SUPREME COURT OF INDIA

State of Jharkhand

Vs.

Pakur Jagran Manch

C.A.No.436 of 2011

(R.V.Raveendran and H.L.Gokhale,JJ.,)

12.01.2011

JUDGMENT

R.V.Raveendran,J.,

1. Leave granted.

2. The Settlement Officer notified and published a record of rights under section 24 of the Santhal Parganas Settlement Regulations, 1872 ('Regulations' for short) under which land measuring 4.40 acres in Thana No.24, Plot No.1061, Mouza Solagaria, Circle and District Pakur, Jharkhand, was recorded as gochar (village grazing land) for the said village Solagaria.

3. In a public interest litigation (W.P. No.5332/2001), the High Court of Jharkhand issued certain directions for effective implementation of national leprosy eradication programme and for improving the standards of health of the tribal residents of the area. In pursuance of it, the Department of Health & Family Welfare, Government of Jharkhand and the Deputy Commissioner, Pakur, on 21.12.2005, authorized the Executive Engineer, Rural Development, Special Division, Pakur, to construct a hospital building. The said gochar was identified as being suitable for construction of the Hospital with the consent of village headman and village community (all the Jamabandi Raiyats of the village), vide consent letter dated 10.11.2006.

4. When the construction commenced, the first respondent filed a public interest litigation [W.P. (PIL) No.6779/2006] in the Jharkhand High Court inter alia contending that the grazing land (gochar) could not be used for any other purpose and seeking prohibition of construction of a hospital in the said gochar.

5. On 31.5.2007, the State government issued a notification denotifying releasing the said 4.44 acres of gochar in Plot No.1061 and in its place declaring an extent of 4.44 acres of Gairmajarua (Government) Khas land in Khata No.44, Plot Nos. 62, 199 and 427 as gochar under section 38(2) of the Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949

('Tenancy Act' for short). On the basis of the said notification it was contended by the appellants in the two appeals before the High Court that the land in question had ceased to be gochar and therefore, there was no impediment for using the said land for construction of an hospital. The High Court by the impugned order dated 17.8.2007 allowed the said writ petition holding as follows : (i) The State had no authority to construct a hospital in the land earmarked as gochar meant for grazing of cattle. (ii) The notification dated 31.5.2007, denotifying and releasing the gochar in order to hand over the same to the health department for construction of a hospital, was not valid in law, having regard to the bar contained in section 38(1) read with sections 67 and 69 of the Tenancy Act.

6. The said order of the High Court is challenged by the State of Jharkhand and by the village headman in these two appeals by special leave. The contentions of the appellants, in brief, are as under:

> "(i) Having regard to section 2(1) read with section 38(2) of the Tenancy Act, the State Government had the authority to denotify/release/withdraw any land from its status as gochar, provided other suitable land is set apart as gochar to make up 5% of the total area of the village as required under section 38(2) of the Tenancy Act.
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> (ii) As the State had settled the said land as gochar for cattle grazing in the settlement made in 1932, it had the implied authority to denotify/de- reserve the said land from its status as gochar having regard to section 24 of the Bihar and Orissa General Clauses Act (for short 'General Clauses Act') subject to compliance with section 38(2) of the Tenancy Act. (iii) Only the raiyats of the village Solagaria have the right to graze their cattle in the said gochar. The village headman and the entire village community (all the Jamabandi raiyats) have given their consent in writing on 10.11.2006 for the land in question being used for construction of a hospital. None else had any right to use the said land and therefore, the first respondent (writ petitioner) was not a person aggrieved. (iv) Large amounts had already been invested for construction of a huge hospital building. If at this stage the said land is to be declared or confirmed or restored as gochar, it would result in irreparable financial loss to the Government as it would involve demolition of the recently constructed huge structure and construction of another building for the hospital at some other place. Such an exercise would also delay in extending health facilities to the residents/ tribals who are in dire need of the same.
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> (v) Having regard to the declaration of an alternative area of 4.44 acres in the same village as gochar under section 38(2) of the Tenancy Act, there was no reduction in the village gochar nor violation of the provisions of the Tenancy Act.
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> (vi) In several other cases, the Jharkhand High Court had accepted and recognized the denotification of the gochar to enable the use thereof for other purposes and therefore the Government bonafide proceeded on the basis that such a procedure of denotification was permissible.

