

(1992) 02 OHC CK 0023

In the Orissa High Court

Case No : Original Jurn. Case No. 282 of 1992

Gurudev Singh Rai

APPELLANT

Vs

Authorised Officer-cum-Asst. Conservator of Forests and
Another

RESPONDENT

Date of Decision : 17-02-1992

Acts Referred:

Constitution of India, 1950 — Article 226, 245
Forest Act, 1927 — Section 52
Orissa Forest Act, 1972 — Section 56(2)

Citation : AIR 1992 Ori 287 : (1993) 76 CLT 671 : (1992) 1 OLR 305

Hon'ble Judges : B.L. Hansaria, C.J;B.N. Das, J

Bench : Division Bench

Advocate : R.Ch. Mohanty, R.K. Mohanty, D.K. Mohanty, N. Behuria and
Raghunath Meher, for the Appellant; R.K. Patra, Government Advocate, for the
Respondent

Judgement

Hansaria, C.J.—Tersely put, we have been called upon in this case to decide "whether the judiciary can also legislate; if so, when and to what extent?" The question as posed above may sound to many ears as novel, strange and a clear attempt to usurp the power of the legislature. But from what is being stated later, it would appear that it is not so.

2. The aforesaid question, however, requires our examination because in this case a truck found involved in committing a forest offence was ordered to be confiscated by the Authorised Officer-cum-Assistant Conservator of Forests, which order having been affirmed in appeal, has been challenged in this Court. After hearing the learned counsel for the petitioner, we felt that on the facts of the case, confiscation of the truck is not merited and so we suggested that in lieu of confiscation we propose to impose fine. This suggestion was given keeping in view the judgments of this Court rendered in O.J.C. No. 3105 of 1988 (Narendra Singh v. Authorised Officer, disposed of on 15-11-1988), which was followed in O.J.C. No. 3265 of 1988 (N.V. Gopalswamy v. Assistant Conservator of Forests)

disposed of on 11-9-1990 and O.J.C. No. 4224 of 1989 (State of Orissa v. Laxmi-dhar Rath, disposed of on 17-10-1990), in all of which cases fine was imposed in lieu of confiscation of the vehicle. Shri Mohanty appearing for the petitioner faintly submitted that as Section 56(2a) of the Orissa Forests Act, 1972, which is the relevant provision, only permits confiscation and does not speak of imposition of fine, it would not be permissible for this Court to impose fine in a case attracting the aforesaid provision. Though in the aforesaid cases fine had been imposed after setting aside the order of confiscation, but as the permissibility of the same had not been questioned, this Court had not applied its mind to this aspect of the case, which has become necessary to do so in the present case in view of the aforesaid contention of Shri Mohanty.

3. Before we answer the aforesaid loaded, complicated and important question, it would be apposite to say as to why we thought of imposing fine in lieu of confiscation of the vehicle. To know this, we have to know the facts of the case.

4. What had happened was that the truck of the petitioner was found at Vochibahal checkgate, which is in the district of Sambalpur, to have been carrying dry and processed Kendu leaf bags. The petitioner is said to have been himself driving the vehicle. At the checkgate, the petitioner produced some documents showing authority to transport the Kendu leaves from Purjang (in the district of Dhenkanal) to Bombay. The Forest Official who was in charge of the checkgate suspected the genuineness of the documents and after having done some checking, he contacted the Range Officer, who also smelt something wrong and so rushed to the spot to find that the petitioner had disappeared leaving the truck. This strengthened the suspicion, because of which the truck was brought inside the compound of the Range Office. Further enquiries were made thereafter, and it was found that the permit in question authorising transportation as aforesaid was forged which assured the minds of the officers that the petitioner was involved in illegal transportation of the Kendu leaves from Purjang to Bombay. This led to the initiation of the confiscation proceeding, which ultimately terminated against the petitioner, whose appeal did not yield fruit.

5. Shri Mohanty first raised a point that there being nothing to show that there was inter-district movement of Kendu leaves in the present case, no offence under the aforesaid Act had been committed. This submission was advanced keeping in mind a recent decision of this Court in O.J.C. No. 1824 of 1984 disposed of on 17-8-1990 (reported in AIR 1991 NOC 55), in which it was held that the penal provisions of the Act would get attracted only in case of inter-district transfer of Kendu leaves. It was strenuously contended that there being nothing on record to show that the Kendu leaves had moved from Dhenkanal, the detection in the district of Sambalpur alone was not sufficient to establish the case of inter-district movement; more so, when in the checkgates falling within the district of Dhenkanal, there was no entry showing the crossing of the truck in question, But then, as the Kendu leave bags had admittedly been booked from

Purjanb, which in the district of Dhenkanal, and as the. detection was in the district of Sambalpur, we entertain no doubt about the fact of interdistrict movement of the Kendu leaves. The aforesaid case cannot, therefore, assist the petitioner.

