
(1991) 11 OHC CK 0027
In the Orissa High Court
Case No : O.J.C. No. 1073 of 1984

Sarat Kumar Malu

APPELLANT

Vs

State of Orissa and Another

RESPONDENT

Date of Decision : 12-11-1991

Acts Referred:

Constitution of India, 1950 — Article 14, 20
Orissa Forest Act, 1972 — Section 56(2)

Citation : AIR 1992 Ori 128

Hon'ble Judges : R.C. Patnaik, J;A. Pasayat, J

Bench : Division Bench

Advocate : J. Das, Y. Das, B.P. Das, U.C. Patnaik and M.S. Haque, for the Appellant; Additional Government Advocate, for the Respondent

Judgement

R.C. Patnaik, J.—In this writ application under Articles 226 and 227 of the Constitution of India, the petitioner seeks a declaration that Section 56(2) and Section 56(2-a) of the Orissa Forest Act, 1972 (hereinafter referred to as the "Act") are ultra vires Article 14 of the Constitution of India, by reason of vesting of unbridled, uncanalised, unregulated powers in forest officers.

2. Though several grounds were taken in the writ application assailing the vires of the aforesaid provisions, challenge to the vires of Section 56(2-a) was not canvassed before us on the ground of (a) of absence of guidelines, (b) that the provision for confiscation or criminal prosecution visited upon the person double jeopardy and (c) that the provision for confiscation is harsher than the procedure for trial before a criminal court, having regard to the decision of this Court in Jogender Singh and Others Vs. State of Orissa and Others, where the vires assailed on the aforesaid grounds was upheld.

3. Learned counsel for the petitioner has therefore, confined his submission to only aspect, namely, the provision contained in Ss. 56(2) and 56(2-a) are ultra vires in the absence of any guideline as to the selection of the mode to be adopted. The provisions do not indicate the counsel contends when a proceeding

for confiscation is to be initiated or when a criminal prosecution is to be launched or even when both are to be initiated. Hence, it is argued that absence of any guideline for the classification renders the provisions unreasonable and arbitrary and, therefore, hit by Article 14 of the Constitution of India.

Learned counsel for the State, on the other hand, has urged that the object of the Act and the reasons for the amendment of Sub-section (2) and incorporation of Sub-sections (2-a) to (2-e) furnish sufficient guidelines and it is the further stand of the State Government that the word "or" occurring in Sub-section (2) should be read as "and" having regard to the scheme of the Act and hence there is no option left to the forest officer to choose at his sweet-will the mode to be adopted in regard to the person when he has reason to believe that a forest offence has been committed in respect of forest produce.

4. Though the provisions now contained in the Orissa Forest Act by Orissa Act 9 of 1983 are in Pari materia with the provisions contained in the Andhra Pradesh Forest Act, 1967 the provisions introduced by Orissa Act 9 of 1983 were also verbatim the same as the provisions which were introduced by the amendment to the Andhra Pradesh Act by the Andhra Pradesh Amendment Act, 1976. Hence, this Court in Jogender Singh and Others Vs. State of Orissa and Others, adopted and followed the decision of the Supreme Court in Divisional Forest Officer and Another Vs. G.V. Sudhakar Rao and Others, to hold that the provisions contained in Section 56(2-a) did not suffer from any constitutional vice for lack of guidelines nor was the provision for confiscation harsher than the procedure for trial before a criminal court nor did the person suffer any double jeopardy by reason of being proceeded against before the departmental officer for confiscation as well as being prosecuted in a criminal court.

5. It is worthwhile to note here that the Supreme Court took note of the purpose of the amendment, its object and reasons which impelled the Legislature to confer powers on the departmental officers, called in the Act as "authorised officer" for confiscation of forest produce seized, where there was reason to believe that a forest offence has been committed in addition to the provision contained in the Forest Act for prosecution of the offender before a criminal court. The objects and reasons which impelled the Legislature of Andhra Pradesh to enact the 1976 Amendment are not different from the objects and reasons which led to the Orissa Amendment of 1983.

There was large scale illicit felling of valuable trees from, Government forests. Statistics indicated that the forest area of the State was heavily decreasing by the activities of unscrupulous traders and the provision authorising prosecution of the offender by a magistrate and confiscation were not adequate to arrest the manace. Unless more drastic and stringent measures were taken, the State would be denuded of its forests in the near future. That impelled the State Legislature to bring about the change in the law by the Amendment Act 9 of 1983. Power was conferred on the departmental officers to initiate proceeding for confiscation of forest produce seized and take a decision in accordance with the

provisions contained in Section 56(2-a). The amendment clearly indicated that where an order for confiscation has already been passed in respect of forest produce seized u/s 56, the magistrate would have no jurisdiction of direct confiscation and the Supreme Court observed that there was no overlapping of the respective jurisdictions as there was clear demarcation over the areas in which they operated. The Supreme Court noted that in addition to the quasi judicial proceeding that might be initiated, the forest officer might also decide to prosecute the accused and in such case a report should be made to the magistrate, this Court has also said so in *Jogender Singh and Others Vs. State of Orissa and Others*, Hence the two modes are not in the alternative, that is to say, even if one mode is adopted the other is also available. It is open to the department either to proceed departmentally or to launch prosecution or adopt both the modes.

