
(2021) 12 CAL CK 0086

In the Calcutta High Court

Case No : M.A.T. No. 1156, 1396 Of 2019, CAN 1, 2 Of 2019(Old No. CAN 9607, 10259, 10262, 10307 Of 2019)

WBSEDCL & Anr.

APPELLANT

Vs

Rabi Besra & Ors.

RESPONDENT

Date of Decision : 23-12-2021

Acts Referred:

Forest (Conservation) Act, 1980 — Section 2, 3
West Bengal Panchayat Act, 1973 — Section 2(10), 2(11), 2(11)(a), 3, 4
Scheduled Tribes And Other Traditional Forest Dwellers (Recognition Of Forest Rights) Act, 2006 — Section 2(g), 3(1), 3(2)

Citation : (2021) 12 CAL CK 0086

Hon'ble Judges : Subrata Talukdar, J;Saugata Bhattacharyya, J

Bench : Division Bench

Advocate : L.K. Gupta, Sujit Sankar Koley, Subhabrata Datta, Debasish Sarkar, Nandalal Singhania, Sankar Sarkar, Ambar Majumder, Ashirbad Sarkar

Final Decision : Disposed Of

Judgement

Subrata Talukdar, J

The primary issue in this appeal arising out of the writ petition on the self-same point pertains to the steps taken by the State of West Bengal to submit

a proposal to the Central Government seeking prior approval of the latter under Section 2 of the Forest (Conservation) Act, 1980 (for short the 1980

Act) for diversion of 234 hectares (234ha) of forest land for construction of the 1000 MW. Turga Pumped Storage Project of the West Bengal State

Electricity Development Corporation Limited(for short SEDCL), also referred to as the User Agency, in Ayodhya Hills under Purulia Forest Division

(for short referred to as the said Project).

Responding to the State's proposal dated 18th September 2017 seeking prior

approval of the Central Government (*supra*), by a reply dated 12th April 2018 addressed on behalf of the Ministry of Environment, Forests and Climate Change (MoEF&CC), it was, *inter alia*, stated that the proposal of the State was examined by the Forest Advisory Committee (FAC) constituted by the Central Government under Section 3 of the 1980 Act. Further, by the said communication dated 12th April 2018, the In-principle approval for diversion of 234ha of forest land for the said Project on the basis of the examination of the State's proposal by the FAC was made subject to fulfilment of XL/ 40 (Forty) conditions, as also stated in the letter dated 12th April 2018.

In the light of the aforesaid developments, the writ petitioners, who are three in number and are the respondents in both the appeals, arrived before the Hon'ble Single Bench seeking a writ of Mandamus upon the respondent authorities, both State and Centre, not to give any effect or further effect to the In-principle approval as granted by the FAC to the said Project. The writ petitioners also prayed for a writ of Mandamus declaring the Certificate issued by the District Magistrate, Purulia dated 13th of June 2017, *inter alia*, declaring that the work of settlement of rights of Scheduled Tribes and Other Traditional Forest Dwellers qua the said Project land has been completed, to be declared void *ab initio*.

By further praying for a writ of Certiorari, the writ petitioners urged the Hon'ble Court to call for the records and documents showing compliance of procedure by the Project Authorities of the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (for short the 2006 Act).

The primary contention of the writ petitioners before the Hon'ble Single Bench in the writ petition being WP No. 20576 (W) of 2018 with its connected CAN 3341 of 2019 (for short the said writ petition) related to non-compliance by the Project Authorities of the provisions of the 2006 Act which protect the rights of Scheduled Tribes and Other Traditional Forest Dwellers from being encroached without the authority of law by the Project Authorities. It is submitted on behalf of the writ petitioners/the respondents to both these appeals by Mr. Ambar Majumder, Learned Counsel, that the 2006 Act provides for a detailed mechanism to consult the adult members of each village likely to be affected by the said Project and referred to as

Gram Sabhas.