In this connection we may note another submission of Shri Mohanty that from the fact that the petitioner had "intended" transportation of the Kendu leaves from Purjang to Bombay as observed by the learned District Judge in para 4 of the impugned judgment, a case of commission of the forest offence in question is not made out. In support of this contention, Shri Mohanty referred us to *Md. Akram v. State* AIR 1951 Gau 17 in which it was held that the fact of attempting to export certain things out of India would not attract the operation of Section 5 of the Imports and Exports, (Control) Act, read with Section 511 of the Indian Penal Code. This view was taken because the Bench felt that unless an attempt of committing an offence under a special or local law has been expressly made punishable by that law, aid of Section 511 of the Indian Penal Code cannot be taken. This decision has no relevance inasmuch as the petitioner has not been booked for trial for committing an offence u/s 5 of the Imports and Exports (Control) Act.

6. Shri Mohanty then submitted that the petitioner could not have known about the illegal act of forging of the permit inasmuch as this became known to the check gate officers after a lot of enquiry was made. There appears to be some force in this submission. Related to this contention is the argument that the petitioner being the owner only could not have known about the illegal act of the driver and so it cannot be said that he had any mens rea in the commission of the offence. This submission has no cutting edge, because, even if it be conceded that the petitioner had no mens rea, the same is not relevant. At this stage it may be stated that a plea had been taken by the petitioner before the appellate authority that he was not driving the vehicle, but one Mahadev Singh of Jammu & Kashmir was doing so, which plea had been rejected by the Authorised Officer. The learned District Judge has agreed with this view because of the reasons given by the Authorised Officer. It has been further observed by the District Judge that it cannot be believed that the petitioner who is a resident of Modipara in the town of Sambalpur will engage a driver of Jammu & Kashmir, whose address is not known to him. This being a question of fact, it is not open to us to interfere with the same as cogent reasons find place for the finding arrived at by the Authorised Officer, which received the endorsement of the District Judge. Even if it be conceded that the petitioner was not driving the vehicle, the same would not make any difference in so far as the question of mens rea is concerned, in view of the recent decision of this Court in *State of Orissa v. Kiram Shankar Panda* 71 (1991) CLT 157, in which it was held that if a forest offence is committed even with the knowledge or connivance of the driver of the vehicle, the vehicle would be liable for confiscation even though the owner might not have any knowledge or connivance. In that decision it was further pointed out that to escape the order of confiscation, it must be further proved that each of

the concerned persons named, in Subsection (2-c) of Section 56 of the Forests Act had taken all reasonable and necessary precaution against the use of the vehicle in respect of the commission of the forest offence. This is lacking in the present case. So, the order of confiscation cannot be faulted with on this ground urged by Shri Mohanty.

7. This takes us to the question as to why we felt that it is a fit case where in lieu of confiscation fine may be imposed. We came to this conclusion having noted that the fact of forgery of the permit could not have been reasonably known to the driver of the vehicle, whosoever he might have been, inasmuch as the same came to light after a lot of enquiry by the forest officials. This feature of the case made us to feel that the petitioner may not lose his truck valued presently at about Rs. 4 lakhs when the Kcndu leaves being illegally transported were worth about Rs. 60,000/-, as stated from the bar. This view was taken by us keeping in mind the decision in the afore-noted O.J.Cs wherein, keeping in view the valuation of the commodities sought to be illegally transported, the order of confiscation was substituted by imposition of fine.

8. We shall now examine the all important questions posed at the threshold. Now, there is no dispute that Section 56(2-a) of the Forests Act permits confiscation alone, on the Authorised Officer being satisfied that a forest offence has been committed; it does not speak of imposition of fine as a substitute for confiscation. Of course, that section has conferred a discretion in the matter, which would appear from the use of the word "may" in this connection. It is because of the use of this word that it was held in *State of Orissa v. Santosh Kumar* 56 (1983) CLT 469 that before ordering confiscation, all the circumstances of the case have to be borne in mind. It is by referring to this decision that in the aforesaid O.J.Cs. fine was imposed in lieu of confiscation as it was felt that the facts of the case did not call for confiscation of the vehicle.