6. Therefore, it has been contended by Mr. Das, the learned counsel for the petitioner, that in the absence of any guidelines as to when either of the modes or both can be adopted, vesting of discretion in the forest officer without laying down the guidelines is uncanalised, unbridled and unreasonable and arbitrary and, therefore, ultra vires Article 14.

7. Counsel for the petitioner has referred us to a large number of decisions in support of his contention that absence of guidelines for classification came within the mischief of Article 14. It is unnecessary for us to burden this judgment with all the authorities cited. Suffice it for our purpose to refer to the case of *Maganlal Chhaganlal (P) Ltd. Vs. Municipal Corporation of Greater Bombay and Others*, where a Seven Judge Bench was specially constituted to consider the correctness of the decision of that Court rendered in *Northern India Caterers (P) Ltd. v. State of Punjab* AIR 1957 SC 1581, where it was held that discrimination would result if there are two available procedures, one more drastic or prejudicial to the party concerned than the other, which can be applied at the sweet-will of the authority. While considering the correctness of the decision in *Northern India Caterers* case, it was observed :

".....One finds it difficult to reconcile oneself to the position that the mere possibility of resort to the Civil Court should make invalid a procedure which would otherwise be valid. It can very well be argued that as long as a procedure does not by itself violate either Article 19 or Article 14 and is thus constitutionally valid, the fact that procedure is more onerous and harsher than the procedure in ordinary Civil Courts, should not make that procedure void merely because the authority competent to take action can resort to that procedure in the case of some and ordinary Civil Court procedure in the case of others, That a constitutionally valid provision of law should be held to be void because there is a possibility of its being resorted to in the case of some and the ordinary Civil Court procedure in the case of others somehow makes one feel uneasy and That has been responsible for the attempts to get round the reasoning which is the basis in the decision in *Northern India Caterers*" case."

For the sake of courtesy to the counsel for the petitioner, we need refer to a decision where the rule as to vice of discrimination in the absence of policy or guidelines was succinctly stated. In *Kedar Nath Bajoria Vs. The State of West Bengal*, it was observed:

".....The vice of discrimination, it is said, consists in the unguided and unrestricted power of singling out for different treatment one among a class of persons all of whom are similarly situated and circumstanced, be that class large or small. The argument overlooks, the distinction between those cases where the legislature itself makes a complete classification of persons or things and applies to them the law which it enacts, and others where the legislature merely lays down the law to be applied to persons or things answering to a given description or exhibiting certain common characteristics, but being unable to make precise and complete classification, leaves it to an administrative authority to make a selective application of the law to persons or things within the defined group, while laying down the standards or at least indicating in clear terms the underlying policy and purpose, in accordance with, and in fulfilment of, which the administrative authority is expected to select the persons or things to be brought under the operation of the law....."

Counsel, therefore, has urged that no guidelines having been indicated in Section 56(2) as to the mode to be adopted, the provision is ultra vires, having vested unbridled power and arbitrary discretion in the forest officer.

8. We may note in this connection, a decision of the Supreme Court in *Commissioner of Sales Tax, Madhya Pradesh, Indore and Others Vs. Radhakrishnan and Others*, There also under the provisions of the Madhya Pradesh General Sales Tax Act, two modes were available, both alternative as well as conjunctive, namely, under the provisions of Section 22 (4-A), the Commissioner, if the tax due was not paid within the time allowed, could after giving the dealer a reasonable opportunity of being heard direct in addition to the amount due to pay by way of penalty a sum as specified in Sub-clauses (a) and (b) to subsection (4-A). The other procedure which was also available to the Commissioner was to take proceedings u/s 46 for the trial of the dealer who without reasonable cause failed to pay the tax due within the time allowed. The vires of the provision was: challenged on the ground that the Commissioner was entitled to two different procedures in enforcing and realising the assessment made but as there was no guidelines as to the circumstances in which he should resort to either of the provisions, the provision regarding grant of sanction was invalid. The Supreme Court after referring to *Maganlal Chhaganlal (P) Ltd. Vs. Municipal Corporation of Greater Bombay and Others*, considered its earlier decision in *State of Kerala and Others Vs. C.M. Francis and Co.*, concerning the Travancore-Cochin General Sales Tax Act. That Act provided two remedies, u/s 13 tax not paid could be recovered as if it were arrears of land revenue and Section 19 authorised prosecution before a magistrate and it was held that if two remedies were open, both could be resorted to at the option of the authority

