

(2020) 05 GAU CK 0020
In the Gauhati High Court
Case No : Writ Petition (C) No. 4608 Of 2019

Birdev Islary And 7 Ors

APPELLANT

Vs

State Of Assam And 5 Ors

RESPONDENT

Date of Decision : 19-05-2020

Acts Referred:

Assam Forest Regulation 1891 — Section 24, 25, 72(c),
Forest Conservation Act, 1980 — Section 2
Scheduled Tribes And Other Traditional Forest Dwellers (Recognition Of Forest Rights)
Act, 2006 — Section 2(c), 2(o), 3, 3(1), 14(1), 14(2)
Scheduled Tribes And Other Traditional Forest Dwellers (Recognition Of Forest Rights)
Rules 2007 — Rule 2(b), 3, 5, 7, 11, 12, 12(A)

Citation : (2020) 05 GAU CK 0020

Hon'ble Judges : Achintya Malla Bujor Barua, J

Bench : Single Bench

Advocate : S Bora

Final Decision : Disposed Off

Judgement

1. Heard Mr. S Bora, learned counsel for the petitioners. Also heard Mr. J Chutia, learned standing counsel, KAAC as well as Mr. BJ Talukdar, learned counsel for the Revenue Department and Ms. M Bhattacharjee, learned Additional Senior Government Advocate for the Forest Department.

2. The petitioners herein claim themselves to be persons belonging to the Schedule Tribe (for short ST) Community and are aggrieved by the common notice dated 29.05.2019, where even, the name of the authority issuing the notice is not being mentioned. The purport of the notice is that all the encroachers who had already encroached various land "from FD Pillar No.3 to 15 near Rillain village-Dimapur & Tengnanglangso near Indisen Village Dimapur in & around FD Pillar No.16-17 (Inside Forest Land of Doldoli RF, Karbi Anglong, Assam), so-called & self styled villages i.e. Disapur village, Raikom Aklam, Tingbangla Nepali Bosti, Notun Basti near Nowgaon Bosti Rangapahar, (Hiteswar Tulsary Gaon) Alias 10th Miles Langtibuk Boro Gaon and Dhoneshnala-Tenganala-

Kochubeel-Khoyabosti-Nahorlangso - I & II", are required to vacate their respective lands under their occupation within a period of 7(seven) days from the issuance of the notice. The notice further provides that on the failure of the persons to vacate the lands, in question, they would be ejected as per the power under Section 72(c) of the Assam Forest Regulation 1891(for short, Regulation of 1891). The notice states that the unlawful occupation of the forest land by the petitioners is a gross violation of Section 24 and Section 25 of the Regulation of 1891 and Section 2 of the Forest (Conservation) Act, 1980.

3. The petitioners claim that as they belong to the ST community, therefore, they have a right under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (for short, Act of 2006) to occupy the forest land in question.

4. From the notice of 29.05.2019 and also from the stand taken by the petitioners that as they belong to the ST community, and, therefore they have a right under Act of 2006, the following questions arise for a determination; firstly whether the procedure adopted by the authorities requiring the petitioners to be evicted from the land they are occupying meets the requirement of a due procedure of law being followed; secondly, if the petitioners have a right under the Act of 2006 by virtue of being belonging to the ST community, whether the forest land under their occupation is required to be settled with them or in order to evaluate any such right under the Act of 2006, the required procedure under the law has to be followed.

5. As regards the first question for determination as to whether the required procedure under the law had been followed in requiring the petitioners to be evicted from their respective plots of land located in the forest areas, we have taken note of of that the impugned notice dated 29.05.2019 provides that the alleged encroachers would be ejected from their respective occupation of the forest land as per the powers conferred under Section 72(c) of the Regulation of 1891, in a situation where the authorities are of the view that the unlawful occupation of the forest land by the petitioners is a gross violation of Section 24 and Section 25 of the Regulation of 1891 and Section 2 of the Forest (Conservation) Act, 1980.