It is submitted that the DM, Purulia forwarded the certification dated 13th of June 2017 holding that the consultative mechanism provided by the 2006

Act has been completed and the Gram Sabhas have given their consent. It has been also certified by the DM, Purulia that no person has been given

patta under the 2006 Act of the land in the project area and no person is in possession of forest land, also in the Project area. It is submitted by the

writ petitioners/ the respondents to these appeals that the 2006 Act, particularly Section 3 thereof, protects both individual and community forest rights

of Scheduled Tribes and Other Traditional Forest Dwellers. Although the procedure for consulting the Gram Sabhas has been clarified by the notices

issued by the DM, Purulia to the effect that in compliance of the Scheduled Tribes and Other Traditional Forest Dwellers, (Recognition of Forest

Rights Rules), 2008 (for short the 2008 Rules), the consultative mechanism in respect of each Gram Sabha within the project area was also initiated,

the writ petitioners allege that actually no such consultative mechanism was followed prior to certifying the project area to be free from

encumbrances. It is submitted that while proposing to obtain an In-principle approval from the Central Government, the State has been unable to show

that the requirement of displacing the forest habitat qua the said Project was met by seeking the consent of each Gram Sabha represented by at least

fifty percent of its adult population and also the public circulation of the requirement of the forest land for the project amongst the members of each

Gram Sabha in a language comprehensible to the villagers.

The State was not represented before the Honâ??ble Single Bench at the hearing. Neither did the State file an affidavit-in-opposition to the writ

petition.

The User Agency/SEDCL and the Union of India were though represented before the Honâ??ble Single Bench as respondents to the writ petition.

By a detailed order, the Honâ??ble Single Bench noticed the requirement of specific compliance with the provisions of the 2006 Act. It was, inter

alia ,held that there is nothing on record to suggest that resolutions in favour of the said Project were taken by each and every Gram Sabha under

Section 3 (2) of the 2006 Act. Therefore, in the absence of compliance with the provisions of the 2006 Act, the Honâ??ble Single Bench quashed the

In-principle approval granted by the Central Government, also quashing the purported resolutions of the Gram Sabhas and permission granted by the State Government to implement the project.

It was made clear that the Judgement and Order of the Honâ??ble Single Bench dated 2nd July 2019 shall not prevent the Project Authorities from taking recourse in accordance with law to the 2006 Act for implementing the project.

Aggrieved by the Judgement and Order dated 2nd of July 2019 the State, being one of the implementing Project authorities and the SEDCL, being the User Agency for the said Project, have filed the instant appeals respectively being MAT 1396 of 2019(MAT-I) and MAT 1156 of 2019 (MAT-II).

The State appellants represented by the Learned Advocate General and ably assisted by Mr. Subhabrata Datta, Learned Junior Government

Advocate, argue that the writ petition is premature since, as on the date of the communication dated 12th April, 2018 from the Centre to the State, the

In-principle approval conveyed by the FAC stands subject to fulfilment of forty conditions specified in the said communication. It is submitted that in

the event if all the conditions are not fulfilled, the In-principle approval of the project will lapse.

This Court is taken copiously to the contents of the communication dated 12th April 2018. Reference is drawn to Condition No. xxiii of the said

conditions. It is submitted that Condition xxiii relates to Settlement of the Rights of Scheduled Tribes and Other Traditional Forest Dwellers. It is

pointed out that the onus has been placed on the State Government to complete settlement of rights in terms of the 2006 Act and providing

documentary evidence as prescribed by the MoEF&CC in support thereof. Such documentary evidence would have to be in compliance with the

MoEF&CCâ??s orders dated 3rd August 2009 and 5th July 2013.

Therefore, it is argued that until Condition No. xxiii is satisfied and such condition directly relates to the issue of compliance of the 2006 Act raised by

the writ petitioners before the Honâ??ble Single Bench, the said Project can only be approved if all forty Conditions, including Condition No. xxiii

stand fulfilled.

On the issue of the consultative mechanism qua Gram Sabhas stipulated by the 2006 Act, State takes the position that out of a total of seventeen

villages said to have fallen within the Project area, one village is not within the Project area at all. Of the remaining, eleven villages fall under Ayodhya

Gram Panchayat and five within Bagmundi Gram Panchayat. It is submitted that the consultative mechanism envisaged by the 2006 Act does not

dispense with the role of Gram Panchayats acting as the vehicle for expression of consent by the Gram Sabhas under them.

In addition to the above points, the State takes the point of absence of locus of the three writ petitioners to maintain the writ petition at all. On the basis

of facts emerging from documents produced at the hearing, the State submits that none of the writ petitioners are either Scheduled Tribes and Other

Traditional Forest Dwellers requiring protection under the 2006 Act. It is submitted that only one of the writ petitioners is stated to be a resident within

the Project area. It is urged that the writ petitioners therefore cannot espouse any legal right more so, on behalf of others, in respect of whom they

(i.e. the writ petitioners) purport to file the writ petition, which is not even filed in representative capacity. Therefore, the State urges that the writ

petition ought to have been dismissed in limine and this appeal should succeed at the very threshold.