recovering the amount unless the statute in express words laid down that one remedy is to the exclusion of the other, and observed that under the Madhya Pradesh General Sales Tax Act, the authority could resort to both the remedies at its option but Section 47 prohibited prosecution where proceedings u/s 22 (4-A) had been taken. But there was no such embargo in the Travancore-Cochin General Sales Tax Act. The Court also referred to the case of Ram Sarup Vs. The Union of India (UOI) and Another, where the vires of Section 125 of the Army Act which authorised the officer either to try a case by court-martial or by an ordinary Court or by a criminal Court, was challenged on the ground that the modes prescribed being clearly within the discretion of the authority without any guidelines the section was violative of Article 14 of the Constitution. The Supreme Court held that the choice as to which Court should try the accused was left to the responsible military officers under whom the accused was serving and those officers were to be guided by consideration of the exigencies of the service, maintenance of discipline in the army, speedier trial, the nature of the offence and the person against whom the offence was committed and when power was conferred on high and responsible officers they were expected to act with caution and impartiality while discharging their duties and the circumstances under which they would choose either of the remedies available should be left to them. So the exigencies, the nature of the offence, discipline in the army were considered to be the relevant guidelines in the matter of making choice and adopted the rule laid down in Province of Bombay v. Bombay Municipal Corporation AIR 1947 PC 34 that every statute must be supposed to be for public good at least in intention and, therefore, of few laws, could it be said that the law conferred unfettered discretionary power since the policy of law officers guidance for the exercise of discretionary power and held :

".....guidance will have to be inferred from the policy of the law, itself, that is, if on particular facts of a case the Commissioner who is an officer of high standing in exercise of his discretion comes to the conclusion that more drastic remedy should be taken, the exercise of that option cannot be termed as unconstitutional. In considering the validity of a statute the presumption is in favour of its constitutionality and the burden is upon him who attacks it to show that there has been a clear transgression of constitutional principles. For sustaining the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, history of the times and may assume every state of facts which can be conceived. It must always be presumed that the Legislature understands and correctly appreciates the need of its own people and that discrimination if any, is based on adequate grounds. It is well settled that Courts will be justified in giving a liberal interpretation to the section in order to avoid constitutional validity..... The provisions of Section 22(4-A) can be read as being applicable to cases in which the stringent step of prosecution is considered not necessary. The option is with the Commissioner and if he thinks levy of penalty would achieve the purpose of collection of the tax he can have recourse to the provisions of Section 22 (4-A).

Before levying a penalty u/s 22(4-A), the Commissioner shall give reasonable opportunity of being heard as to why the penalty should not be levied. Reading the two provisions harmoniously, we are of the view that the discretion is given to the Commissioner to resort to one of the two remedies as the facts of the case may require. In graver cases he will be justified in taking the drastic remedy and resorting to prosecution in the criminal court if he is satisfied that such a course is necessary for the collection of the tax expeditiously. If the discretion is not properly exercised the Court may be justified in interfering in such cases but the law cannot be held to be invalid....."

In the light of the observations made in Commissioner of Sales Tax, Madhya Pradesh, Indore and Others Vs. Radhakrishnan and Others, , we are of the view that having regard to the menace the country is facing by large scale depredation of its forest by unscrupulous persons and traders, the provision conferring both the modes on the forest officer is not arbitrary or unreasonable. Both the modes, i.e., proceeding for confiscation by the departmental authority and prosecution before the magistrate should ordinarily and generally be resorted to where the officer has reason to believe that a forest offence has been committed in respect of any forest produce so that the forest produce together with all tools, ropes, chains, boats, vehicles or cattle used in committing such offence are confiscated and the offender is also prosecuted before a criminal Court having committed an offence under the law.

9. But there are cases and cases. There would be cases of trifling in character and petty in nature. The State may not desire that the person should face the ordeal of a criminal trial which having regard to the offence committed might appear to be unjust or more sinned against than sinning. The State is also the protector of its citizens. An offence unwittingly committed and trivial in nature should not reach the criminal Court when other mode for confiscation is adequate. For example, a tribble cutting a twig of a teak tree from Government forest does commit an offence under the Forest Act. He does not know the law though he is presumed to know. He is an inmate of the forest. He treats the forest as his. It is one thing to confiscate the forest produce in a departmental proceeding. But would it be expedient and in the general interest of the society to prosecute him before a criminal court? If students on a picnic close by a Government forest unaware of the consequence of the act remove some manua flowers and tamarind, should they be prosecuted before a criminal court? We are of the view that justice would be casualty if discretion not to prosecute them is not exercised in their favour. Similarly such instances of acts trivial and trifling in character and petty in nature may be multiplied. Should such cases go to a criminal court? Hence, we are of the view that the objects and reasons for which the amendment was brought on the statute book, the history of the times and matters of common knowledge are adequate guidelines to guide the forest officer in the matter of exercising discretion where he shall take recourse to the mode of confiscation only or for both. The gravity of the offence, the triviality of the offence, the petty character of the offence would guide him in the exercise of

discretion. Hence, in our view the provisions contained in Section 56(2-A) does not suffer from the vice of discrimination and is not ultra vires Article 14 of the Constitution of India.

10. We may draw attention to the provisions contained in Section 95 of the Indian Penal Code, which reads as under:--

"Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm is so slight that no person of ordinary sense and temper would complain of such harm."

The principle embodied in the aforesaid section is commonsense guideline and is founded on the latin maxim *do minixis non curat les*, which means the law does not take account of trifles, though not written into the Act, this well known commonense principle shall also inform the authority while exercising discretion to prosecute or not to prosecute.

11. In the result, the writ application is dismissed as devoid of merit. No costs.