6. Section 24 of the Regulation of 1891 pertains to penalties for trespass or damage in reserved forests and Section 25 pertains to the acts that are prohibited in such forests, whereas Section 2 of the Forest (Conservation) Act, 1980 provides for the restrictions on the dereservation of forests or use of forest land for non-forest purpose.

7. Apparently, the allegation against the petitioners is that they have done certain acts, which are causing damage to the reserved forest and such acts are prohibited in forest land and further it violates the restrictions that are in force on the dereservation of forests and use of forest land for non-forest purpose.

8. Be that as it may, what we take note of is that the notice dated 29.05.2019 is

a general notice applicable to all such persons who may have been encroaching the forest lands under the KAAC and are being asked to either vacate their land so encroached or else they would be ejected as per the provisions of Section 72(c) of the Regulation of 1891.

9. In the notice it was stated that there was a gross violation of Section 24 and Section 25 of the Regulation of 1891 and Section 2 of the Forest (Conservation) Act, 1980. Section 72(c) of the Regulation of 1891 provides for a rule making power of the State Government to provide for ejectment of any person, who had entered into an unauthorized occupation of a reserved forest and for disposal of any grievance raised or as regards any building or other construction erected without authority in a reserved forest. Apparently, Section 72(c) is a rule making power of the State Government. If a rule would have been framed by the authorities under Section 72(c) of the Regulation of 1891, such rule would have provided for the procedure to be followed for eviction or ejectment of a person in any forest land under occupation in a reserved forest.

10. We have been told upon instruction from the authorities in the Forest Department that no such rule has been framed by the State Government under Section 72(c) of the Regulation of 1891. As Section 72(c) provides for ejectment of any person from any unauthorized occupation in a reserved forest, we cannot accept that in absence of any rule being framed, the State Government would be denuded of its power to eject any unauthorized occupier, but at the same time any process initiated for eviction or ejectment of an unauthorized occupier/encroacher of a forest land also would have to subscribe itself to a given procedure and atleast it must satisfy the requirement of the principles of natural justice.

11. In the instant case, the impugned notice dated 29.05.2019 although requires the petitioners to vacate the area under their occupation within a period of 7(seven) days, but no procedure acceptable under the law has been followed for requiring them to vacate the forest land under their occupation. Consequently, we interfere with the notice dated 29.05.2019. However, considering the nature of the allegation that the petitioners are illegally occupying or encroaching upon the reserved forest land, we deem it appropriate that interest of justice would be met, if the respondents in the Forest Department are given the opportunity to proceed against the petitioners by following the due procedure of law as indicated above.

12. Considering the seriousness of the allegations in the notice dated 29.05.2019 and as the same is being interfered on a technical ground, the respondents in the Forest Department are directed to proceed against the petitioners by issuing them individual notices and also allowing them an opportunity of hearing and if necessary allow them to produce any document/testimonial etc., to substantiate that they have a right to occupy the forest land under the Act of 2006 and upon such opportunity of hearing being given, a reasoned order be passed.

13. The very object and reason of the Act of 2006 provides that a forest right over the forest lands may be granted to the forest dwelling scheduled tribes or to the other traditional forest dwellers. It is apparent that such right would not be available merely because the claimant concerned may belong to the ST community unless such claimants can show through relevant material that they are forest dwelling scheduled tribes or other traditional forest dwellers. Accordingly, making a claim that the person concerned belongs to ST community alone would not be sufficient to claim forest right under the Act of 2006, unless materials are produced that the person concerned is a forest dwelling scheduled tribe or he is other traditional forest dweller. The emphasis would be on the aspect of being a forest dweller by tradition who also may belong to the ST community and not being a person merely belonging to the ST community alone.

14. The long title of the Act of 2006 and its statement of object and reason provides for it to be an Act to recognize and vest the forest rights to the forest dwelling scheduled tribes and to other traditional forest dwellers who have been residing in such forest lands but whose rights could not be recorded. The very statement and object of the Act of 2006 provides that such right is available only to the forest dwelling scheduled tribes and other traditional forest dwellers and therefore, first and foremost, anybody claiming a right under the Act of 2006 would first have to satisfy the authorities that they are forest dwelling scheduled tribes or they are other traditional forest dwellers. Further any right bestowed under the said Act would be circumscribed as per the provisions of Section 3 of the Act of 2006. The relevant portions from the Act of 2006 including its long title and the statement of objects and reasons are extracted as below:

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 An Act to recognize and vest the forest right 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 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.