On behalf of the User Agency, i.e. the SEDCL, Mr. L.K. Gupta, Learned Senior Counsel appears and takes the point outright that the said Project

stands outside the purview of Section 3 (2) of the 2006 Act. It is argued that Chapter II of Section 3 (1) provides for the Forest Rights of Scheduled

Tribes and Other Traditional Forest Dwellers. After such rights are enumerated in Section 3 (1), Section 3 (2) thereafter provides for the Central

Government allowing for the diversion of the forest land notwithstanding anything contained in the 1980 Act connected to certain specific projects/

facilities managed by the Government which involve felling of trees. It is submitted that such facilities/ projects covered by Section 3(2) (supra), inter

alia, relate to non-conventional sources of energy. It is submitted that the said Project, being hydel in nature, is a conventional source of energy and

hence Section 3(2) stands inapplicable at the threshold.

Since the premise connected to the project itself laid down by Section 3(2) (supra) stands to be inapplicable, its Provisos axiomatically stand

inapplicable. Specific mention is made by Learned Senior Counsel for SEDCL to Proviso II requiring the Forest projects to be first recommended by

the Gram Sabhas. It is urged that with the said Project not falling within the purview of Section 3(2) at all, the compliance of Proviso (II) as raised by the writ petitioners is wholly unnecessary.

Having considered the rival submissions and closely examined the materials placed, this Court arrives at the following findings:

A) That the non-application of Section 3(2) of the 2006 Act as raised by Learned Counsel for the User Agency/SEDCL/ the appellants in MAT-II

requires to be first addressed. The premise on which Section 3(2) is based relates to facilities/projects managed by the Government which involve

felling of tree which shall not exceed 75 trees per hectare. Therefore there is an arithmetical dimension to the application of Section 3(2) in respect

of projects/facilities which involve the felling of trees specifically fixed at not exceeding 75 trees per hectare.

B) Keeping such arithmetic in mind the said Project area comprises in all 234 hectares. The total number of trees required to be felled for the said

Project as recommended by the Conservator of Forests(Central) (pages 224-229 of the State Paper Book) is 6816. Therefore, on an arithmetical

basis, the number of trees required to be felled per hectare of the said Project is approx. 30 a figure well within the limit of 75 trees per hectare

provided by Section 3(2).

C) With further regard to the arguments placed by Learned Senior Counsel for the User Agency, the attention of this Court is drawn to the contents

of the National Electricity Plan (Vol.-I), Generation, as issued by the Central Electricity Authority (CEA) Ministry of Power, Government of India in

January 2018. Item 5.1 under Chapter 5 reads as follows:

5.1 OPTIONS FOR POWER GENERATION IN INDIA

Coal is the major source for power generation in our country and since Low Carbon Growth Strategy has to be followed, other generation options

need to be harnessed in the most optimum manner.

Fuel Options available for Power Generation are:

• Conventional Sources- Coal and Ignite, Hydro, Nuclear natural gas

• Non-Conventional Renewable Energy Sources- Solar, Wind, Biomass, small hydro, tidal, Geothermal, Waste to energy, Hydrogen/fuel cells,

etc.

D) From item 5.1(supra) the position stands unassailable that the said Project being hydel in nature is a conventional source of energy. Since Section

3(2) of the 2006 Act confers blanket clearance to projects involving non-conventional sources of energy, the said Project stands admittedly outside the purview of Section 3(2)(supra).

E) Moving on from the pure factual indices offered by Section 3(2) of the 2006 Act, this Court is required to examine whether the Honâ??ble Single

Bench was absolutely justified in directing the respondent State/ Central Government/ the User Agency to undertake the process under the 2006

Act afresh.

This Court is also required to examine whether having regard to the contents of the communication dated 12th April 2018, particularly Condition xxiii

thereof disclosing, inter alia, that the said Project is still at the approval stage, whether the Honâ??ble Single Bench was correct in cancelling the

exercise outright at this stage.

F) At the heart of the controversy raised by the writ petitioners lies the consultative mechanism qua Gram Sabhas. While on the one hand, the writ

petitioners insist on disclosure of the complete consultative mechanism in terms of the 2008 Rules attached to the 2006 Act, it will not be out of place

to also notice the merits of the nature of the consultative exercise disclosed by the State leading up to its recommendation for confirmation of the In-

principle approval.

