
(1997) 12 RAJ CK 0030
In the Rajasthan High Court
Case No : Civil Writ Petition No. 2735 of 1993

Rajendra Kumar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 03-12-1997

Acts Referred:

Wild Life (Protection) Act, 1972 — Section 49B

Citation : AIR 1998 Raj 165 : (1998) 1 RLW 689 : (1998) 1 WLC 277

Hon'ble Judges : J.C. Verma, J

Bench : Single Bench

Advocate : C.N. Sharma and Manoj Kumar Sharma, for the Appellant; V.S. Gurjar, Suresh H. Mathur, Subodh Shah and K.K. Mehrish, for the Respondent

Final Decision : Dismissed

Judgement

J.C. Verma, J.—Petitioner was running the business of Carver Ivory, popularly known as Mammoth Ivory under the license as issued by the State which license stood renewed from year to year. There are certain restraints on his business which have been provided under the Wild Lite (Protection) Act. It is stated by him that because of certain amendments made in Sections 5, 27, 33, 34, 35 and 37 vide Act No. 44 of 1991 in the aforesaid Act, his livelihood has been effected and exercising powers u/s 49 of the Amended Act, he has been informed vide Annexure-4 dated 23-12-1991 to the effect that the import of ivory has been banned and, therefore, the petitioner is restrained from dealing with ivory in any and whatsoever manner subsequent to 29-2-1992. The letter Annexure-4 has given a cause of action to the petitioner for challenging the amended sections of Act 44 of 1991. It is stated by the petitioner that the provisions of the amended law do not and cannot have effect of preventing the manufacture or dealings in ivory of Mammoth animals, which animal according to the petitioner had already become extinct as long as 17,000 years B.C. and is no more in existence in the Universe. The petitioner submits that the mammoth animal was and is an extinct but was a different and distinguished from Elephant of Indian and African Region.

The petitioner has reproduced certain events of even 3000 years ago and of 3rd and 4th Century to show that ivory trade had flourished in India and was one of the export item to the west and is one of the best Indian arts which is an integral part of the National Culture and relate to the work of Indian Craftsmen for their livelihood. The petitioner has traced out the history of Wild Life Protection, stating there firstly the Animal Protection Act of 1912 was promulgated which merely concerned to prevent the killing of wild birds and animals and later on for a comprehensive and practical legislation to protect the Indian Wild Life, the present Wild Life (Protection) Act, 1972 was enacted with the statement of objects inter alia as under:

"The rapid decline of Indian's Wild animals and birds, one of the richest and most varied in the world, has been a cause of grave concern. Some wild animals and birds have already become extinct in this country and others are in the danger of being so. Areas which were once teeming with wild life have become devoid of it and even in sanctuaries and National Parks the Protection afforded to wild life needs to be improved. The Wild Birds and Animals Protection Act, 1912 (8 of 1912) has become completely outmoded. The existing State laws are not only outmoded but provided punishments which are not commensurate with the offence and the financial benefits which accrue from poaching and trade in wild life produce. Further, such laws mainly relate to control of hunting and do not emphasise the other factors which are also prime reasons for the decline of India's wildlife, namely taxidermy and trade in wild life and products derived therefrom."

2. It is stated that the list of Scheduled animals which were to be protected did not contain the Indian Elephants (*Elephas Maximus*). The Parliament had further amended the Act of 1972 in the year 1986 and by incorporating Section 44 the ivory imported into India was licensed. Under Chapter V-A of the amended Act prohibition of trade or commerce in trophies, animal articles, etc. derived from certain animals was prescribed.

3. The petitioner states vide the latest amendment vide Act 44 of 1991, passed on 20-9-1991, the Parliament had inserted the amendment with the following statement of objects. The statement of Objects provide that the decline in population of African elephant, due to illegal trade of ivory as imported in Appendix-I of the Convention in October 1989. had to be curtailed and import of ivory would no longer be possible to meet the domestic trade. If the trade is allowed to continue, it is bound to lead the large scale poaching of Indian Elephants. Aims and objects of the Amended Act are read as under :--

"It may be recalled that the parties to the "Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), being greatly concerned by the decline in population of African Elephant due to illegal trade in ivory, have included this animal in Appendix-I of the convention in October 1989. Due to this change, the import and export of African ivory for commercial purposes has been prohibited. As a result, import of ivory would no longer be possible to meet the

requirements of the domestic ivory trade. If the ivory trade is allowed to continue, it will lead to large scale poaching of Indian Elephants. With this point in view the trade imported ivory within the country is proposed to be banned after giving due opportunity to ivory traders to dispose of their existing stock."