And whereas 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 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.

Statement of objects and reasons:

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 conservations rather than learning from the rich traditions of the country where conservation is embedded in the ethos of tribal life. The reservation process for creating wilderness and forest areas for production forestry somehow ignored the bonafide 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 approached 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 of 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 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 of 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 right 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 shows and cautions against any form of unsustainable or destruction practices;

(ii) it lays down a simple procedure for recognition and vesting of forests 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)

(iv)

15. Further the Act of 2006, in Section 2 provides, amongst others, the following definitions:

"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, undermarked 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;

(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.

.....".

16. Further in exercise of the powers conferred by sub-sections (1) and (2) of Section 14 of Act of 2006, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules 2007 (for short, Rules of 2007) has been framed by the Central Government. The relevant portions of the Rules of 2007 including the definition, amongst others, are as follows

"2).....

(b) "bona fide livelihood needs" means fulfillment of livelihood needs of self and family through exercise of any of the rights specified in sub-section (1) of Section 3 of the Act and includes sale of surplus produce arising out of exercise of such

rights;

17. On the other hand, if the petitioners in course of such hearing being provided to them against the eviction contemplated in the notice dated 29.05.2019 prima facie satisfies the authorities by producing any document/testimonial evidence etc., that they have a right to occupy the forest land under the provisions of the Act of 2006, the authorities would be required to follow the procedure prescribed under the Act of 2006 and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules 2007.

18. From the provisions of the Act of 2006 it is discernible that the Act had been enacted to recognize and vest, the forest rights and occupation of forest land to the forest dwelling scheduled tribes and other traditional forest dwellers who have been residing in such forest land for generations but whose rights have not been recorded.

19. The recognition and vesting of such rights over the forest lands are based on the premises that the forest rights of those forest dwelling scheduled tribes and other traditional forest dwellers over their ancestral lands and habitants were not adequately recognized at a stage when there was a consolidation of the State authorities during the pre-independence period as well as in independent India, which had resulted in a historical injustice to the forest dwelling scheduled tribes and other traditional forest dwellers. The statement of object and reasons of the Act of 2006 recognizes the aspect that the forest dwelling tribal people and forests are inseparable and such forest dwelling tribal people through their traditional means bring about an ecological balance in the forest and the modern conservation approach was found to be inadequate and there is no integration between the traditional forest conservation methods which have been prevalent since centuries and the modern day forest management techniques. Accordingly through an implementation of the Act of 2006, a restoration of the balance is sought to be made by recognizing the forest rights of the forest dwelling scheduled tribes and other traditional forest dwellers. From the above, what we can infer is that in order to claim a forest right over the forest lands, the first and foremost requirement would be for any claimant to first prove through reliable cogent and acceptable evidence that they either belong to the forest dwelling scheduled tribes or they belong to other traditional forest dwellers. They would also have to bring in reliable cogent and acceptable evidence that they have been residing in such forest for generations, but their rights were not appropriately recorded.

20. Section 2(c) of the Act of 2006 defines forest dwelling scheduled tribes to mean the members or community of the scheduled tribes who primarily reside in and who depend on the forests or forest lands for bonafide livelihood needs and includes the Scheduled Tribes pastoralist communities whereas Section 2(o) defines other traditional forest dweller to mean any member or community who has for at least three generations prior to the 13.12.2005 primarily resided in and who depend on the forest or forests land for bonafide livelihood needs. Again

bonafide livelihood is defined in Rule 2(b) to mean fulfillment of livelihood needs of self and family through exercise of any of the rights specified in Section 3(1) of the Act of 2006 and includes sale of surplus produce arising out of exercise of such rights.

