

(1994) 12 OHC CK 0018

In the Orissa High Court

Case No : Original Jurn. Case No's. 5042, 5478, 5566, 5607, 5608, 5659, 5689 and 5690 of 1994

Laxminarayan Saw Mill and Another

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 02-12-1994

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 19(6), 226, 245
Orissa Saw Mills and Saw Pits (Control) Act, 1991 — Section 4, 4(1), 4(2)

Citation : AIR 1995 Ori 114 : (1995) 1 OLR 1

Hon'ble Judges : V.A. Mohta, C.J.; R.K. Patra, J.; D.P. Mohapatra, J

Bench : Full Bench

Advocate : S.C. Ghosh, Bijan Ray, D.P. Sahoo, R.K. Mohanty, Pradip Mohanty, S.D. Hauq, Jagabendhu Sahoo, N.C. Chakrabarty, S.K. Patnaik, L. Misra, N. Behuria, K.K. Jana, S. Mohanty, S.C. Mohanty, S.K. Misra, S.K. Mohanty, R.P. Ray, A.K. Dalai, A. Mohanty, N.N. Mohapatra, C. Choudhary, S. Mohanty, Ghosh and S. Mishra, for the Appellant; S.K. Das, Government Advocate, for the Respondent

Judgement

V.A. Mohta, C.J.—Forests of Orissa are the invaluable treasure of this culturally rich but financially poor State. In order to prevent the illegal and ruthless exploitation of this wealth, some measures were tried by the State. For varacity of reasons - theoretical as well as practical - they were found inadequate to prevent this menace and hence a more stringent measure has been introduced. It is the Orissa Saw Mills and Saw Pits (Control) Act, 1991 (the Act). The Act is intended to create a total bar against establishing or operating any saw mill or saw pit within a reserved forest, protected forest, or any forest area, or within a radius of ten kilometers from the boundary of any such forests or forests areas. Section 4 of the Act, which has imposed this restriction, reads thus-

"4. Establishment and operation of saw mill and saw pit-

(1) On and after the appointed day, no person shall establish or operate a saw mill or saw pit except under the authority and subject to the conditions of a

licence granted under this Act:

Provided that no person shall establish or operate any saw mill or saw pit within a reserved forest, protected forest or any forest area or within ten kilometers " from the boundary of any such forest or forest area.

(2) Notwithstanding anything contained in Sub-section (1),-

(i) a saw mill or saw pit, established by the Orissa Forest Development Corporation Limited or by any other agency of the Government prior to the appointed day, may continue to be operated by such Corporation or agency, as the case may be, and in such a case, the Corporation or agency, as the case may be, shall be deemed to be a licensee for the purposes of this Act;

(ii) a saw mill or saw pit other than one referred to in clause (i) and established prior to the appointed day, may continue to be operated, and shall be deemed to be a saw mill or saw pit, as the case may be, licenced under this Act,-

(a) for a period of three months from the appointed day; or

(b) if an application made in accordance with Section 6 for a licence is pending on the expiry of the period specified in clause (a), till the disposal of such application under subsection (2) of Section 7".

2. Validity of the proviso to Sub-section (1) of Section 4 was challenged in this Court on the ground that it is ultra vires Article 14 of the Constitution if it is interpreted to mean a total ban. A Division Bench of this Court in the case of M/ s. Saraswati Saw Mill v. State of Orissa (O.J.C. No. 1826 of 1994, and other connected matters, decided on 23-9-1994) read down the proviso as not creating a total ban against establishment as well as operation of saw mill/pit in the prohibited zone and on that basis held the same as constitutional. Finding it difficult to agree with the said interpretation of the proviso, another Division Bench has, in these petitions, referred the following three questions to the Full Bench:-

"1. Whether the proviso to Section 4(1) of the Act creates a total bar?

2. If the answer to the above question is in the affirmative, whether the proviso is unconstitutional ?

3. Whether the Act suffers from the vice of legislative incompetence?"

3. Having heard parties at length, we find it difficult to sustain the view that the proviso to Section 4(1) does not create a total bar and the Act gives the discretion to the authorities under the Act to grant or not to grant licence to operate the saw mills and / or saw pits in the prohibited zone. We neither see any unconstitutionality in the proviso to Section 4(1) nor the vice of legislative incompetence in the Act.

