

(2012) 02 GAU CK 0100

In the Gauhati High Court

Case No : WA Nos. 28(AP) of 2008, 04(AP) of 2009 & 36(AP) of 2010

Sonoram Chakma & Ors.

APPELLANT

Vs

State of Arunachal Pradesh & Ors.

RESPONDENT

Date of Decision : 16-02-2012

Acts Referred:

Assam Forest Regulations, 1891 — Regulation 72C, 72C, 73, 73
Constitution of India, 1950 — Article 21, 21

Citation : (2012) 2 GLT 23

Hon'ble Judges : I.A.Ansari, J and A.C.Upadhyay, J

Bench : Division Bench

Advocate : Advocate appeared for the Appellants: Mr. P.K. Tiwari, Advocates
appeared for the Respondents: Dr. A.K. Saraf AG, Mr. K. Ete, Addl. AG & Mr. R. H. Nabam, Sr. GA., Advocates appearing for Parties

Judgement

I.A. Ansari, J.—We have heard Mr. P. K. Tiwari, learned counsel, for the appellants, and Dr. A.K. Saraf, learned Advocate General, Arunachal Pradesh, assisted by Mr. R.H. Nabam, learned Senior Govt. Advocate, Arunachal Pradesh. We have also heard Mr. K. Ete, learned Additional Advocate General, Arunachal Pradesh.

2. These three appeals have arisen out of the judgment and order, dated 27.02.2008, passed in four writ petitions, namely, WP(C) Nos.8587/2004, 7328/2004, 3895/2004 and 8924/2004. While the petitioners, in WP(C) 8924/2004, have not preferred any appeal, the petitioners, in the remaining writ petitions, have preferred these appeals.

3. Before we come to the merit of these appeals and/or correctness of the decision, which has been arrived at by a learned Single Judge of this Court and which is under challenge in these appeals, the cases of the writ petitionersappellants need to be taken note of. The case of the writ petitioners being based on more or less same set of facts, the impugned decision was rendered by one common judgment and order.

4. The case of the petitioners may, in brief, be set out as under:

(i) The petitioners are chakma refugees, who had come from Chittagong Hill Tracts of erstwhile East Pakistan, now, Bangladesh, to India as refugees. After providing them with shelter, at different places, in India, they were rehabilitated in the then North East Frontier Agency (in short, "NEFA") presently the State of Arunachal Pradesh. Acting upon the requests made by various departments of the State Government in Arunachal Pradesh, the petitioners had started plantation in different areas of the districts of Arunachal Pradesh, because they were assured of being provided with permanent settlement in the areas in which they were to carry out plantation works. As there were attempts to forcibly remove the petitioners and oust them from the State of Arunachal Pradesh, they, for reasons of safety and survival, shifted to the areas called Madhukanallah and Sukhranallah. The petitioners claim that the areas, under occupation of the petitioners, are located between the demarcated land of various forest plantation of Diyung Forest Range in the village of Jyotshnapur and Sumpoi in Diyung circle. The petitioners also claim that substantial part of the said area falls within Khajim resettlement area, which was earmarked by the State Government for rehabilitation of chakma refugees with financial assistance from the Government of India and that the petitioners had been living, with their families, in the said areas since 1966 and had been carrying on, as indicated hereinbefore, plantation work as forest workers. According to the petitioners, the forest villages of Chitrapur in Miao SubDivision, Miao Namsik Range, was established by the families of chakmas.

(ii) As their lives and properties, according to the petitioners, were under serious danger, because of some incidents of forcible eviction carried out in the year 1980, 1989, 1991 and 1994, they approached the Supreme Court by way of a writ petition, which came to be reported as National Human Right Commission Vs. State of Arunachal Pradesh & Ors. : AIR 1996 SC1234, wherein the State of Arunachal Pradesh was directed to ensure that the life and property of each and every chakma, residing within the State of Arunachal Pradesh, remain protected and any attempt to forcibly evict or drive the chakmas, out of the State, by organized groups shall be repelled. It was accordingly ordered by the Supreme Court, in National Human Right Commission (supra), that the chakmas shall not be evicted from their homes and shall not be denied domestic life and comfort except in accordance with law and that while the application of any individual chakma for granting him/her citizenship remains pending for consideration, the State of Arunachal Pradesh shall not evict or remove the concerned person from his occupation on the ground that he is not a citizen of India until the competent authority has taken a decision in that behalf.