4, Section 2 of the amended Act of 1991 defines the "animal articles" made from any captive animal or wild animal etc. whereas subsection (36) of Section 2 defines the wild animal.

The definition reads as under:

"2(a) "animal article" means an article made from any captive animal or wild animal, other than vermin, and includes an article or object in which the whole or any part of such animal has been used, and ivory imported into India and an article made therefrom."

Section 2(36) containing the definition of "wild animal" was not amended, the said definition reads as under:

(36) "Wild Animal" means any animal found wild in nature and includes any animal specified in Schedule I, Schedule II, Schedule III, Schedule IV, or Schedule V, wherever found."

5. It is argued that Chapter V-A deals with the Scheduled Animal Articles and according to the petitioner the ivory derived from Mammoth is not an ivory derived from a scheduled animal and, therefore, according to the petitioner no article could be brought into the definition as no article made out of such fossil ivory which can be brought within the purview of the Act.

6. It is the submission of the petitioner that ivory derived from Mammoth, an extinct species could not be covered by the provisions of Wildlife Protection Act as amended. The petitioner states that because of the amended Act and the instructions issued by the concerned authorities, the dealers in Mammoth Ivory have stopped dealing in the ivory as the petitioner apprehends for being prosecuted.

7. The Dictionary meaning of the expression "Ivory" is a "hard, white, elastic and fine-grained substance" as "dentine of exceptional hardness". comprising the main part of the tusk of the elephant, mammoth, hippopotamus, walrus and narwhal (Arctic whale). The petitioner wants to submit that there is difference of identification between "Mammoth Ivory" and "Ivory" taken from Indian/African Elephants. Under the heading "Elephant and Mammoth" the following distinct points are apparent i.e. "Elephant and Mammoth tusk ivory comes from the two modified upper incisors of extant and extinct members of the same order (Proboscidean). African and Asian elephants are both extant. Mammoths have been extinct for 10,000 years. Because of the geographical range in Alaska and Siberia, Mammoths Primitive tusks have been well preserved, therefore, Mammoths Primitive is the only extinct Proboscidean which consistently provides high quality carvable ivory."

8. For the aforesaid submission, the petitioner relies on the notification published by Wild Life Fund in co-operation with CITES which has been attached as Annexure-7.

9. The petitioner submits that the total prohibition to deal even with Ivory derived from Mammoth, an extinct species shall deprive and render several thousands of Ivory carvers jobless and would result in destruction of art which have been in existence since 10.000 B.C. It is further submitted that the Mammoth Ivory of Russian origin in which the petitioner is engaged is a fossil ivory of an extinct animal. Mammoth which was found thousands of years before in Siberia and in Russia. Because of the reason that Indian Elephant was included for the first time in the schedule of animals only in the year 1986, the every trade was licensed and in the year 1991 the further amendment was necessitated in view of the reason that the persons importing African Elephant Ivory which was similar to Indian Elephant Ivory were indulged in poaching of Indian Elephant. It is stated that it is nowhere mentioned that the Ivory derived from Mammoth has been banned if the aims and objects of the amending Act of 1991 is read.

10. A prayer has been made to declare that the Mammoth Ivory is not covered by the Wild Life Protection Amending Act, 1991 or that the Central Government has not imposed any restriction on trade in relation to mammoth Ivory and further to issue directions to the officers of the Government to not interfere in any manner in the manufacturing activities of the Mammoth Ivory.