G) The State has submitted that the villages within the said Project area are part of two Gram Panchayats namely, Ayodhya and Bagmundi. The State

has disclosed the assent of the two Gram Panchayats, i.e. Ayodhya and Bagmundi. Now, the definition of Gram Sabha provided under Section 2(g) of

the 2006 Act reads as follows :

â??(g) â??Gram Sabhaâ? means a village assembly which shall consist of all adult members of a village and in case of States having no Panchayats,

Padas, Tolas and other traditional village institutions and elected village committees, with full and unrestricted participation of women;â??

The definition of a Gram Panchayat in the West Bengal Panchayat Act, 1973 (for short, the 1973 Act) vide Section 4 thereof reads as follows :

â??Section 4. Gram Panchayat and its constitutions.- (1) For every Gram the State Government shall constitute a Gram Panchayat bearing the name

of the Gram. (2) Persons whose names are included in the electoral roll 2 [prepared in accordance with such rules as may be made by the State

Government in this behalf and in force on such date as the State Election Commissioner may declare for the purpose of an election] pertaining to the

area comprised in the Gram, shall elect by secret ballot at such time and in such manner as may be prescribed, from among themselves such number

of members 3 [not being less than five] or 4 [more than thirty] 5 [as the prescribed authority may, having regard to the number of voters in hill areas

and other areas and in accordance with such rules as may be made in this behalf by the State Government, determine

Provided that seats shall be reserved for the Scheduled Castes and the Scheduled Tribes in a Gram Panchayat, and the number of seats so reserved

shall bear, as nearly as may be and in the manner and in accordance with such rules as may be made in this behalf by the State Government, the same

proportion to the total number of seats in that Gram Panchayat to be filled up by election as the population of the Scheduled Castes in that Gram or of

the Scheduled Tribes in that Gram, as the case may be, bears to the total population of that Gram and such seats shall be subject to allocation by

rotation, in the manner prescribed, to such different constituencies having Scheduled Castes or Scheduled Tribes population which bears with the total

population in that constituency not less than half of the proportion that the total Scheduled Castes population or the Scheduled Tribes population in that

Gram, as the case may be, bears with the total population in that Gram:â??

The definition of Gram Sabha is provided in Section 2(11a) of the 1973 Act and reads as follows:

â??11(a) â??Gram Sabhaâ? means a body consisting of persons registered in the electoral rolls pertaining to a Gram declared as such under sub-

section (1) of section 3;â??

Section 2(10) and Section 2(11) of the said 1973 Act refer to Gram and Gram Panchayat and read as follows :

â??(10) â??Gramâ?? means an area referred to in section 3;

(11) â??Gram Panchayatâ?? means a Gram Panchayat constituted under section 4;â??

Finally Section 3 of the 1973 Act defines the area which forms part of a Gram and reads as follows:

3. Gram. - (1) The State Government may, by notification, declare for the purposes of this Act any mauza or part of a mauza or group of

contiguous mauzas or parts thereof to be a Gram: 3 Provided that any group of mauzas or parts thereof, when they are not contiguous or have no

common boundaries and are separated by an area to which this Act does not extend or in which the remaining sections of this Act referred to in

subsection (3) of section 1 have not come into force, may also be declared to be a Gram.

(2) The notification under sub-section (1) shall specify the name of the Gram by which it shall be known and shall specify the local limits of such

Gram.

(3) The State Government may, after making such enquiry as it may think fit and after consulting the views of the Gram Panchayat or Panchayats

concerned, by notification—

(a) exclude from any Gram any area comprised therein;

or

(b) include in any Gram any area contiguous to such Gram or separated by an area to which this Act does not extend or in which the remaining

sections of this Act referred to in sub-section (3) of section 1 have not come into force; or

(c) divide the area of a Gram so as to constitute two or more Grams, or

(d) unite the area of two or more Grams so as to constitute a single Gram.

H) Therefore, to the mind of this Court from a conjoint reading of the 2006 Act and the 1973 Act the following may be deduced.

That Gram Sabha would mean a village assembly under the 2006 Act and, in case of States having no Panchayats, such village assembly shall include

other traditional village institutions.

That in the context of a State such as West Bengal, the Gram Sabha, as statutorily defined, essentially indicates an electoral-cum-geographical area

comprising villagers residing in a particular Gram.