4. The legislative background of the above Act is that under the Orissa Forest Saw Pits and Saw Mills (Control) Rules, 1980, framed under the Orissa Forest

Act, 1972, the activity of saw mill and saw pit carried on within the reserved forest or the protected forest or any forest area within 80 kilometres from the boundary of any such forest or forest area was regulated by introducing a licensing provision. These measures were found inadequate to tackle the problem of illicit felling of trees and over-exploitation of forests. The saw mills and the saw pits in and around the forest area became the major receivers of the illegally felled timbers and were knowingly or unknowingly responsible for destroying the evidence of illegality. Hence, with a view to controlling and regulating establishment and operation of saw mills and saw pits and the trade of sawing for the protection and conservation of forests and environment and in public interest, the Act was made.

5. The Act was brought into force with effect from 23rd March, 1992. Its salient features can be noticed in Sections 4, 5, 6, 7, 13 and 23. We have already reproduced Section 4. The non-obstante provision of Section 5 empowers the State Government to declare any area to be prohibited area for such period as may be specified in the notification. In such areas and during the period notified, neither new licence for saw mills/pits can be granted nor can the old licence be renewed and the saw mills/pits have to be forthwith closed for operation. Section 6 provides for making an application for licence, Section 7 for grant, renewal, revocation or suspension of licence, and Section 13 for confiscation of unauthorisedly established or operated saw mills/ pits. Section 23 is the usual rule making power and Section 24, the usual repeal and saving clause. It provides that nothing contained in any other Act, Rule, Order or any other thing having the force of law would apply to the saw mill and saw pit and sawing, in respect of which the Act has. made the provisions. As a result, all old licences automatically come to an end on application of the Act. u/s 6, every person who continues to operate on the appointed day a saw mill/pit desirous of continuing the operation after expiry of the period referred to in Section 4(2)(b) may make, at least one month before expiry of such period, an application for licence. New intended operator has also to make an application. Different forms "A" and "B" are prescribed for the old and new applicants under the Orissa Saw Mills and Saw Pits (Control) Rules, 1993 (the Rules) framed u/s 23 of the Act, Rule 3 provides for a procedure and form of application for licence. The rule as well as different forms, inter alia, contemplate disclosure of details of the location of the saw mil/pit -existing or proposed, as the case may be.

6. In the case of *Saraswati Saw Mill* (supra), it is held that (A) the proviso to Section 4(1) does create a total ban; (B) the proviso is subject to the non-obstante clause contained in sub-section (2); (C) Sub-clause (b) of Clause (ii) of Section 4(2) provides for making an application, which means that the ban was not intended to be total and the location of the saw mill/pit in the area specified was merely one of the factors to be taken into consideration in granting or refusing the licence; (D) the use of the expression "any area" in Section 5(1) and not the use of "any other area" militates against the concept of total ban; and (E) Section 13(1) (b) gives the discretion to the licensing officer to order

confiscation where a saw mill/pit is established/operated, save as provided in subsection (2) of Section 4, without a valid licence.

7. The language employed in the proviso is simply clear. It creates a total ban against establishing a new saw mill/pit or operating the existing saw mill/ pit in the areas specified which can be described as, prohibited zone. Sub-section (1) of Section 4 mandates against establishing or operating a saw mill/pit except under the authority and subject to the conditions of a licence granted under the Act. In view of Section 24, all old licences come to an end. Clause (i) of sub-section (2) of Section 4 carves out an exception in respect of existing saw mill/pit established by the Orissa Forest Development Corporation Limited or by any other agency of the Government prior to the appointed day. As a result, that saw mill/pit, even though within the prohibited zone, can continue to operate. Exception is only about existing saw mill/ pit, and even that class of operator cannot establish a new saw mill/ pit within the prohibited area. Clause (ii) (a) of Section 4(2) provides for continuation of the existing saw mill/pit as a deemed licensee under the Act for a period of three months from the appointed day. This was clearly necessary as a transitory measure to avoid hardship to the operator and also to gain time to apply fresh mind by the authorities. Section 6(2) provides for an application to be made at least one month before the expiry of the period of three months from the appointed day. Clause (ii)(b) of Section 4(2) provides that if such application is pending, the period of deemed licence shall be extended till the disposal of the application u/s 7(2). Section 7(2) provides for disposal of the application u/s 6(1) within a period of three months from the date of its receipt.