(iii) The petitioners further claim that despite the directions issued by the Supreme Court, in National Human Right Commission (supra), as mentioned hereinbefore, the State administration failed to take action in terms of the directions so issued; rather, during 14th Lok Sabha elections, a rumour was

spread that about 1000 chakmas were going to exercise their franchise. Consequently, amove was initiated against the chakmas to uproot them, finally, with their families from the areas, where they had been residing since 1960. This design of the State administration resulted into issuance of notices, dated 22.05.2004, by the Divisional Forest Officer, Nampong Forest Division, Jairampur, wherein it was alleged that the petitioners were occupying the land, belonging to the area, which falls under Diyung Reserve Forest, and that by making their settlement in the said area, the petitioners had committed offences under Sections 25(d), (e) and (f) of the Assam Forest Regulations, 1891. As the petitioners were asked to vacate the land in their possession within seven days of the issuance of the notices, or else, they would be forcibly evicted and their properties would be confiscated, they came to this Court with writ applications, made under Article 226, putting to challenge the impugned notices by contending, inter alia, that there is no provision, in the Assam Forest Regulations, 1891, (in short, "the Regulations"), which has been adopted by the Government of Arunachal Pradesh, and which empowers the State Government to evict an encroacher from the reserved forest and, that too, without making any rules in this behalf.

5. By the judgment and order under appeal, the learned Single Judge has referred to the provisions of Regulation 72 (c) of the Regulations and taken the view that Regulation 72 (c) empowers the authority to eject any person, who has unauthorisedly entered into a forest reserve, and to dispose of any crops raised or other construction erected, without authority, in forest reserve.

6. Having, thus, reached the conclusion that Regulation 72(c) vests in the State Government the power to evict an encroacher from the forest reserve forest, as pointed out hereinabove, the learned Single Judge disposed of, by the judgment and order under appeal, the writ petitions filed by the appellants and others by giving opportunity to the present appellants and others (who were petitioners in the said writ petitions) to reply to the impugned notices by riling their objections and directed the authorities concerned to consider the replies, if any, which may be given by the petitioners and, then, do the needful in accordance with law.

7. Contending that though the State Government does not have the power to evict the present appellants and the present appellants could not have been evicted from the land in occupation and use of the appellants and yet the State Government was, according to the decision reached in the said writ petitions, held to have been vested with the power to do so without even making rules in terms of the provisions of Regulation 72(c), the present appeals have been preferred.

8. While considering the present appeals, one has to remain alive to the guarantee, which Article 21 of the Constitution of India gives to every person, whether he is a citizen or not, of not being deprived of his life and liberty except according to the procedure established by law. Even a refugee falls within the ambit of Article 21 and he cannot be deprived of his life and personal liberty

except according to the procedure established by law. There has to be, therefore, a law in place to support the impugned action taken by the respondents/authorities concerned for ejection of the appellants and that law, if any, has to be just, fair and reasonable.

9. Dealing with the rights, if any, of the pavement dwellers visavis the rights, if any, of the passersby, the Supreme Court, in *Olga Tellis & Ors. Vs. Bombay Municipal Corporation & Ors.*, reported in (1985) 3 SCC 545, speaking through Y. V. Chandrachud, C.J., observed, at para 39, thus:

"39. It is far too wellsettled to admit of any argument that the procedure prescribed by law for the deprivation of the right conferred by Article 21 must be fair, just and reasonable."

10. The Constitution Bench has also pointed out, in *Olga Tellis (supra)*, that the procedure, which is unjust and unfair, in the circumstances of a given case, attracts the vice of unreasonableness, thereby vitiating the law, which prescribes the procedure and, consequently, the action taken thereunder, too, gets vitiated. It was also pointed out, in *Olga Tellis (supra)*, that any action taken by a public authority, vested with statutory powers, has to be tested by application of two standards, namely, (i) the action must be within the scope of the authority conferred by law and (ii) it must be reasonable. Necessarily, therefore, when an action is illegal or void ab initio and/or if the procedure adopted, in taking an action, is unreasonable, then, the action cannot be sustained. It is, therefore, pointed out, in *Olga Tellis (supra)*, that the substance of the law cannot be divorced from the procedure, which it prescribes, for, how reasonable the law is would really depend upon how fair is the procedure prescribed by law.

11. Coupled with the above, what also needs to be borne in mind is that the right to property may not have remained a fundamental right in Partin of the Constitution, yet the fact remains that possession of land, for a period of time, may give rise to a semblance of right or else, the Limitation Act, 1963, would not have provided for adverse possession as against Government's land meaning thereby that uninterrupted and continuous possession by a person of a Government land claiming the same to be his own within the knowledge of the Government may protect the right of the person to remain on the land. The Government's right on its own land is, therefore, not absolute or without any restrictions. The Government cannot, therefore, deprive a person of his liberty, when it uses force for removal of such a person from Government land unless there is a law for ejection or removal of such a person from the Government land and the law, in such a case, shall lay down a procedure, which is just, fair and reasonable.