That again in the context of the State of West Bengal the statutory administrative unit for every Gram shall be the Gram Panchayat elected on the

basis of adult franchise including women.

I) In the light of the discussion at the Paragraph-F above, the disclosure by the

State of the consent of Ayodhya and Bagmundi Gram Panchayats

comprising the villages stated to be within the said Project area requires to be tested. It also requires to be tested whether the specific consent

mechanism enshrined in the 2008 Rules attached to the 2006 Act as also notified by the DM, Purulia at the pre-recommendation stage of the said

Project stands essentially fulfilled.

It must be also noticed that, as stated in the communication dated 12th of April 2018 the In-principle approval is not final but subject to fulfilment of

settlement rights as provided by the 2006 Act. Reference may be had to Condition xxiii which requires the State Government/User Agency to

complete the settlement of rights in terms of the 2006 Act and submit documentary evidence thereof. For the benefit of this discussion Condition

XXIII stands quoted below :

â??(xxiii). The State Government shall complete settlement of rights, in terms of the Scheduled Tribes and Other Traditional Forest Dwellers

(Recognition of Forest Rights) Act, 2006, if any, on the forest land to be diverted and submit the documentary evidence as prescribed by this Ministry

in its letter No. 11-9/1998-FC(pt.) dated 03.08.2009 read with 05.07.2013, in support thereofâ??

J) Accordingly, in terms of Condition xxiii, the issue of consent of the Gram Sabhas is still open for scrutiny under Section 2 of the 1980 Act by the

appropriate authority constituted by the Central Government. It has been clearly conveyed by the communication dated 12th of April 2018 that there

shall be no transfer of forest land to the User Agency till formal orders approving the diversion of forest land are issued by the Central Government.

In the above view of the matter this Court finds substance in the argument of the State appellants that the writ petition is premature, although at the

same time this Court does appreciate that compliance of the terms of the 2006 Act pertaining to rights of Scheduled Tribes and Other Traditional

Forest Dwellers is an issue which requires scrutiny at the appropriate level.

K) This Court is now also required to notice certain supplementary but important facts.

That it is the second Project of its type in the Purulia region named as the Turga Pumped Storage Scheme. The previous project by the name of

Purulia Pumped Storage Scheme is already operational. The Geological Survey of

India had conducted feasibility studies in 1978-1979.

That the Project is suitable for the terrain from the technical point of view.

That the Project is likely to generate permanent/ regular employment for 169 persons and temporary employment for 1890000 persons.

That the Project area also comprises of an Elephant corridor for a herd of around 14 wild elephants. However, the Project work involves minimum to

nil displacement of humans, fauna and flora.(Source: Site Inspection Report of the Conservator of Forests (Central); (Pages 224-229 of the State??

Paper Book).

It would be not without significance to notice that the above topographical, social, economic and natural facts stood uncontroverted at the hearing.

For the reasons as already stated above in this Judgement and Order, this Court is not persuaded to agree with the finding of the Honâ??ble Single

Bench that the consultative mechanism involving Gram Sabhas under the 2006 Act read with its 2008 Rules has been absolutely subverted.

This Court finds that the consultative mechanism performed and placed by the State requires to be tested at the appropriate level whether reflective of

the consent of the minimum required adult members, including women, in villages covered by the said Project area.

For the above reasons, the Judgement and Order of the Honâ??ble Single Bench dated 2nd July, 2019 directing the process of settlement to be

executed afresh stands set aside.

The issue of settlement of rights as recommended by the State shall be now examined at the appropriate level by the Central Government in

consonance with the requirement of Condition xxiii of the letter dated 12th April 2018. The writ petitioners, or their authorized representative, shall also

be entitled to place their presentation before the Central Government, upon being put to prior notice. Needless to add, the other Conditions set forth in

the letter dated 12th April, 2018 shall also be examined in accordance with law.

M.A.T. 1156 of 2019 with CAN 1 of 2019(Old No. CAN 9607 of 2019),CAN 2 of 2019(Old No. CAN 10307 of 2019), CAN 3 of 2020 and M.A.T.

1396 of 2019 with CAN 1 of 2019(Old No. CAN 10259 OF 2019), CAN 2 of 2019(Old No. CAN 10262 OF 2019) stand accordingly disposed of.

Parties shall be entitled to act on the basis of a server copy of this Judgement and Order placed on the official website of the Court.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities

I agree.