
(1993) 05 PAT CK 0006
In the Patna High Court
Case No : C.W.J.C. 2661 of 1993

Vinay Verma

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 21-05-1993

Acts Referred:

Wild Life (Protection) Act, 1972 — Section 18, 18(1), 26, 26A, 29

Citation : (1993) 2 PLJR 263

Hon'ble Judges : B.C. Basak, C.J;Choudhary S.N. Mishra, J

Bench : Division Bench

Advocate : Tarakant Jha and Ashok Priyadarshi, for the Appellant; R.B. Mahto, Ashok Kumar Singh and Sunil Kumar, for the Respondent

Judgement

1. Let it be recorded that the Advocate General states that he is appearing on behalf of the State respondents and accordingly represents all the departments of the State of Bihar including Mining Department which has been made respondent no. 4 in this writ petition. We are mentioning this because on the last occasion a separate Advocate, who is not a Government Advocate, appeared for respondent no. 4 and it was stated that he was supporting the petitioner in view of the fact that the petitioner was working under the authority of the licence granted by the relevant authority under the Mines Act and accordingly the petitioner was entitled to work. This stand was directly opposite to the stand taken by the impugned order. Upon prayer made by Mr. Jha, Learned Counsel appearing for the petitioner, the name of Respondent no. 6 is deleted.

2. We are not disposing of this writ petition at this stage having regard to the shortness of time available. We are passing certain orders and giving certain directions only at this stage. In view of the fact this application is not being disposed of at this stage, we need set out only those facts which are relevant for the purpose of this order.

3. The admitted position is that the petitioner is a holder of licence which has been granted by the Mines Department of the State of Bihar. This licence allows

the petitioner to collect the boulders in certain areas in the district of West Champaran. There was no difficulty regarding working under the same until the Collector of the West Champaran, who is also the Chief Wild Life Warden, within the meaning of Wild Life (Protection) Act, 1972 (hereinafter referred to as the "said Act") directed the petitioner to stop the work by annexures-5 and 6 of the petition. The short submission of Mr. Jha Learned Counsel for the petitioner, is that having regard to the fact that he is the holder of licence duly granted by the State Government, it is not permissible on the part of any authority to prevent him from carrying out his work under that licence until and unless such licence is duly cancelled in accordance with law.

4. No authority has been shown in the impugned order as to under what provision such action is being taken. However, Mr. Advocate General has made two fold submissions in this regard. He has submitted that such power is conferred u/s 29 of the said Act, in view of the fact that it is a "sanctuary". In any event he has submitted that such power is conferred u/s 35 (6) of the Act in view of the notification u/s 35(4) of the said Act.

5. So far as the first submission is concerned, as no notification u/s 26A of the said Act has been produced before us and it is not stated that there is in fact such a notification, we are of the view that no such power u/s 29 can be exercised. Accordingly, it is not necessary for us to go into the question as to whether the impugned direction can be given u/s 29 of the said Act. The second aspect of the matter is Section 35(6) of the said Act. There is a notification being annexure-D to the counter-affidavit filed by the State and it is submitted that reliance is placed not only on Section 29 but also on Section 35 of the said Act. We ought to point out, so far as the notification u/s 35 (4) of the said Act is concerned, it is not challenged in this proceeding. Mr. Tara Kant Jha, Learned Counsel for the petitioner, has submitted that this question is not relevant. Unless there is a declaration of a sanctuary u/s 26A of the said Act neither the power u/s 29 nor u/s 35(4) can be exercised. We are not prima facie satisfied about the same. These are two different matters; one is "sanctuary" which is u/s 18 of the said Act regarding which certain steps may be taken as provided in the subsequent sections only when Section 26A is complied with. Only then the "sanctuary" comes into existence under the law and power u/s 29 of the said Act can be exercised. However, Section 35 is completely a different matter as it relates to a "National Park". Even if there is no declaration u/s 26A and no power can be exercised u/s 29, still in view of the notification u/s 35 (4) of the said Act, the power u/s 35 (6) can be exercised. To this Mr. Jha, Learned Counsel, has submitted that his land is not covered by Section 35 (4) of the said Act. He has further submitted that the operation carried out under the licence granted in favour of the petitioner does not come within the mischief of Section 35 (4) of the said Act.

6. Under the circumstances we pass the following orders :

In absence of a declaration/notification u/s 26A of the Wild Life (Protection) Act,

1972, no such power as conferred u/s 29 of the Act can be exercised. Therefore, the only relevant Section is Section 35 of the Act. Without prejudice to the rights and contentions of the parties, the petitioner shall be entitled to challenge the notification u/s 35 (4) of the Act by way of filing a supplementary petition. The Collector of the District, who is also the Chief Wild Life Warden of the area in question under the Act and who has passed the impugned order contained in Annexure-6, shall hold an enquiry to ascertain the following : (1) whether this leased area in favour of the petitioner come within the area of national park as specified u/s 35 (4) and (2) whether the operation carried out under such mining licence, attracts the mischief of section 35 (6) of the Act. In the facts of this case Section 35 (6) of the Act would be attracted only if the operation carried out "damage the habitat of any wild animal or deprive any wild animal of its habitat within such National Park" within the meaning of such sub-section.