8. Before the Act was brought into force, the saw mill/pit belonged to two categories - one established beyond the prohibited zone and the other established within the prohibited zone. The former did not require any licence, but the latter did. Section 4 created two classes of saw mills/pits, one situated within the prohibited zone and the other beyond that zone, Former class was banned and the latter was regulated. Thus, under the Act, even those saw mills/pits which did not require licence were brought in the net of the licensing provision. A transitory provision was made for all varieties of saw mills/pits for a period of three months in the first instance and thereafter till the disposal of the application for licence u/s 6 in accordance with Section 7(2). The assumption that clause (ii)(b) of Section 4(2) applies even to the mills/pits situated within the newly created prohibited zone appears to be erroneous. It will have to be borne in mind that the non-obstante clause contained in sub-section (2) was meant not only to apply to the proviso to Section 4(1) but also to the substantive provision. Clause (ii)(b) of Section 4(2) was not meant for mills which are undisputedly in the prohibited area. One of the points to be considered while granting licence is whether or not the saw mill/pit is situated within the prohibited zone. On that question, there may be a dispute and if there is a dispute the matter has to be adjudicated upon. Such contingency was also required to be provided for. Under the circumstances, there is no scope for an

interpretation that Section 4(2)(ii)(b) provides for a discretion in the officer to grant or refuse a licence to a saw mill/pit even within a prohibited zone. A discretion to grant or refuse licence in accordance with the law very much exists, but not in respect of cases governed by total ban. If discretion even in cases covered by the proviso is read to exist, the proviso is rendered otiose. Normally, interpretation leading to such result has to be avoided. Moreover, the provision as a whole will have to be read together and no part of it can be read in isolation.

9. Section 5 deals with an altogether different subject of declaration of any area as prohibited area by notification by the State Government for such period as is specified therein. Total ban operates against grant or renewal of licence and also against continuation of operation of the saw mill/pit in that area for the period specified. The nature, extent and period of ban u/s 5 is quite different than that of the ban under the proviso to Section 4(1). The term "any area" has no connection whatsoever with the area mentioned in the proviso to Section 4(1). The area mentioned in the proviso to Section 4(1) may be included in the notification u/s 5 or may not be included. Had the term "any other area" been used, ban of the type mentioned in Section 5 could not be imposed in the area covered by the proviso. The declaration of prohibited area u/s 5 can be made even before the expiry of the period of three months contemplated by Section 4(2)(ii)(a). Therefore, the absence of the term "any other area" and the use of the term "any area" in Section 5 will have no impact on the scheme of Section 4. Reference in the confiscation provision of Section 13(1)(b) to the saw mill/pit without a valid licence, save as provided u/s 4(2), does not in any way support the petitioner.

10. The language employed in the proviso to Section 4(1) is plain and clear. It is capable of only one interpretation. It also is quite in consonance with the very object of the new Act. In this context, taking aid of any other principle of interpretation is unnecessary. Section 4 will have to be read as a whole and each part thereof will have to be reconciled to the other. Hence clause (ii)(b) to sub-section (2) or any other clause cannot be read in isolation. Even if the language of the statute in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment or to absurdity presumably not intended, construction may be put upon it which modifies the meaning of the word and even the structure of the sentence. All this is permissible only when two constructions are reasonably possible and not when only one construction is possible. In that case, the opinion of the Court, howsoever strong, must yield to the language and it is Court's duty to give effect to the inevitable result and leave it to the legislature to amend or alter the law.

11. There is a distinction between proviso, exception, provision, saving clause, non-obstante clause, explanation etc. The better rule appears to be not to give undue weight to the aforesaid distinctions which are somewhat obscure and to direct one's attention to the substance rather than to the form adopted by the

legislature. The proper course is to apply the broad general rule of construction, which is that the provision must be construed as a whole, each portion throwing light, if need be, on the rest. There is no other rule even in the case of a proviso or non-obstante clause in the strict and narrowest sense. When language is quite clear and no alternative view is possible, it is futile to go into the question whether it operates as a substantive provision or only by way of an exception. Proviso thus cannot be presumed to be a surplusage. The non-obstante clause need not necessarily and always be co-extensive with the operative part so as to have the effect of cutting down the clear terms of the enactment. If the words of the enactment are clear and are capable of Only one interpretation on a plain and grammatical construction of the words thereof, a non-obstante clause cannot cut down the construction and restrict the scope of its operation. The enacting part of the statute must, where it is clear, be taken to control the non-obstante clause where both cannot be " read harmoniously.

