
(2011) 08 GAU CK 0038
In the Gauhati High Court
Case No : Writ Petition (Civil) No.3180 of 2008

T.C.G.Traders

APPELLANT

Vs

State of Assam and Ors.

RESPONDENT

Date of Decision : 04-08-2011

Acts Referred:

Citation : (2012) 4 GLR 739

Hon'ble Judges : P.K.Musahary, J

Bench : Single Bench

Advocate : Mr. G.N. Sahewalla, Mr. P. Bora, Md. Aslam, Ms. D. Senapati , Ms. M. Jain for the petitioner.??Ms. V.L. Singh , Mr. A.K. Sarkar for the respondents.,
Advocates appearing for Parties

Judgement

1. Heard Mr. G.N. Sahewalla, learned senior counsel assisted by Ms. M. Jain, learned counsel for the petitioner, Mrs. V.L. Singh, learned Government Advocate Assam appearing for the State respondent and Mr. A.K. Sarkar, learned counsel appearing for respondent Nos. 9 to 14.

2. The petitioner firm claims that it is engaged in business of supply of home grown bamboos out side the State of Assam. The petitioner is supplying the home grown bamboos collected from bamboo cultivators who are growing the bamboos in their private patta land. There was no objection from the Forest Department to collection and transportation of home grown bamboos. A clarification was issued by the Chief Conservator of Forest (Territorial) Assam, Guwahati in his letter No. FS.04/7/Pt.II dated 19.7.1995 to the effect that no T.P. is required for home grown bamboos and accordingly the officer concerned in the field were directed not to insist on T.P. for home grown bamboos. Another letter was issued by the Chief Conservator of Forests, Assam, Rehabari, Guwahati in this regard vide communication No. P. 50/TP/Genl. Dated 4.8.1997. Subsequently the DFO, Aie Valley Division, Bongaigaon issued the impugned order dated 24.8.2006 addressed to the Area Manager, N.F. Railway, New Bongaigaon to stop despatch from Chaprakata and Basugaon stations out side

the State of Assam without transit pass. In the aforesaid letter it is stated that home grown bamboos when consumed at the place of origin requires no felling permission and T.P. but when the same home grown bamboos are intended to be transported out side the place of origin, felling permission and certificate of origin and T.P. are required. The present petitioner is aggrieved by the aforesaid communication dated 24.8.2006 and the same is under challenge in this writ proceeding.

3. Mr. Sahewalla, learned senior counsel submits that there is no rule as such framed by the Government requiring felling permission and T.P. for transporting the home grown bamboos out side the State of Assam and even if there is one, it would according to him, is illegal and unauthorised. He has referred to "Assam Control of Felling and Removal of Trees from NonForest Land Rules, 2002" ("Control Rules"). Under Rule 4.1 there is no provision for issuing felling permission and T.P. from the Forest Department in respect of all species of home grown bamboos. The impugned communication dated 24.8.2006 is in contravention of the provisions of the aforesaid Control Rules and as such according to him the same is liable to be quashed and set aside.

4. An affidavit in opposition has been filed on behalf of the respondent No. 3 and 5. The main contention of the respondent authorities is that the felling and transportation of home grown bamboo in Assam is regulated under provision of Assam Forest Regulation, 1891 ("Forest Regulation") and its subsequent amendments. The further contention of the respondent is that the Deputy Secretary to the Government of Assam, Environment and Forests Department vide communication No. FRM.88/2001/103 dated 23.5.2003 clarified that "in case the owner of these exempted tree species requires to transport the timber outside the place of origin, the owner of such trees shall have to follow the provisions of the Rules applicable for nonexempted tree species for obtaining the required certificate of origin".

5. I have gone through the relevant provisions of the Forest Regulation, particularly definition of "Tree" under section 3(2) and "forest produce" under section 3(4). The definition of "tree" includes palms, bamboos, stumps, brushwood and canes. As per the definition "forest produce" under section 3(4), it includes the produce which are found in or brought from a forest or not that is to say, timber, charcoal, caoutchoue, catechu, woodoil, resin, natural varnish, bark, lac, myrabolams, etc., to the trees and leaves; and fruits and all other parts or produce not hereinbefore mentioned as trees. Under section 3(4)(a), the bamboos which are grown in the places out side the reserve forest would not be recorded as forest produce. That position has further been clarified in the Control Rules wherein the nonforest land for the purpose of the said rules has been defined. "Nonforest land" as defined under rule 2(c), means area which is not forest. "Forest" has been defined under rule 2(b) of the Control Rules. To get the clear meaning of "nonforest land" it is necessary to reproduce rule 2(b) hereunder :

"2. In these rules, unless there is anything repugnant in the subject or context.

(b) "Forest" means

(i) Reserved forest or Protected Forest or any other areas legally constituted as forest;

(ii) Any area recorded as "Forests" in Government records maintained by the Forest Department or any other Government departments; and

(iii) Land to be treated as deemed forest as per Supreme Court Orders dated 12.12.1996. A continuous patch of 10 ha. Or more having not less than 200 naturally grown trees per ha. On an average.