7. The enquiry is to be held by such authority commencing from 11 A. M. on 24th of May, 1993 and on subsequent dates and he shall give a personal hearing to the petitioner and other persons interested and pass the final order on this point giving reasons. Such order is to be passed and communicated by 7th of June, 1993.

8. We make it clear that this will not prevent the petitioner from challenging the notification u/s 35 (4) of the Act and this order will be without prejudice to the rights and contentions of the parties. The petitioner shall be at liberty to approach this Court before and after such decision is given, if so advised.

9. Mr. Jha, learned Senior counsel appearing for the petitioner, has expressed the apprehension that on the one hand he is not being allowed to work by an authority under an Act, whereas at the same time another authority is threatening to impose damages and other penalties on the petitioner for not carrying out the work under the mining lease. This anomaly cannot be allowed to take place. Accordingly, we direct that no penalty or damage shall be imposed by the Mines Department or any other authority of the State Government merely because the petitioners are not working during this period.

10. Let copies of this order be given to Learned Counsel for the parties.

11. However, we make it clear that as the Court is closing for Annual Vacation after today, accordingly this order is to be carried out whether the copies are obtained or not, as the order has been passed in presence of Learned Counsel for the parties including the learned Advocate General.

12. Let this case appear on 28th of June, 1993.

Order dated 28.6.1993

13. We have heard Mr. Tara Kant Jha for the petitioner and Mr. Advocate General for the State respondent at length and this writ petition is being disposed of at the admission stage itself.

14. In this writ petition the petitioner has made the following prayer.

That this is an application for issuance of writ/writs, order/orders, direction/directions to the respondents to allow the petitioner to carrying on his contract/lease of clearing and mining in the river Pandai at village Balwal in the district of West Champaran during the lease period and quash the orders contained in Annexures 5 and 6 issued by the Respondent nos. 5 and 6 restraining the petitioner in carrying out the aforesaid leased contract or pass such other order or orders as this Hon'ble Court may deem fit and proper.

The admitted position is that the petitioner holds a mining lease for doing certain works, namely, for carriage of boulders, pebbles and shingles. The petitioner was granted mining licence in accordance with the Mines and Minerals (Regulation and Development) Act, 1957, (hereinafter referred to as the said Act). Admittedly, there has been no difficulty regarding any technical objection of such licence being worked and the petitioner was acting accordingly. What has happened now is that this respondent no. 5, Collector-cum-District Magistrate, West Champaran, Bettiah, has issued order which are Annexures 5 and 6 to this writ petition. By Annexure "5" the Deputy Director, Project, Champaran Forest Project, Division 1, Bettiah, vide letter dated 26.2.93, had directed the petitioner to stop mining work immediately in view of the direction of the Collector. By Annexure "6" dated 23.2.93 the Collector, West Champaran, Bettiah, issued an order in the light of letter no. 527 dated 21.2.93, received from the Deputy Director, Project, Champaran Forest Project, Division I, Bettiah, directing immediate stoppage of mining works in the area which has been declared as a "sanctuary".

15. After this writ petition was made and prayer for interim order was sought for we passed orders after hearing the parties on 2.4.1993 and 21.5.93, which will speak for themselves and we need not reiterate the same. We can just give, in short, the substance of the contentions and our observations as recorded in the said order dated 21.5.1993. Being called upon to explain under what circumstances and under what legal justification such order preventing the petitioner from working under mining lease, which is still in existence, has been issued, two contentions were raised before us by the Advocate General. Firstly, it was stated that it is a sanctuary within the meaning of Wild Life (Protection) Act, 1972 (hereinafter to be referred to as the Act 1972) and, accordingly, such power was there u/s 29 of the Act. Secondly, it was submitted that such power is conferred u/s 35(6) of the Act in view of the notification u/s 35(4) of the said Act as it has a National Park. Under this circumstance by a detailed order we directed an enquiry to be held by the Collector of the district who is also the Chief Wild Life Warden to ascertain the following :

Whether this leased area in favour of the petitioner comes within the area of national park as specified u/s 35(4) of the Act and whether the operation carried out under such mining licence attracts the mischief of section 35(6) of the Act. In the facts of this case Section 35(6) of the Act would be attracted only if the

operation carried out "damage the habitat of any wild animal or deprive any wild animal of its habitat within such National Park within the meaning of such sub-section."

It was clear from our order that this order was passed on the submission of learned Advocate General that if there was no notification u/s 26A of the said Act no order could be passed u/s 35(5) of the Act. Pursuant to that an enquiry has been held and order has been passed by the authority as directed by us. He has found that it is not a "National Park" but he has found, accepting the contention of the Project Director, that it is wild life sanctuary and this is the reason which he has given. The relevant portion of the order dated 18.6.93 is quoted below :

After hearing both the parties and perusing relevant papers on the record it appears that the entire forest area, nearly 910.000 sqr was considered for four different categories of area they are as follows :

- (i) The National Park.
- (ii) The Valmikinagar Wild Life Sanctuary.
- (iii) The Valmikinagar Tiger project.
- (iv) The protected forest.