9. The answer to the question at hand would depend upon the power of the judiciary to read words in a statute which are not there. This is not the first occasion when a judicial mind has been called upon to decide this question. The trend setter in this regard is none else than the world renowned Lord Denning, because this is what the noble Judge said in *Seaford Court Estates Ltd. v. Asher* (1949)2 All ER 155

"When a defect appears, a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament..... and then he must supplement the written word so as to give "force and life" to the intention of the legislature..... A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they should have straightened it out? He must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

10. It may be stated that the aforesaid view about the task and duty of the

judiciary did not find favour with the House of Lords, as would appear from what has been stated in Paragraph 2 of Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, by Beg C.J. Lord Simonds, who was one of the members of the House of Lords before whom the aforesaid case had come in appeal, regarded the bold effort of Lord Denning as "a naked usurpation of the legislative function under the thin guise of interpretation". Lord Morten (with whom Lord Goddard entirely agreed) observed : "These heroics are out of place." After noting these views, Beg C.J., however, observed as below in paragraph 3 :--

"3. Perhaps, with the passage of time, what may be described as the extension of a method resembling the "armchair rule" in the construction of wills, Judges can more frankly step into the shoes of the legislature where an enactment leaves its own intentions in much too nebulous or uncertain a state. In M. Pentiah and Others Vs. Muddala Veeramallappa and Others, Sarkar, J. approved of the reasoning, set out above, adopted by Lord Denning. And, I must say that in a case where the definition of "industry" is left in the state in which we find it, the situation perhaps calls for some judicial heroics to cope with the difficulties raised."

11. A reference to the case of M. Pentiah noted in the aforesaid quotation shows that apart from drawing upon the aforesaid observations of Lord Denning, Sarkar, J. mentioned about the following proposition of law finding place in Maxwell on Statutes (10th Edition) at page 229 :--

"Where the language of a statute, in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence..... Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except on a case of necessity, or the absolute intractability of the language used. Nevertheless, the courts are very reluctant to substitute words in a statute, or to add words to it, and it has been said that they will only do so where there is repugnancy to good sense."

12. It may also be stated that the Supreme Court had referred to the aforesaid views of Lord Denning in the case of Hameedia Hardware Stores, represented by its partner S. Peer Mohammed Vs. B. Mohan Lal Sowcar, in which the following observations were also made at pages 524 and 525 (of SCC) : (at p. 1067 of AIR) :--

".....It is no doubt true that the court while construing a provision should not easily read into it words which have not been expressly enacted but having regard to the context in which a provision appears and the object of the statute in which the said provision is enacted, the court should construe it in a harmonious way to make it meaningful."

13. We may next refer to *Surjit Singh Kalra Vs. Union of India (UOI) and Another*, wherein it was observed in paragraph 19 that though it is true that it is not permissible to read words in a statute which are not there, but "where the alternative lies between either supplying by implication words which appear to have been accidentally omitted, or adopting a construction which deprives certain existing words of all meanings, it is permissible to supply the words", as stated at page 109 of Craies' Statute Law, 7th Edition.

14. The latest thinking of the apex Court on this subject is to be found in *K. Veera-swami v. Union of India* (1991) 3 SCC 656. Therein, Shetty, J. speaking for self and Venkatachaliah, J. made the following very pertinent observations in paragraph 59:--

".....We must never forget that this Court is not a court of limited jurisdiction of only dispute settling. Almost from the beginning, this court has been a law maker, albeit, in Holmes' expression, "interstitial" law maker. Indeed, the Court's role today is much more. It is expending beyond dispute settling and interstitial law making. It is a problem solver in the nebulous areas. In this case, we consider it no mere opportunity; it is a duty. It is our responsibility and duty to apply the existing law in a form more conducive to the independence of the judiciary."

Being of this view, the two Hon'ble Judges read much in the Prevention of Corruption Act, 1947 which was not to be found in the Act. We are conscious of the fact that the aforesaid observations can be pressed into service only in very exceptional cases; and the judiciary would clothe itself with the power of law making, even interstitially, by donning this robe, where non-supply of words in a statute would result in so unjust a result which the Court's conscience would not permit. While taking this view, we may state that though the aforesaid observations related to the power of the Supreme Court, we entertain no doubt that the same power would be available to this Court also in appropriate cases. It may also be stated that though the observations were made in connection with a case relatable to the independence of the judiciary, this facet of the case has no relevance.

15. Being thus assured that it is not beyond the competence of this Court to read words in a statute which are not there, let us see whether the present case warrants exercise of this power. We have given our deep thought to this aspect of the matter. Here is a statute which in its Section 56(2-a) has visualised confiscation alone as the punishment to be awarded against persons like owner of a vehicle which had been used in the commission of a forest offence. Not only this, the power of ordering confiscation has been made discretionary, which would show that in appropriate cases only, confiscation should be ordered and that in the facts of a particular case, confiscation may not be ordered. But beyond these two choices, the section has not provided for any other punishment to be imposed on the owner of the vehicle. It may, however, well be that in a particular case the authority may not feel satisfied that confiscation of the vehicle