7. The first respondent on the other hand, supported the decision of the High Court. It contended that having regard to the bar contained in section 38(1) of the Tenancy Act, the land earmarked and settled as gochar could not be used for any other purpose (including the use as a hospital) under any circumstances. They relied upon the following passage from the final Report on "Revision Survey and Settlement Operations in the District of Santhal Parganas" submitted by Mr. J.F. Gantzer in 1935 (vide Para 63) to highlight the object of setting apart some Government land as gochar :

> "Gochar and its Object
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> 63. That there are mainly two objects of gochar or grazing land : (a) It provides rights to Jamabandi Raiyats (Poor Tribal Agriculturist) to graze their cattle free of cost, and without any money. These tribal people are very poor and illiterate, and they cannot afford to purchase expensive feed and fodder for their domestic animals to provide them good health and nutrient foods. Grazing lands provides economic support to these indigent people, and it is a very source and means of livelihood for them. (b) Grazing land is a part of our ecology, and helps a lot in maintaining our ecological balance by providing domestic animals of the tribes, their natural habitation, natural home and natural environmental and natural vegetation, where they eat food (grass), drink water, get pure air, sunlight, rest, move and enjoy freedom, freedom from the shackles of farm-house, freedom from the fetters of rope, and freedom from every iron bar. Their habitats are necessary, and necessary to be preserved, as otherwise it would be a perpetration of cruelty, torture, exploitation and degrading treatment of domestic animals unbalancing our ecological system."

Whether section 2(1) of the Tenancy Act has any bearing ?

8. The appellants relied upon section 2(1) of the Tenancy Act, as the source of power, to support the validity of the notification dated 31.5.2007 and the said section is extracted below:

> "2. Power to vary local extent of the Act and effect of the withdrawal of the Act from any area.--(1) The State Government may, by notification withdraw this Act, or any part thereof, from any portion of the Santhal Parganas Division and may likewise extend this Act, or any part thereof to the area from which the same has been so withdrawn." Sub-section (1) of section 2 of the Tenancy Act enables the state Government to re-organise or delimit any portion of the Santhal Parganas Division for convenient revenue administration. De-reserving certain land which has been recorded as gochar in the record-of-rights in pursuance of a settlement under the Settlement Regulations, has nothing to do with withdrawing the applicability of the Tenancy Act or any part thereof from any portion of Santhal Parganas Division. De-reservation or re- categorisation of a land recorded as gochar in the record-of-rights is not within the scope of the Tenancy Act. We are therefore, of the view that section

2(1) of the Tenancy Act has no relevance and cannot be treated as the source of power to issue a notification de-reserving gochar. Whether the Notification dated 31.5.2007 is valid?

9. The core issue is whether section 38(1) of the Tenancy Act was violated by the State Government, in using the gochar for constructing a hospital, after de¬reserving it from its status as gochar. Section 38 of the Tenancy Act reads thus:

> "38. Grazing land shall not be cultivated.--(1) No land recorded as village grazing land or gochar shall be settled or brought under cultivation or utilized for any purpose other than grazing by any one. (2) If the area recorded as grazing land or gochar be less than five per centum of the total area of the village, the Deputy Commissioner may, in consultation with the landlord, village headman or mulraiyat, and raiyats, set apart suitable area of village waste land for grazing. Such land when so set apart shall be governed by the provision of sub-section (1)." Sub-section (1) of section 38 prohibits any land recorded as village grazing land or gochar being (i) settled or (ii) brought under cultivation or (iii) utilized for any purpose other than grazing, by anyone.

10. The appellants seek to support the notification dated 31.5.2007 with reference to section 24 of the State General Clauses Act (corresponding to section 21 of the Central Act) which provides that where by any State Act or Regulation, a power to issue notifications, orders, rules or bye-laws is conferred, then that power includes a power exercisable in the like manner and subject to like sanction and conditions if any, to add to, amend, vary or rescind any notification, orders, rules or bye-laws so issued. The power implied from the said provision of General Clauses Act would be available only to add, amend, vary or rescind a notification issued in exercise of power conferred by a State Act or Regulation (which does not specifically confer the power to add, amend, vary or rescind such notification). It is not the case of the appellants that the lands in question were declared reserved or notified as gochar by issue of a notification under any State Act or Regulation. The notification dated 31.5.2007 was not issued to add, amend, vary or rescind any notification issued in exercise of power under a State Act or Regulations. Therefore, the implied power to rescind, vary or amend an existing notification, recognised by section 24 of the State General Clauses Act is of no assistance to support the power to issue a notification de- reserving a land recorded as gochar.

11. The High Court has erroneously assumed that as there is no provision in the Tenancy Act for dereserving gochar for other uses, the State Government has no power to dereserve any land recorded as gochar, under any circumstances and therefore the notification dated 31.5.2007 was invalid. The High Court has also erroneously assumed that once a land is recorded as gochar, such land should forever be gochar. The prohibition under section 38(1) of the Tenancy Act in regard to settlement, cultivation or utilization for non-grazing purposes is applicable only to land recorded as village grazing land or gochar. If the land is not recorded as gochar or village grazing land, or if the land ceases to be shown as gochar or village grazing land in the Record-of-Rights for valid reasons, then the bar under section

38(1) will not apply. The manner of recording a land as gochar (or village grazing land), or the manner of de-reserving any land recorded as gochar (or village grazing land) is not governed or regulated by section 38 of the Tenancy Act. If the State Government has the power to dereserve or denotify gochar (village grazing land) under any other law, and such power is validly exercised, then the land will cease to be gochar and the prohibition under section 38(1) of the Tenancy Act in regard to non-grazing use will not apply.