The petitioner has raised basically two important points that the National Park has not been finally notified u/s 26A of the Act. But as far as this point is concerned, the Project Director has clarified by citing the section 66 and sub-sections (2) and (3) of the Wild Life (Protection) (Amendment) Act, 1972.

The petitioner's second objection is that his lease-hold area does not fall within the National Park. The Project Director also has agreed and stated that the petitioner's mining area does not fall within the National Park but it falls within the notified Balmikinagar Wild Life sanctuary.

After going through those arguments, I feel that both the parties have raised very valid legal technical issue. But, in my opinion, though the petitioner's mining area above does not fall in the National Park, it definitely falls within the wild life sanctuary with regard to the notification under 26A. I think the arguments of the Project Director are convincing and acceptable.

With these observations this petition is disposed of. Inform the parties concerned accordingly.

Due to pre-occupation with law and order matter the order could not be passed on of before 7th June.

16. We are of the view that the stand taken by the authority and by the State at the time of enquiry pursuant to our order, is not justified. Having regard to the said finding, there is no longer any question of its being a National Park. No such case was made out in the impugned order, and no such contention is raised before us today though it was raised earlier. Therefore, such action cannot be

justified u/s 35 (6) of the Act.

17. In our opinion the impugned orders preventing the petitioner from carrying on the work under the existing Mining Lease, are completely uncalled for, unwarranted and illegal. Such action can be taken u/s 29 of the Act, if it comes under the mischief of the said section, provided there is a specific declaration u/s 26A of the Act. Obviously, for this reason, practically no argument was made before us on the earlier occasion by the learned Advocate General, in support of the impugned order, that it was a "Sanctuary". However, it appears that a completely different stand was sought to be made on behalf of the Project Director during the enquiry directed by us. The contention of the Project Director during such enquiry was that as there is a notification u/s 18 of the Act, therefore, that can be treated as a notification u/s 26. This has no merit. The argument based on section 66 is untenable. Section 66 does not contemplate that a notification u/s 18 can be treated as a declaration u/s 26A, and that action can be taken accordingly. Admittedly, there is no independent and separate declaration u/s 26A. No such notification was produced before us earlier and not even today. It is not also contended today that there is any such notification. Accordingly, it is not permissible to contend, as contended by the Project Director and accepted by the authority making enquiry, that there is a "sanctuary" according to law and therefore, section 29 is attracted.

18. Reliance has also been placed on a Supreme Court order by the Project Director which was blindly followed by the authority making the enquiry without examining the relevant orders of Supreme Court. The Enquiring Authority has relied on the order of Supreme Court dated 25.4.1988 passed in S. L. P. 6968/85 which is before us being Annexure-C to the counter-affidavit filed by respondent no. 6. This order merely states as follows :

The matter is adjourned for eight weeks to enable the State Government to take necessary steps for cancellation of the mining lease already granted contrary to the notification issued u/s 18(1) of the Wild-Life (Protection) Act, 1972. The Government will file a survey map with reference to the impugned notification.

19. This is merely an interim order. No law has been laid down. Secondly, such order was passed in the facts of that case and it does not show that the facts of that case are similar to the facts of this case. The Supreme Court order also does not say that in view of any notification u/s 18, that is to be taken as a notification u/s 26A and that section 29 of the Act comes into force merely because there is a notification u/s 18 without there being a separate declaration u/s 26A. This was an interim order of the Supreme Court and the matter was adjourned for 8 weeks. This order was passed on 25.4.1988. What happened thereafter is that (as would appear from Annexure-11) the Supreme Court disposed of this matter by directing as follows :

In view of cancellation of all the leases, it is not necessary to examine the grievance. The legal contentions of the Government and the parties are left open.

The SLP is disposed of accordingly.

20. Accordingly, the action of the District Magistrate in this particular case relying on the said interim order of the Supreme Court dated 25.4.88 is not justified.

21. Accordingly, we dispose of this application by making following direction :

The impugned orders being Annexures 5 & 6 of the writ petition are hereby quashed and the respondents are directed not to give effect to the said impugned orders. The petitioner shall be entitled to carry on business by virtue of the Mining lease in accordance with law as long as such lease is in effect. If the State Government desire to take any action in respect of the said lease, such action must be taken after giving the petitioner a personal hearing. This would also not prevent the State Government from taking any step under any other Act particularly 1972 Act if there is any proper declaration u/s 26A or u/s 35. If such declaration is made then it would be open to take appropriate action as sanctioned by the Act.

22. Before we conclude, we must express our unhappiness about the manner in which different stands were taken at different stages. Certain action was sought to be taken under another Act to stop the grant of the lease under one Act from carrying out the work. One particular stand was taken by the authorities which was impugned in this proceeding. Before us at first one stand was taken by the other department by different lawyers. Ultimately, when the Advocate General appeared on behalf of both the Departments one stand was taken and that stand was different from the stand taken in the impugned order. In the enquiry directed by us a different stand was taken and again another different stand was sought to be taken before us today. We can only express our view that the State must act fairly and properly in such cases. This application is disposed of accordingly.