(c), (d), (e) & (f) *** *** ***"

6. Having read the parent provisions under the Assam Forest Regulation, 1891 with the Control Rules one can clearly understand that in case of transportation of home grown bamboos no permission is required to be obtained from the Government. The impugned communication dated 24.8.2006 is nothing but an official letter and it cannot be treated as an administrative circular. It is an official letter by a field officer in contravention of the aforesaid Regulation and Rules. If such official letter, even an administrative circular is in violation of the statutory rules and regulation, the same can be ignored and declared as illegal and on that score only such administrative instruction/circular can be set aside and quashed.

7. At the time of hearing, Ms. V.L. Singh, learned Government Advocate, Assam placed some written instructions communicated to the Senior Government Advocate, Gauhati High Court received from the Deputy Conservator of Forests, attached to the Principal Chief Conservator of Forests and Head of Forest Force, Assam vide No.FG.58/WP(C) No.3180/2008 dated 20.7.2011, The relevant portion of the said instructions are quoted below :

"1. Government of Assam vide Notification No. FRM. 88/2001/77, in compliance with the directions of the hon"ble Supreme Court of India in its order dated 12.5.2001 in WP(C) No.202 of 1995 and in exercise of powers conferred under sections 40 and 72 (C) of the Assam Forest Regulation, 1891 (Regulation VII of 1891), the Governor of Assam is pleased to make the following Rules for controlling the felling and removal of trees from nonforest lands in the manner hereinafter appearing.

(a) These rules may be called "Assam (Control of Felling and removal of trees from nonforest lands) Rules, 2002":

(b) These rules shall be applicable to the whole of Assam in respect of nonforest land as defined in 2(c) below.

(c) These rules shall come into force with effect from the date of publication in the official gazette.

2. As per provision of the section 4 of the "Assam (control of felling and removal of trees from nonforest lands) Rules, 2002" (copy enclosed) for felling and conversion of trees of the following species from nonforest areas, no felling permission from the Forest Department under these rules is needed:

Aam (Mangifer indica), Jamun (Syzygium cumim), Kathal (Artocarpus integrifolia), Eucalyptus, Poplar all species, home grown bamboo, Leteku, Paniol and Madhuriam (Psidium guajava).

3. As per Government of Assam, Environment and Forest Department's U/O No. FR M. 88/2001/103, dated 23rd May, 2003 (copy enclosed). Under the provision of rule 4.1 of the "Assam (Control of Felling and removal of trees from nonforest lands) Rules, 2002", the tree species not requiring felling permission have no provision for their transportation from the place of origin. It is, therefore, clarified that in case the owner of these exempted tree species requires to transport the timber outside the place of origin, the owner of such trees shall have to follow the provisions of the Rules applicable to nonexempted tree species for obtaining the required Certificate of Origin.

4. The provisions of section 3(2) and 3(3) of Assam Forest Regulation, 1891, define bamboo as "Tree and Timber" respectively. Though home grown bamboos are not found and brought from forest as per the definition of "Forest Produce" in section 3(4) of Assam Forest Regulation, 1891, it is a forest produce.

5. "Tree and timber as denned under section 3(2), 3(3) and for regulation of trees growing in nonforest land, the "Assam (Control of Felling and removal of trees from nonforest lands) Rules, 2002" has been framed and are in force since then. For movement of forest produce from the place of origin requires Transit pass under the section 40 of Assam Forest Regulation, 1891 and Rule 6 of the nonForest land Rules, 2002 and to issue transit pass the owner of the trees as timber has first to obtain C.O. (Certificate of origin).

6. In partial modification of the above provision, the Government has issued Notification No. FRM.88/2001/02/9, dated 27.9.2006 saying that "there would be no restriction on felling and transportation of home grown bamboo to Hindustan Paper Corporation Ltd. Jagiroad". The restriction on felling and transportation of home grown bamboo has been relaxed in case of supply of raw material to HPC Ltd. Jagiroad only and is not applicable on felling and transportation of home grown bamboos for any other purpose.

7. As per transit rule No. 15 framed under section 40,41: The booking or moving of timber in logs or rough hewn, sawn timber (except tea shocks), bamboos exceeding 100 in number, canes exceeding 100 kops, charcoal, exceeding 5 maunds, lac, agar, elephants, elephant tusks, and any other forest produce by rail, aeroplane, steamer or boat is prohibited unless such forest produce is accompanied by a transit pass under transit rules."