12. The basic approach to the interpretation of a statute has" been pithily put in the case of *Utkal Contractors and Joinery Pvt. Ltd. and Others Vs. State of Orissa and Others*,

"..... .A statute is best understood if we know the reason for it. The reason for a statute is the safest guide to its interpretation. The words of a statute take their colour from the reason for it. How do we discover the reason for a statute? There are external and internal aids. The external aids are Statement of Objects and Reasons when the Bill is presented to Parliament, the reports of Committees which preceded the Bill and the reports of Parliamentary Committees. Occasional excursions into the debates of Parliament are permitted. Internal aids are the preamble, the scheme and the provisions of the Act. Having discovered the reason for the statute and so having set the sail to the wind, the interpreter may proceed ahead. No provision in the statute and no word of the statute may be construed in isolation. Every provision and every word must be looked at generally before any provision or word is attempted to be construed. The setting and the pattern are important. It is again important to remember that Parliament does not waste its breath unnecessarily. Just as Parliament is not expected to use unnecessary expressions. Parliament is also not expected to express itself unnecessarily. Even as Parliament does not use any word without meaning something, Parliament does not legislate where no legislation is called for. Parliament cannot be assumed to legislate for the sake of legislation; nor can it be assumed to make pointless legislation."

13. Some of the petitioners have not disputed that the proviso to Section 4(1) creates a total bar and consequently have not supported the view taken in *Saraswati Saw Mills (supra)* and have addressed us only on questions Nos. 2 and 3. Some have supported the reasoning partly. According to them, total bar exists but only against the establishment of new mills/pits and not against operation of the existing units. All petitioners accept that total bar does operate against establishment of new mills/pits.

14. It is contended that the proviso should be segregated into two parts - one pertaining to the establishment of new saw mill and the other to the continuation of the old saw mill. The total ban is only against establishment of new mill/pit and not against the operation of the existing units. It is not possible to draw such distinction in view of the plain language employed in various provisions. Considering the object, there would be no justification to permit operation of the existing units and prohibit only new units that may create only a monopoly in private exploitation of forest. Such a classification may not have nexus with the object and, therefore, the provision may become discriminatory.

15. It is true that non-obstante clause is usually used to indicate the overriding effect, but it is not the rule of thumb. Sometimes, proviso can be treated as a substantive provision and a non-obstante clause as another provision. But assuming for a moment that Sub-section (2) has an overriding effect, is on the whole sub-section (I) and not merely on the proviso. Moreover, the overriding effect can be only to the extent of inconsistency and cannot travel beyond that limit. We are unable to notice any such inconsistency that would obliterate the substantive provision of total ban designedly created by the proviso to Section 4(1).

16. This takes us to the question No. 2. Fundamental right to practise any profession or to carry on as occupation, trade or business is specified under Article 19(1)(g) of the Constitution. But this right is subject to limitations provided for in Sub-article (6), which permits the State to make a law imposing, in the interest of general public, Reasonable restrictions on the exercise of that right. The key words are "reasonable restrictions" and "in the interest of general public". What is reasonable restriction and what is in the interest of general public cannot be put in any strait jacket formula. All depends upon the object of the Act and its scheme. But the very words "reasonable restrictions" connote that they should not be arbitrary or of an excessive nature beyond what is required in the interest of public. Though there is a presumption in favour of constitutionality of a statute, determination of reasonableness by legislature is not conclusive. It is subject to judicial review. These are the broad features and touchstones on the basis of which the validity of an enactment has to be tested. Considering the object sought to be achieved and the legislative background of the Act, it cannot be said that the total prohibition of saw mill/pit in the prohibited zone is not a reasonable restriction and is not in public interest. On the face of it, it is in public interest. No law can claim to be perfect for all times to come. Passage of time, new experiences etc. necessitate changes. The extent of the changes depends upon many factors. Forest is a national wealth. It is being denuded by illegal cutting. Considering the vast area involved and their situation in the far off places from the habitat area, it is becoming increasingly difficult to control the illegal activities. Earlier after experiemnt of imposing condition of licence within 80 Kms. did not serve the purpose. More drastic measure to achieve the same result was thought of. The saw mills/pits in or around the forest and forest area can be and has been the recipients of the illegal forest produce. They have great

potentiality of destroying the evidence of unauthorised denuding of the forest. Physical control, though possible theoretically is not always practicable. If in this context a total ban has been put on the establishment and operation of the saw mills/pits within the forest and a radius of 10 . Kms. therefrom, there is no legal justification to make a grievance. There has to be a balance between an individual and public interest, and in case of conflict, individual interest must yield to public interest. In the whole context, it cannot be said that this restrictions, which is obviously in general public interest, is unreasonable or excessive. The measure is essentially regulatory in nature and is neither unguided, nor unreasonable, nor discriminatory.