21. Section 3(1) of the Act of 2006 is extracted as under:

"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;

(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 preagricultural communities;

(f) rights in or over disputes 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) rights 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 tribal 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 or 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.

22. Accordingly if a claimant intends to make a claim that he is a forest dwelling scheduled tribe and other traditional forest dweller, such claimant has to establish before the authorities that they belong to the community of the scheduled tribes and primarily residing in the forest land or they belong to a community who for the last 3(three) generation prior to 13.12.2005 been residing in the forest lands. Further they would also have to prove that they depend on the forest or forest land for bonafide livelihood i.e., they fulfill their livelihood needs of self and family by doing all such acts as provided in Section 3(1) of the Act of 2006. Upon such materials or evidence being produced by any such claimant, it is for the authorities to arrive at their conclusion that such claimants are either forest dwelling scheduled tribes or they are other traditional forest dwellers.

23. The procedure as to how such claims are to be processed is provided in the Rules of 2007. Rule 3 thereof provides for the constitution of a Forest Rights Committee by the Gram Sabha and the committee is to initiate the process of determining the nature and extent of forest rights, receive and hear claims relating to forest rights and thereupon prepare a list of claimants of forest rights and maintain a register containing such details of the claims as the Central Government may determine. After giving a reasonable opportunity to the interested person, the Forest Rights committee is to pass a resolution on the claims on various rights and forward the same to the Sub-Divisional Level Committee. The said Sub-Divisional Level Committee whose composition shall be as provided in Rule 5, amongst others, hear petitions from person including State Agencies who may be aggrieved by the resolution of the Forest Rights Committee of the Gram Sabha and thereafter prepare Block and Tehsil wise draft reconciliation of the Government records and forward the draft record to the District Level Committee for its final decision. The District Level Committee having a composition as provided in Rule 7 shall examine all claims, especially those of the primitive tribal groups, pastoralists and nomadic tribes by keeping in mind the objectives of the Act and thereafter consider and finally approve the claims and record of forest rights prepared by the Sub-Divisional Level Committee. The District Level Committee is also required to hear the petitions from any aggrieved person against the orders of the Sub-Divisional Level Committee and thereafter issue directions for incorporation of the forest rights in

the relevant Government record including record of rights. The District Level Committee is also required to ensure publication of the records of forest right as may be finalised.

24. Rule 11 of the Rules of 2007 provides for the procedure of filing, determination and verification of claims by the Gram Sabha. Rule 12 provides for the process of verifying the claims by Forest Right Committee which also provides for a visit to the site and physical verification of the claims and evidence made by the claimants and Rule 12 A provides for the procedure for recognition of the forest rights.

25. Upon going through the scheme of the procedure laid down in the Rules of 2007 it is taken note of that if there is any claim made by any person claiming a forest right under the Act of 2006, a mere claim would not entitle such claimants to a right over the forest land or to allow any such illegal encroachment of the forest land that may have been made by such claimants. If any such claim is made, the claimant is required to follow the procedure under the Rules of 2007, which had broadly been indicated above and would be required to make their claims in the prescribed format before the Forest Rights Committee of the Gram Sabha and thereafter follow the procedure prescribed therein. If upon following the procedure a forest right is recognized, such right be granted to the claimant in the manner provided in the Rules.

26. In view of the above, this writ petition is disposed of by directing the respondent authorities to follow the procedure of giving an opportunity of hearing to the petitioners as regards their encroachment in the forest lands as indicated in the notice dated 29.05.2019 and thereupon pass a reasoned order as regards their eviction if the circumstance requires so.

27. On the other hand, if the petitioners make a claim of a forest right under the Act of 2006, they be subjected to the procedure of recognition of the forest right under the Act of 2006 by following the procedure prescribed in the Rules of 2007 as indicated above. The entire requirement be done and brought to its logical end within a period of 3(three) months from the date of receipt of a certified copy of this order.

28. Writ petition is disposed of in the above terms.

29. Interim order passed earlier stands vacated.

30. A copy of the order be provided to the learned counsel for the Forest Department to enable the Department to do the needful as indicated hereinabove.