11. Reply has been filed by the respondents. It is stated that the total ban on Ivory trade is the result of a policy-decision taken by the Government to protect the male elephant population (which alone have tusks) and this species of animals is fast dwindling because of large scale destruction through poaching by greedy and wreckless traders, who manufacture article of Ivory of Indian Elephants under the cover of Mammoth Ivory. It is stated that the Amending Act is applicable to every type of Ivory including the Mammoth Ivory. Imported Ivory and the Mammoth Ivory with which the petitioner is dealing is the Ivory. It is averred in the written statement that the distinction between Elephant Ivory and Mammoth Ivory is very well known to the State, but after the raw ivory is carved into finished goods, it becomes difficult to exactly and immediately distinguish between Imported Ivory and Indian Ivory. The difficulty in drawing distinction between the two had resulted in Indian Ivory being carved under the garb of Mammoth Ivory and it has encouraged the unauthorised killing of elephants and depletion in their population. It is stated that the traders dealing with such materials have no fundamental right and cannot challenge the banning of Ivory. It is stated that as a matter of fact only few hundred Ivory carvers have been left. It has been averred in the written statement that Stale was hoping that Ivory trade would be based on tolerance and respect for the lives of the elephants and that is why the elephant was kept outside the purview of the wild life, but the hope was belied by the traders and the manufacturers themselves

who started carrying trade on Indian Ivory of Elephants under the garb of imported Mammoth Ivory. They had taken undue benefit for the reason that it was difficult, if not impossible, to immediately distinguish between the two types of raw material and after going through till these aspects, the practical position, dwindling of the number of elephants despite the ban on the elephants ivory and to prevent further poaching, the Government of India had ultimately banned the import of unmanufactured Ivory as well for local trade and manufacturing in imported Ivory which includes the Mammoth Ivory. It is stated that Chapter V- A in the definition of Animal Articles as given in the Act clearly indicates that the dealing in Mammoth Ivory also stands banned, and that has been so done for fulfilment of a lofty public purpose of maintaining environmental purity and conservation of the population of Indian Elephants.

12. The petitioner has filed rejoinder and the averments made in the writ petition have been reiterated with the submission that it was not necessary to ban the Mammoth Ivory.

13. The petitioner has admittedly not challenged any of the vires of the provisions of the Amending Act of 1991, but has prayed to declare that the Mammoth Ivory is not covered by the Amending Act of 1991 and therefore, no restriction can be imposed on the trade in relation to Mammoth Ivory. The necessity for enacting the Wild Life Protection Act. 1972 and again for amending the same in the year 1986 and 1991 had already been incorporated above and in order to appreciate that the necessity to carry out the amendments, it shall be necessary to look the insight into the purposes of the Amendment Act. 1991 which has been reflected in the Statement of Objects and Reasons of the Amendment Bill as under:--

"The Wild Life (Protection) Act. 1972 provides for the protection of wild animals and birds.

2. In the implementation of the Act over 18 years, the need for amendment of certain provisions of the Act to bring them in line with the requirements of the present times has been felt. The Indian Board for wild life also endorsed the need for these amendments. Ministry of Environment and Forest has worked out the proposals for Amendment of the Act on the basis of recommendations of the Standing Committee of Indian Board for Wild Life and various ministries of the Government.

3. Poaching of wild animals and illegal trade of products derived therefrom, together with degradation and depletion of habitats have seriously affected wildlife population. In order to check this trend, it is proposed to prohibit hunting of all wild animals (other than vermin). However, hunting of wild animals in exceptional circumstances, particularly for the purpose of protection of life and property and for education, research, scientific management and captive breeding, would continue. It is being made mandatory for every transporter not to transport any wild life product without proper permission. The penalties for

various offences are proposed to be suitably enhanced to make them deterrent. The Central Government officers as well as individuals now can also file complaints in the courts for offences under the Act. It is also proposed to provide for appointment of honorary Wild Life Wardens and payment of rewards to persons helping in apprehension of offenders.

4. To curb large scale mortalities in wild animals due to communicable diseases, it is proposed to make provisions for compulsory immunisation of livestock in and around National Parks and Sanctuaries.

5. Realising the need to protect offshore marine flora and fauna, the provision of National Parks and Sanctuaries are proposed to be extended to the territorial waters. It is also being provided that while declaring an (sic) part of territorial sic sanctuary due precaution shall be taken to safeguard the occupational interests of local fishermen.