17. In this connection, useful reference may be made to the decision in the case of Kailash Chandra Sharma and Another Vs. State of Madhya Pradesh and Another, wherein the validity of the Madhya Pradesh Kastha Chiran (Viniyaman) Adhiniyam (13 of 1984) permitting for a limited period prevention of establishment and operation of saw mill on a particular area declared as a prohibited area by the State was upheld. We entirely agree with the approach adopted therein. It is true that the scheme of the Madhya Pradesh Act and the Orissa Act in question is not identical. In the Madhya Pradesh Act, restriction is for a specified period whereas in the Act it is permanent. But that would make no difference. A regulation can be of a temporary nature as well as of a permanent nature. Which of the two schemes is better was a matter of debate before us. The debate was in a wrong forum. That is a matter of legislative and executive policy an area generally prohibited for the judiciary to enter.

18. It was substituted that the right to regulate does not include the right to destroy. The business of saw mill and raw pit has not been completely destroyed. Beyond the prohibited zone, the business can be carried on. There is no right to carry on business at a particular spot.

19. Relying on the case of Mohammed Faruk Vs. State of Madhya Pradesh and Others, , it was contended that one of the factors to be taken into consideration by the Court in judging the validity is whether a less drastic restriction would not have ensured the interest of general public. Those observations will have to be read in the context of that case. In the absence of a clear concept of what that less drastic restriction would be, such a debate has only theoretical value.

20. It was contended that the limit of 10 Kms. is "out of the hat" and no reason is disclosed to justify that. The point has to be stated only to be rejected. Area restrictions can always be put. Determination of that area is again a matter of policy. What is of importance and relevance is that there is nothing to indicate that picking up of a distance of 10 Kms. is absurd or more drastic than was necessary, considering the quick transport facilities available now even in the interior forests.

21. Next submissions is that permitting continuation of the saw mills/pits established only by the Orissa Forest Development Corporation or other agencies

of the Government is discriminatory. Now, private persons on one hand and Government or public bodies on the other belong to two distinct classes. Giving special facilities to the Government, its agents and statutory corporations has been recognised as valid and reasonable. In this case, classification has clear nexus to the object. Hence, the provisions cannot be faulted even on that ground.

22. Inviting our attention to the definition of the term "forest area" in Section 2(b) of the Act, it was contended that any non-notified area administered by the State as forest, whether State-owned or private and whether wooded or maintained as a potential forest land, can be the basis for formation of the centre point for prohibited zone and this would introduce an element of uncertainty and hence, the prohibition is unreasonable on that ground. The submission is a product of pure imagination. In view of the provisions of the Orissa Survey and Settlement Act, 1958 and the Rules framed thereunder, the Orissa Forest Act, 1972, Indian Forest Act, 1927, no area can be treated as forest without following elaborate procedure and the only notifying it.

23. On the basis of the provisions of Section 35 of the Indian Forest Act, 1927, it was contended that the provision of deemed licence to the Orissa Forest Development Corporation Limited or the Government agency in respect of the area in the reserved forests is illegal. Now, there is no total prohibition. If at all, what is required is the permission of the Central Government. In this matter, that aspect is not relevant for adjudicating the Issues raised before us.

24. Before parting with this topic, it may be noticed that while interpreting the validity of such legislation, Article 48A of the Constitution must always be kept in mind. It specifies that protecting and improving environments and to safeguard the forests and wild life of the country is our constitutional goal.

25. Had the Orissa State Legislature competence to make this legislation is the 3rd and 1st question. State is relying on Entry 17A in List III of the Seventh Schedule to the Constitution. It may incidentally be mentioned that this Entry has been transferred from List II by the Constitution (42nd Amendment) Act, 1976. The Entry reads as follows:-

"17A. Forests."

The contention is that this is essentially a legislation on Entry "industry" in List I and, therefore, the State Legislature was incompetent to pass this legislation. General rules for interpretation of the Entries have been well crystallised by judicial pronouncements made from time to time. The Entries in the three Constitutional Lists are not powers of legislation but are fields of legislation, They merely demarcate the area over which the respective legislations can operate. They are of enabling character. As a result, they are given the widest possible scope of which their meaning is fairly capable. Each general word should accordingly be held to extend to all ancillary and subsidiary matters which can fairly and reasonably be comprehended in it. Tested on the above touchstone of pith and substance, there cannot be any doubt that the Act does not suffer from

the vice of legislative incompetence. The Act aims at protecting the forests and the entire regulation in it is in that direction only. The Act has received the assent of the President.

26. For all these reasons, our conclusions are:- (j) The proviso to Section 4(1) creates a total bar against the operation or establishment of the private saw mills/pits in the prohibited zone specified therein; (ii) the proviso is valid and (iii) the Act does not suffer from the vice of legislative incompetence.

27. All these petitions be now remitted to the appropriate Bench for disposal in accordance with law in the light of the above answers,

D.P. Mohapatra, J.

28. I agree.

R.K. Patra, J.

29. I agree.