgments, squirreling them away in our varied filing systems for future use and benefit. This compendium began as just such a hoarding exercise, but within a few short weeks it was painfully apparent that this was valuable information which needed to be shared widely and used widely. As a perusal of the judgments in this compendium will reveal, where lawyers and judicial officers have had ready access to decisions of other constitutional courts, they have been greatly benefitted and enabled to arrive at just decisions. Where such material was not readily available, the process was arduous and complicated.

It is with great humility, therefore, that I acknowledge the efforts of those legal professionals who have stepped into the unknown and taken the plunge by bringing cases to court which have resulted in the judgments comprising this compendium. To these intrepid explorers, I am truly thankful.

The guidance and leadership of Mr. Ashok Pai, Joint Secretary Ministry of Tribal Affairs, and National Project Director of the UNDP-MoTA Joint Project on Forest Rights Act, cannot be articulated in words. It has been a privilege to be challenged and encouraged at the same time by him.

Many thanks are also due to the officers in the FRA division of MoTA, who have suffered stoically as I pulled out file after dusty file to create this compilation.

I must also acknowledge the vision and encouragement of Alka Narang, Sushil Chaudhary and Sreetama Guptabhaya of the UNDP, who have never lost faith in this project, even at times when I was ready to do so. My sincere thanks to Sudeep Chaudhuri for the beautiful cover, and the painstaking attention to detail with the design and layout which is user-friendly and aesthetic at the same time.

Finally, I must thank my Research Associate, Tusharika Mattoo, for her unflappable equanimity and unflagging enthusiasm for this 'project', which at one time had us overwhelmed with its enormity. This compendium would not have been possible without her.

If there are errors and mistakes, the burden for these is entirely mine.

NEW DELHI
23.12.2015

SHOMONA KHANNA
ADVOCATE