is demanded keeping, inter alia, in view the magnitude of the offence. Say, where a forest offence committed relates to a forest produce whose total value though not nominal is also not on the higher side to merit confiscation of a vehicle valued many times more than the value of the produce in question. It may also be that the owner though legally vicariously liable for the acts of his driver which would permit confiscation, yet the facts may be such as may not demand confiscation of the highly valued property but the authority may also feel that some sort of punishment deserves to be inflicted on the owner. To take care of these and similar other situations, the Court may generally feel that a lacuna has been left in the statute which must be supplied to implement the real intention of the legislature. When such a defect comes to the knowledge of a Judge, he is not required to simply fold his hands and blame the draftsman. He has to supplement written words in such a situation by asking the question as to how the legislature would have acted had it known about the defect in question and then do what the legislature would have done according to the Judge. This is what Lord Denning thought in 1949 which thinking has received approval of the apex court of this country as already noted.

16. In this connection we should like to refer to what has been stated by Lord Denning in his celebrated autobiography "The Discipline of Law" (1979) in Chapter II: "The Interpretation of Statutes". The author says that he decided Seaford Court Estates case when he was a very junior Lord Justice of Appeal of only six months" standing. The views of the House of Lords relating to this judgment in which it was inter alia, described as "a naked usurpation of the legislative function" are thereafter noted. But then, the same principle was restated after 30 years in Nothman v. Barnet London Brough Council (1978) 1 WLR 220. Reference is finally made to International Convention, and it is stated at page 21 that the European courts "fill in gaps quite unashamedly, without hesitation.

They ask simply : what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation? They lay down the law accordingly..... To our eyes -- shortened by tradition -- it is legislation, pure and simple. But, to their eyes, it is fulfilling the true role of the courts. They are giving effect to what the legislature intended, or may be presumed to have intended". So, what was being once discussed in low voice in a drawing room is now being talked loudly.

17. Having deeply reflected over the question at hand, we are of the firm view that if the deficiency in Section 56 (2-a), of which reference has been made above, would have come to the knowledge of the legislature, it would have definitely provided for imposition of fine as an alternative punishment in those cases where the authorities may not be satisfied about the desirability of confiscation and may not also feel happy in allowing the owner of the vehicle to go scot-free. We, therefore, read in the aforesaid section a power to impose fine in lieu of confiscation in appropriate cases. What could be the appropriate cases

cannot be laid down with rigidity -- the same has to be left to the satisfaction of the appropriate authority.

18. Being thus satisfied that the aforesaid section would permit us to impose fine in lieu of confiscation, let it be seen whether the present is a fit and appropriate case where this power should be invoked. From the facts of the case as narrated above, it would appear that the driver of the vehicle whosoever he might have been could not have known that the permit on the strength of which he was transporting Kendu leaves was forged. We have said so because the forest authorities themselves had to work hard to find out the fact of forgery. In such a case it would not have been improper exercise of discretion even not to confiscate the vehicle. Even sitting as a writ court, we would have been perhaps within our rights to set aside the order of confiscation despite its approval by the appellate authority because of total non-application of mind to the aforesaid glaring aspect of the matter. We are, however, not doing so because of the fact that illegal activity of the type at hand is going on in a mass scale "which is causing a great drain to the State exchequer; but then, our conscience does not permit us to see to the confiscation of a vehicle valued presently at about Rs. 4 lakhs because of its involvement in illegal transporting Kendu leaves valued at about Rs. 60,000/-. Even so, we do not think it is a fit case where the owner should go scot-free as that would send a wrong message to the people involved in the objectionable activity. To curb the illegal activity of the type at hand, we do think that the owner has to be punished,, which punishment can be in the shape of fine only in the facts of the present case. Keeping in view the facts and circumstances of the case, we are of the further opinion that a fine of Rs. 60,000/- (which was the value of Kendu leaves involved in the case) shall be the proper punishment to be imposed on the owner of the vehicle. While fixing this amount, we have borne in mind the submission of Shri Mohanty that the petitioner may not be fastened with the heavy liability because of some illegal act done by his driver. We have not felt inclined to give much importance to this submission, first because, as per the authorities below the petitioner himself was driving the vehicle, and secondly because, even if the case of the petitioner be accepted in this regard that the vehicle was being driven by Mahadeb Singh of Jammu & Kashmir, this cannot be a relevant factor to determine the quantum of fine because in that case all the truck owners whose vehicles are driven by others would claim the benefit of leniency, which would not be advisable in the larger interest of the society which consists in curbing these anti-social activities.

19. The petition is accordingly disposed of by setting aside the order of confiscation and instead, awarding a fine of Rs. 60,000/-. The vehicle which is in the custody of the forest authorities shall be released forthwith in favour of the petitioner on his paying in cash the aforesaid amount.,

B.N. Dash, J.

20. I agree.