12.Let us now consider whether the State Government has the power to de-reserve or de-notify gochar (village grazing land). We find that appropriate provision therefor is found in the Regulations. The preamble of the Regulations make it clear that it was made for securing the peace and good governance of the territory known as Santhal Parganas (as contrasted from the preamble to the Tenancy Act which shows that the Act was made to amend and supplement certain laws relating to landlords and tenants in Santhal Parganas).

> "12.1) Regulation 10 empowers the state government to appoint the officers by whom the settlement is to be made and make rules for the procedure of such officers in the investigation into rights in the land and hearing of suits, and generally for the guidance of such officers.
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> 12.2) Regulation 13 provides that the record of rights to be prepared by a settlement officer shall show the nature and incidents of each rights and interest held by each class of occupiers or owners in a village and if need be, of each individual owner, occupier or headman in a village. The second part of Regulation 14 provides that the Settlement Officer shall inquire into, settle and record all rights in, or claims to, the lands of a village of which he is preparing a record-of-rights, even though such claims or rights may not be urged by the parties interested.
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> 12.3) Regulation 24 relates to publication or record of rights and it is extracted below:
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> "Publication or record-of-rights - After the Settlement the Settlement Officer shall have made the record-of-rights for any village, he shall notify and publish the contents of such record to the persons interested by posting it conspicuously in the village and otherwise in such manner as may be convenient. Objections against such record - Any person interested shall thereupon be allowed to bring forward (in the Settlement Courts) within a period of six months from the date of publication of such record-of-rights, any objection he may desire to make to any part of such record; and the objection so made shall be inquired into and disposed of by a decision in writing under the hand of the officer presiding in the court." 12.4) Regulation 25 provides when and how the record-of-rights of any village becomes final. Sub¬sections (1) and (3) thereof which are relevant for our purpose are extracted below: "25. Record to be final after six months publication : (1) After a period of six months from the date of the publication of the record-of-rights of any village, such records shall be conclusive proof of the rights and customs therein recorded, other than the rights mentioned in

section 25-A, except so far as concerns entries in such record regarding which objections by parties interested may still be pending in the Original or Appellate Courts, or may still be open to appeal.

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(3) When a record-of-rights has become final, or any objection to any entry in a record-of-rights has been finally disposed of in the Settlement Courts, and when all final decisions and orders, including such as may have been passed on revision as provided in sub-section (2), have been correctly embodied therein, such record shall not, until a fresh settlement is made or a new table of rates and rent-rols are prepared, be re-opened without the previous sanction of the State government." 12.5) It is evident from Regulation 25 read with Regulation 24 that though normally once the record of rights has become final, it shall not be re-opened until a fresh settlement is made, the entries in the record of rights can be re- opened and altered with the previous sanction of the state government. It is therefore clear that even if a land had been recorded as a gochar in the record-of-rights of a village in pursuance of a settlement under the Regulations, it can be re-opened and altered at any time, without waiting for the next settlement, with the previous sanction of the state government. Therefore the contention of the first respondent that once a gochar, always a gochar, and there is no power in any one at any time, to alter its status as gochar is without merit. All that the state government did by the notification dated 31.5.2007 was to dereserve gochar in pursuance of a proposal/request for sanction by the Deputy Commissioner so that it is no longer recorded as gochar (or village grazing land).”

13. The Deputy Commissioner is the authority empowered to reopen the record-of- rights for the purpose of dereserving the land recorded as gochar by altering its use. He made a proposal seeking the sanction of the state government, for de-reserving the gochar in question (4.40 acres in Thane No.24, Plot No.1061, Solagoria) and the state government by the impugned notification dated 31.5.2007 granted such approval by passing an order of de-reservation. By the very same notification, it ensured that section 38(2) of the Tenancy Act was also fulfilled by earmarking alternative land as gochar. The only possible objection that can be raised to the notification dated 31.5.2007 is that having regard to the Regulation 25(3), the state government had to merely sanction the dereservation and could not by itself de¬reserve the land. This technical objection has no merit as de-reservation is effected by the Deputy Commissioner in pursuance of the approval granted by the state government, by making appropriate entry in the record-of-rights of the village. Therefore, the notification in question has to be read as an order granting reopening of the final record of rights of the village Solgaria for the purpose of dereserving the gochar of 4.40 acres for the purpose of constructing a hospital with the consent of the village headman and Jamabhandi Raiyats and at the same time instructing and directing the Deputy Commissioner to ensure that appropriate suitable land is set aside for grazing so as to make up 5% of the total land of the village as required under section 38(2) of the Act.