12. Bearing in mind what have been indicated above, let us come to the provisions embodied in the Assam Forest Regulation, 1891, which, as mentioned above, stood adopted by the State of Arunachal Pradesh at the relevant point of time and it is Regulation 72(c), which, according to the learned Single Judge,

empowers the State to evict an encroacher from reserve forest without any rule having been made in this regard.

13. For reasons of clarity, Regulations 72(c) and 73, which are inextricably linked together, are reproduced below:

"72. The State Government may make rules consistent with this Regulation:

(c) to provide for the ejectment of any person, who has encroached upon forest reserves. 73. All rules made by the Government under this Regulation shall be published in the (Arunachal Pradesh) Gazette, and shall thereupon have the force of law."

14. From a combined reading of Regulations 72(c) and 73, what transpires is that Regulation 72 is an enabling provision and not a mandatory provision. It enables the State to make rules consistent with the Regulations for five specific purposes. One of the purposes is embodied in Regulation 72(c), namely, to provide for the ejectment of any person, who has encroached upon forest reserves. This apart, Regulation 73 requires that all rules, which have been made by the State Government, shall be published in the Arunachal Pradesh Gazette and shall, thereupon, have the force of law. Regulation 73 puts it beyond pale of doubt that no rule, framed by the State Government, can have the force of law unless the rule has been published in the Arunachal Pradesh Gazette. One cannot, therefore, read or consider the provisions embodied in Regulation 72(c) without taking into account, or wholly independent of, Regulation 73.

15. There was, admittedly, no rule in existence, when the decision, under appeal, was rendered. In fact, the State of Arunachal Pradesh has published Arunachal Pradesh Forests (Ejectment of Unauthorised Persons) Rules, 2010, on 26th May, 2010, and it has come into force with effect from 26th May, 2010. It, thus, logically follows that till 26th May, 2010, no Rule for ejectment of an encroacher from reserve forest was framed by the State Government for taking recourse to the provisions of Regulation 72 (c).

16. It has been pointed out by the learned Single Judge, in the judgment and order, under appeal, that when the power is vested in the State, the State can exercise the power without framing any rule. Apart from the fact that it is difficult to sustain the observations so made in the writ petitions, because of the fact that Regulation 73 gives the force of law to the rules only when the rules are framed, it is pertinent to note, as rightly contended by Mr. Tiwari, learned counsel for the appellants, and, in fact, could not be disputed on behalf of the State, that there is no provision in the Regulations, except Regulation 72 (c), providing for ejectment of an encroacher from reserve forests.

17. Independent of, therefore, the provisions of Regulation 72(c), the State Government does not have even enabling provision to remove or eject an encroacher from reserve forest. The power to eject an encroacher from reserve

forests not being in existence per se or the power to eject an encroacher from reserve forest, independent of Regulation 72(c), not being in existence, it cannot be said that the State Government has the power to eject an encroacher from a reserve forest. When the power to eject an encroacher from reserve forest is per se not available with the State Government, Regulation 72(c) cannot be read without the aid and support of Regulation 73. Since the State Government does not have any power, as indicated hereinbefore, to eject an encroacher from forest reserve, one has really no option, but to conclude that Regulation 72 (c) empowers the State Government to make rules providing for ejectment of any person, who has encroached upon reserve forest and without making rule and without such a rule having been published in the official Gazette of the State of Arunachal Pradesh, ejectment, by force, by the State Government of an encroacher from the reserve forest would not be permissible.

18. We may also pause here to point out that the Supreme Court, in *T. Cajee Vs. Jormanik Stem*: AIR 1961 SC 276, while sustaining executive action, without making law, clearly concluded, at para 10, that where executive power impinges upon the rights of citizens, it will have to be backed by an appropriate law; whereas existence of law is not necessary, where executive power is concerned only with the personnel of the administration. Though chakmas are refugees and not Indian citizens, the fact of the matter remains that they are as much covered by Article 21 as any Indian citizen and, hence, every executive action of the State Government or of its functionaries shall have to have the backing of appropriate law.