6. While making the provisions of the Act more effective and stringent, due regard has also been given to the rights of the local people, particularly the tribals, It is being provided that except for the areas, under reserve forests, (where the rights of the people have already been settled) and the territorial waters no area can be declared a sanctuary unless the rights of the people have been settled. State Wildlife Advisory Boards are also being made responsible for suggesting ways and means to harmonise the needs of tribals and the protection of wild life.

7. In the recent limes, there has been a mushroom growth of zoos in India. Zoos, if managed properly, serve a useful role in the preservation of wild animals. So far there is no legislation dealing with zoos. Provisions are now being made for setting up of a Central Zoo Authority responsible for overseeing the funtioning and development of zoos in the country. Only such zoos would be allowed to operate as are recognised and maintain animals in accordance with the norms and standards prescribed by the Zoo Authority. Activities causing disturbance to animals in a zoo are being made a punishable offence.

8. Over exploitation has endangered the survival of certain species of plants. Although the export of these plants and their derivatives is restricted under the provisions of the export policy and the "Convention of International Trade in Endangered Species of Wild Fauna and Flora" to which India is a party, yet there is no restriction on collection for these species from the wild provision to prohibit collection and exploitation of wild plants which are threatened with extinction, is being made. Cultivation and trade of such plants would, however, be permitted under licence. The provisions, however, would not affect the collection of traditionally used plants for the bona fide personal use of the tribals.

9. It may be recalled that the Panics to the "Convention on International Trade in Endangered Species of Wild Fauna and Flora" (CITES), being greatly concerned by the decline in the population of African elephant (sic) the import and export of African ivory for commercial purposes has been prohibited. As a result import of

ivory would no longer be possible to meet the requirements of the domestic ivory trade. If the ivory trade is allowed to continue, it will lead to large scale poaching of Indian elephants. With this point in view, the trade in African ivory within the country is proposed to be banned after giving due opportunity to ivory traders to dispose of their existing stock.

10. The existing legal provisions do not permit the collection of snake venom for producing life saving drugs from snakes like Cobra and Russel's Viper. This is causing hardship. It is, therefore, proposed to amend the Act to provide for extraction of and dealing in Snake Venom in a regulated manner.

11. The Bill seeks to achieve the aforesaid objects."

14. The relevant amendments which affected the petitioner are as under:

5. Amendment of Section 2:-- In Section 2 of the principal Act,

(a) in Clause (2), for the words "has been used", the words "has been used, any (and) ivory imported into India and an article made therefrom" shall be substituted.

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27. Amendment of Section 39 :-- In Section 39, of the principal Act. in Sub-section (i), the

(a)

(b) after clause (b), the following clauses shall be inserted, namely :--

"(c) ivory imported into India and an article made from such ivory in respect of which any offence against this Act or any rule or order made thereunder has been committed :

shall be| |

30. Amendment of Section 44: In Section 44 of the principal Act, in Sub-section 1) --

(i)inclause (a), Sub-clause (ia) shall be omitted.

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(iii) for the second proviso, the following proviso shall be substituted, namely :--

"Provided further that nothing in this subsection shall apply to the dealers in tail feathers of peacock and articles made therefrom and. the manufacturers of such articles."

33. Amendment of Section 49A. -- In Section 49A of the principal Act --

(a)".....

(b) in clause (c)

(ii) after Sub-section (ii), the following Sub-clause shall be inserted, namely :--

"(iii) in relation to ivory imported into India or an article made from such ivory, the date of expiry of six months from the commencement of the Wild Life (Protection) Amendment Act, 1991".

34. Amendment in Section 49B. -- In Section 49B of the principal Act, in Sub-section (i), in Clause (a), after Sub-clause(i), the following Sub-clause shall be inserted, namely :--

"(ia) a dealer in ivory imported into India or articles made therefrom or a manufacturer of such articles; or".

, 35. Amendment of Section 49C:--In Section 49C of the principal Act.--

(a) in Sub-section (1), in Clause (a), after Subsection (iv), the following Sub-clause shall be inserted.

"(v) ivory imported into India or article made therefrom;"

(b) in Sub-section (7), for the words "any scheduled animal or a scheduled animal article", the words "any scheduled animal, or scheduled animal article or ivory imported into India or any article made therefrom."