14. The notification no doubt does not refer to Regulations 24 and 25(3). But it is now well settled the omission to refer to the provision of law which is the source of power, or the mentioning of a wrong provision, will not by itself render an order of the government invalid or illegal, if the government had the power under an appropriate provision of law -- vide *K.K. Parmar vs. High Court of Gujart*[1]- and Kedar Shashikant Deshpande vs. Bhor Municipal Council (CA Nos.10452-457/2010 dated 10.12.2010).

15. We should however note that such de-reservation of any government land reserved as gochar, should only be in exceptional circumstances and for valid reasons, having regard to the importance of gochar in every village. Any attempt by either the villagers or others to encroach upon or illegaly convert the gochar to house plots or other non-grazing use should be resisted and firmly dealt with. Any requirement of land for any public purpose should be met from available waste or unutilized land in the village and not gochar. Whenever it becomes inevitable or necessary to de-reserve any gochar for any public purpose (which as stated above should be as a last resort), the following procedure contemplated in Regulations 24 and 25 and section 38(2) should be strictly followed:

> "(a) The jurisdictional Deputy Commissioner shall prepare a note/report giving the reasons why the gochar had been identified for any non- grazing public purpose and record the non-availability of other suitable land for such public purpose. Deputy Commissioner shall send the said proposal for de¬reservation to the State government for its previous sanction.
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> (b) The state government should consider the request for sanction keeping in view the object of gochar and the need for maintaining a minimum of five percent of village area as gochar, and call for suggestions/objections from the villagers before granting sanction. (c) If the state Government grants the sanction, the Deputy Commissioner should proceed to make an order de-reserving, the gochar by making appropriate entries in the record-of-rights and re-classifying the same for the purpose for which it was de-reserved.
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> (d) Whenever the gochar in a village is de-reserved and diverted to non¬grazing use, simultaneously or at least immediately thereafter the State should make available alternative land as gochar, in a manner and to an extent that the gochar continues to be not less than 5% of the total extent of the village as provided under section 38(2) of the Tenancy Act. When the gochar is not government land, but is village common land vesting in the villagers and not the government, the consent of village headman and the Jamabandi Raiyats/villagers in whom the land vests shall have to be obtained, before de-reservation and diversion of use of gochar.

16. In this case the urgent need for de-reserving the gochar of 4.40 acres and diversion of its use for the public purpose of hospital is not in dispute. The village headman and all the Jamabandi Raiyats have consented to the de-reservation and use of the land in question for hospital. The land in question was found to be most suitable for housing the hospital.

Alternative land was immediately notified as gochar. The Hospital has already been constructed in the land. Any delay would come in the way of health care of the villagers/tribals. In the circumstances, the notification dated 31.5.2007 of the Government is upheld. It is needless to say that respondents 6 and 9 will carry out necessary amendments in the Record of Rights of the village, showing Plot No.1061 as used non-grazing public purpose and record Plot Nos.62, 199 and 427 as gochar. Other objections of first respondent

17. Learned counsel for the first respondent submitted that the hospital could have as well been put up in Plot Nos.62, 199 and 427 measuring 4.44 acres which has now been declared as alternative gochar. The gochar measuring 4.40 acres in plot No.1061 was chosen for the hospital having regard to its easy accessibility as it adjoins a main road. Any interior land would be disadvantageous for construction of a hospital but will not be disadvantageous for being used as a grazing land. Therefore the decision of the authorities to locate the hospital in Plot No.1061 in question cannot be faulted with.

18. The first respondent next submitted that Plot Nos.62, 199 and 427 are rocky land and not suitable for grazing land for being declared/earmarked as gochar. But such an objection has not been raised by the village community who are entitled to use the gochar. If the alternative lands notified as gochar were unsuitable, they would have raised the objection. When the village headman and Raiyats have agreed for the alternative area as gochar, such a contention is not available to the first respondent.

19. The first respondent lastly submitted that there were some irregularities and misuse of funds in the construction of the hospital building, during the pendency of the litigation, as it was done without inviting tenders. That is a separate issue. If there is any irregularity in regard to construction, the first respondent may agitate the issue by lodging a complaint with appropriate authorities.

20. We therefore allow these appeals, set aside the impugned order of the High Court and dismiss the public interest litigation (W.P. (PIL) No. 6779/2006) and permit the hospital to function in ex-gochar land namely Plot No.1061, Mohza Solagaria.

Judgment Referred.

[1]*(2006) 5 SCC 0789*