19. As a proposition of law, there can be no dispute that where a statute confers powers on an authority to do certain acts or exercise power in respect of certain matters, subject to rules, the exercise of power conferred by the statute does not depend on the framing of the rules. In other words, framing of rules is not a condition precedent to the exercise of the power expressly or unconditionally conferred by statute. The expression "subject to rules" only means, in accordance with the rules, if any. If rules are framed, the powers so conferred on authority could be exercised in accordance with these rules. But if no rules are framed, there is no void and the authority is not precluded from exercising the power conferred by the statute. This has been made explicitly clear by the decision in *Surinder Singh Vs. Central Govt. & Ors.*, reported in (1986) 4 SCC 667, wherein the Supreme Court, explaining the position of law, in this regard, observed thus:

"6.....Where a statute confers powers on an authority to do certain acts or exercise power in respect of certain matters, subject to rules, the exercise of power conferred by the statute does not depend on the words framing of the rules is not condition precedent to the exercise of the power expressly or unconditionally conferred by the statute. The expression "subject to rules" only means, in accordance with the rules, if any. If rules are framed, the powers so conferred on authority could be exercised in accordance with these rules. But if

no rules are framed there is no void and the authority is not precluded from exercising the power conferred by the statute."

20. From the above observations, made in *Surinder Singh* (supra), what follows is that an authority may do acts or exercise power provided that the power is, expressly or unconditionally, conferred on the authority in respect of certain matters even without framing rules and if the rules have been framed, then, exercise of power have to be in terms of the rules.

21. In the present case, there is no provision other than Regulation 72(c) empowering the State to eject an encroacher from reserve forest. Hence, in the context of the scheme of the Regulations, the power to eject an encroacher from forest reserve cannot be exercised by the State without making rules so that everyone, including the functionaries and officials of the Government, knows when, how and by whom an encroacher would be evicted from reserve forest.

22. Though Dr. A.K. Saraf, learned Advocate General, has drawn the attention of this Court to the decision in *Jaintia Hill Truck Owners Association Vs. Shailang Area Coal Dealer and Truck Owner Association & Ors.*, reported in (2009) 8 SCC 492, it may be noted that in *Jaintia Hill Truck Owners Association* (supra), the Supreme Court, in no uncertain words, observed that levy of charges towards rendering services by itself does not infringe the right of any person. Consequently, when the right of any person is infringed, law must be available. In the case at hand, we have already shown that ejectment of a person from Government land by Government officials impinges upon the liberty of an individual and since nobody's liberty can be curtailed or restricted except in accordance with the procedure prescribed by just, fair and reasonable law, Regulation 72(c) has to be read in conformity with Regulation 73 so that a meaningful and sustainable scheme for ejectment of an encroacher from reserve forest emerges.

23. In the case at hand, there is no dispute that the law for ejectment of an encroacher from reserve forest is traceable to Regulation 72(c). The controversy is with regard to the question as to whether it would be permissible for the State to eject an encroacher without making requisite rules and without publishing the same. Considering the fact that the rules, according to Regulation 73, would have the force of law only and only when it is published in the official gazette of the State of Arunachal Pradesh, it becomes abundantly clear as to what importance Regulation 73 enjoys in the scheme of the Regulations.

24. It needs to be borne in mind that Regulation 72(c) is not an ordinary rule making power. Far from this, the power, which has been given to the State Government by Regulation 72(c), is in respect of a matter with regard where to, the State Government has not been vested with the requisite power by any other provisions of the Regulations. In such circumstances, when Regulation 72 states that the State Government may make rules consistent with the Regulation, it clearly follows that without making rules, the State Government would not be

able to eject any encroacher from reserve forest, because no other provision is available to the State Government in the light of what the Regulations contain.

25. What emerges from the above discussion is that the State Government having not been given the power to eject an encroacher from reserve forest by any provisions of the Regulations other than Regulation 72(c), Regulation 72(c) has to be given purposive construction and, if so constructed, it would mean, if we may reiterate, that an encroacher from the reserve forest can be ejected only in accordance with the rules, which the State Government may frame. Otherwise also, the right of the State Government to eject an encroacher from its own land, not being without restrictions, it clearly follows that the State Government and its functionaries must know as to how an encroacher would be ejected from reserve forest. If no rule is prescribed, the result would be chaos, because every official will adopt his own procedure for removing an encroacher from reserve forest and, at the same time, even Indian citizens would not know what procedure would be adopted by the Government officials for their removal from reserve forest. In such circumstances, it is not impossible to imagine that an official may use force for removal of an encroacher from reserve forest without resorting to any procedure, which is not prescribed by law or which is not fair, just and reasonable.

26. Situated thus, we conclude that in the case at hand, the impugned notices, having been issued without support of the rules, prescribing the procedure for ejectment of an encroacher from reserve forest, could not have been sustained and ought not to be sustained. We, therefore, allow these appeals and set aside the decision reached in, and the directions given by, the impugned judgment and order. We, however, leave the respondents free to take action as may be permissible in law against the appellants if the appellants are encroachers or have encroached upon reserve forests.

27. With the above observations and directions, these appeals shall stand disposed of.

28. No order as to costs.