8. The aforesaid instructions have not been brought on record by way of filing an

affidavit. However, for the purpose of disposal of this case, it has been referred to and kept on record, marked "X". The sole question involved in this case is whether transit pass is necessary for transporting the home grown bamboos from the place of origin to destination outside the State. Under rule 4.1 of the aforesaid Control Rules, 2002 it is clearly stated that no felling permission from the Forest Department is needed for felling and conversion of trees from nonforest areas. The species mentioned therein are Aam (*Mangifer indica*), Jamun (*Syzygium cumim*), Kathal (*Artocarpus integrifolia*), Eucalyptus, Poplar, all species, home grown bamboo, Leteku, Paniol and Madhuriam (*Psidium guajava*). All species of home grown bamboo, as per this Rule are exempted from taking felling permission from the Forest Department. The Rule is silent about the requirement of permission from the Forest Department if the home grown bamboos are collected from nonforest areas and transported out side the State. The Forest Department has taken note of this lacuna in the Control Rules and issued clarification vide U/O dated 23.5.2003 saying that in case the owner of those exempted tree species require to transport the timber which includes bamboos, outside the place of origin, the owner of such trees shall have to follow the provisions of the Rules applicable to nonexempted tree species for obtaining the required certificate of origin. The aforesaid U/O dated 23.5.2003 speaks about the certificate of origin only without any mention about the transit pass. No clarification has been made as to whether a holder of certificate of origin of timber including home grown bamboo in the nonforest land, would be required to obtain transit pass for transporting them outside the State.

9. The State Government under section 40 of the Forest Regulation is vested with power to make Rules to regulate transit of forest produce. Being vested with such power, the State Government has framed the transit Rules to regulate the transport of forest produce by land and water. In the said Rules, under rule 2 (a) (iii) it has been clearly provided that no certificate of origin or other pass shall be required for the transport of home grown Fatti, Baruah Bakal and Bethua Bamboo and no royalty will be realised on bamboos of these kinds unless they are known to have come from the Government forest. This provision is meant for home grown bamboos. Under the transit rules there is no provision for requirement of transit pass. It may be noted that after issuance of the impugned communication by the DFO of Aie Valley Division, Bongaigaon on 24.8.2006, the Commissioner and Secretary to the Government of Assam Environment and Forest Department issued Notification No.FRM/88/2001/Pt/9 dated 27.9.2006 (Annexure VII to the writ petition) to the effect that there would be no restriction of felling and transporting of home grown bamboo to Hindustan Paper Corporation Ltd., Jagiroad. The State Government has not clarified the issue raised by the said DFO regarding TP in respect of home grown bamboo when such bamboos are intended to be transported outside the State. The exemption granted under the State Government Notification dated 27.9.2006 is in respect of supply of home grown bamboos to Hindustan Paper Corporation Ltd. only but it has not answered the question raised or the action intended to be taken by the

DFO concerned, which has far reaching consequence on the collection of revenue by the State. It is not understood why the State Government has not taken the said question seriously and left it still undecided. The Court is authorised to see and interpret the provision under the Act and Rules and while doing so it cannot travel beyond provision of the statute. What is found in Control Rules as well as Transit Rules, is that no provision has been made for obtaining transit pass in respect of the home grown bamboos. In absence of such provision this court is not authorised to interpret the law/rules aforementioned to decide as to whether the party concerned who wants to transport the home grown bamboos outside the State should be required to obtain TP. It is the wisdom of the Legislature to make or not to make any provision regarding TP on home grown bamboos and when the Legislature has decided not to make provision for TP, the judiciary has no authority to interpret in either way. If, under the existing situation any change is required, the Government should take necessary steps to amend the law/Rules to serve the present demand for TP in respect of home grown bamboos or other forest produce for the economic interest of the State. Unless such change in law/rules is brought into effect, the intended action of the executive to introduce system of issuance of TP on transportation of home grown bamboo can be regarded as illegal and unauthorised.

10. The lacuna in the Control Rules and the Transit Pass Rules is apparent so far as it relates to requirement of issuing TP on home grown bamboos and unless such lacuna is removed by way of amending the rules, this court in exercise of power under article 226 of the Constitution of India, in judicial review, cannot permit the respondent authorities to act what is not permitted under the existing Rules. In my considered view the respondent authorities cannot also be allowed to insist on transit pass on transportation of home grown bamboos by way of issuing executive instructions or administrative circular without amending the existing Rules. The Apex Court in *Suresh Lohiya v. State of Maharashtra and Another*, (1996) 10 SCC 397 had an occasion to decide a question whether "forest produce" includes bamboo mat and in answering the said question in paragraph 7 it has been held as under:

"7. The Legislature having denned "forest produce", it is not permissible to us to read in the definition something which is not there. We are conscious of the fact that forest wealth is required to be preserved; but, it is not open to us to legislate, as what a court can do in a matter like at hand is to iron out creases; it cannot weave a new texture. If there be any lacuna in the definition it is really for the Legislature to take care of the same."

11. The issue in question in the present case may be different from the ones raised in the above cited case but I am of the considered view that the same principle can be applied to the present case also. If a Government is really interested to do something positive for the revenue and economic interest of the State it may take necessary steps to get the existing Rules amended by introducing and enacting appropriate legislation. The intended action of the

respondent authorities to introduce TP on transportation of home grown bamboo can not be allowed before any appropriate amendment is brought into force to the relevant rules. Under such circumstances, the impugned communication dated 24.8.2006 is declared unauthorised and illegal and accordingly the same is set aside and quashed.

The petition stands allowed. No order as to costs.