Taking into account the amendments, the principal Act, in so far as it is relevant for the purposes of the present writ petitions, reads as follows :--

2. Definitions :

In this Act, unless the context otherwise requires

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(2) "animal articles" means an article made from any captive animal or wild animal, other than vermin, and includes an article or object in which the whole or any part of such animal has been used and ivory imported into India and an article made therefrom.

39. Wild animals, etc. to be Government property --

(I) Every

XX XX XX XX

(c) "ivory imported into India and an article made from such ivory in respect of which any offence against this Act or any rule or order made thereunder has been committed :

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shall be the property of the State Government and, where such animal is hunted in a Sanctuary or National Park declared by the Central Government, such animal or any article, trophy, uncured trophy or meat derived from such animal or any

vehicle, vessel, weapon, trap, or tool used in such hunting, shall be the property of Central Government."

15. From the above reading it is clear that virtually all International trade in Ivory was prohibited with effect from the date mentioned in the Amending Act. u/s 49B(1)(a) of the principal Act, a trade in "imported ivory" and articles made therefrom, were completely prohibited from the specified date. The very reading of the enactment makes it clear that the legislature has banned the ivory imported into India and not any African Ivory or any other specified ivory. The legislature has definitely enlarged the operation of the Act and has totally banned from the specified date a trade in relation to ivory imported into India or an article made therefrom. It does mean that the orders dealing with ivory or manufacturers of the articles dealing with imported ivory were to stop all activities in this regard within specified period.

16. A similar question arose wherein the amending Act of 1991 was challenged before the Delhi High Court and Full Bench of Delhi High Court in Civil Writ Petition Nos. 1016/92, 1272/ 92, 1631/92, 1749/92, 1303/92 and 1964/93 had held that the provisions of the amending Act are not ultra vires and the legislature was competent to pass such an Act as to maintain the species of elephants. The decision was awarded on 12-3-1997 (or 20-3-1997) (reported in Amar Singh and Another Vs. Jai Parkash and Others, (copy of the unreported judgment has been placed on record by the counsel for the respondents after the arguments of the writ petition). It was observed by the Delhi High Court after going through the data placed on record that in the early part of the 20th Century the number of elephants was two lakhs but in the year 1977-78 it had dwindled to 20,000 or so and in the year 1991 it was something in between 14000-20000. Despite the ban having been imposed, the elephants population had considerably gone down. It was observed that if the existing position is allowed to prevail, the elephants would become extinct in this part of the subcontinent as has been noted down by the Hon'ble Supreme Court in the case of State of Bihar Vs. Murad Ali Khan and Others, where it was observed that relationship between the nature and man is extricably linked. They are co-existing entities that partake of each other and to preserve different species is to preserve human life. The elephant is no exception to depredations of man and it is now an endangered species requiring not only protection from being hunted but also a chance to recoup its depleting numbers and in order to achieve this object, drastic steps for or conservation of the elephant were undoubtedly required. The Parliament judged the situation and in its determination completely prohibited the trade in imported ivory and ivory articles and this was done in keeping with the global perception that the elephant must be saved from extinction. The Full Bench of Delhi High Court in the aforesaid writ petitions after noticing number of judgments had upheld the vires of the amending Act of 1991.

17. The Full Bench was also seized with the matter where the ivory including the Mammoth Ivory was the subject-matter of challenge and in Civil Writ Petition

Nos. 1303/92 and 1964/93 (reported in Amar Singh and Another Vs. Jai Parkash and Others, in the said judgment, while answering that the contention that the impugned legislation does not apply to Mammoth Ivory as the same is not covered by the provisions thereof, and in any case the Parliament was not competent to legislate with regard to the subject of Mammoth Ivory, had held that no person can commence or carry on business as a dealer in ivory imported into India or articles made therefrom or as a manufacturer of such articles. It was noted down that the words "Ivory imported into India" have been used designedly and deliberately by the legislature. The legislature had intended to cover all descriptions of ivory imported into India including Mammoth Ivory. The Full Bench of Delhi High Court in the aforesaid writ petitions observed as under:

The contentions of the learned counsel for the petitioners in Writ Petition Nos. 1303/92 and 1964/93 that the impugned legislation does not apply to Mammoth Ivory as the same is not covered by the provisions thereof and in any case the Parliament was not competent to legislate with regard to the subject of Mammoth Ivory, does not appeal to us. It is significant to note that Act 44 of 1991 inserted Clause (ia) in Section 49B(i)(a) in the principal Act. As per this clause, no person can commence or carry on business as a dealer in ivory imported into India or articles made therefrom or as a manufacturer of such articles. It is also noteworthy that Sub-clause (ia) uses the words "ivory imported into India". These words have been designedly and deliberately used by the legislature. The legislation was intended to cover all descriptions of ivory imported into India including Mammoth Ivory. This was to prevent Indian Ivory from entering into the market under the pretext of Mammoth Ivory or African Ivory. Once the Mammoth Ivory is shaped into an article or curio, it looks exactly like an article made from elephant ivory. This we can say on the basis of the articles shown to us in Court -- both of Mammoth Ivory as well as Elephant Ivory. The respondent, Union of India, in its affidavit dated May 19, 1992 has also expressed the same difficulty in distinguishing between articles of Mammoth Ivory and Elephant Ivory. Para 4 of the affidavit reads as follows:--

"Superficially this may be so, but when an article is manufactured from ivory it is impossible to distinguish whether that article is manufactured from Mammoth Ivory or from elephant ivory. The petitioner is in no position to guarantee that no ivory derived illegally from Indian elephant would be sold in the garb of Mammoth Ivory because there is no method by which one can distinguish the articles made from Indian ivory and Mammoth African Ivory....."

When a buyer intends to buy a curio, he is not interested to know whether it was created from elephant ivory or mammoth ivory. An average buyer also does not have the expertise or the knowledge to distinguish between articles made from Mammoth Ivory and Indian Ivory. To him the translucent whiteness of the ivory matters. He buys it purely on aesthetic considerations or as a status symbol. To give permission to trade in Articles made from Mammoth Ivory would result in laundering of Indian ivory -- a result which the legislation wants to prevent for

the reasons already explained above. Learned counsel for the petitioners referred to certain correspondence with the Secretariat of the CITES in support of his contention that it is possible to identify Mammoth Ivory from the ivory of the Asian and African elephants. This may be so but the identification can be made by experts in the field or those who have experience in this line and not by a layman who sets out to buy an ivory article. Learned counsel also invited our attention to page 753, Vol. 7 of the New Encyclopaedia Britannica, 15th Edition, and submitted that ivory which is drawn from Mammoth, an extinct genus of Elephants found as fossils in Pleistocene deposits over every continent except Australia and South Africa (Pleistocene epoch began 2,50,000 years ago and ended 10,000 years back) is fossil Mammoth Ivory and not ivory in the sense in which the same is used in the Act. We are unable to accept the submission that the Mammoth Ivory is not ivory in the sense in which it is used in the Act. In case the legislation was not to apply to Mammoth Ivory the Parliament would have made an exception in this regard. We cannot attribute to the legislature that it was not aware of Mammoth Ivory found as fossils in large parts of the world. In the shorter Oxford Dictionary, the meaning of the ivory is given as under :--

(i) The hard, white, elastic and fine grain substance (being dentine of exceptional hardness) composing the main part of the tusks of the elephant, mammoth (fossil)

(ii) A substance resembling ivory or made in imitation of it."

18.1 fully agree with the view expressed by the judgment of Full Bench of Delhi High Court in the aforesaid writ petition, portions of which have been reproduced hereinabove. The words "ivory imported into India" in accordance with Section 49B(i)(a) would definitely include all descriptions of ivory including the Mammoth Ivory and in order to achieve the purpose for which the Amending Act has been enacted by including the imposition of ban on trade in imported ivory of all descriptions whether drawn from mammoth or elephant and for the salutary purpose of protection of Indian Elephant, no fault can be found in the action of the State and no declaration can be handed over to the petitioner to the effect that the word "ivory" does not and should not have included or it does not mean the mammoth ivory.

19. For the abovesaid reasons and in view of the Full Bench decision of the Delhi High Court I do not find any merit in the writ petition and the same is dismissed with no order as to costs.