

IN THE SUPREME COURT OF INDIA
(CIVIL ORIGINAL JURISDICTION)
WRIT PETITION (CIVIL) No. 180 OF 2011

IN THE MATTER OF:

ORISSA MINING CORPORATION

..... **PETITIONER**

VERSUS

MINISTRY OF ENVIRONMENT & FORESTS AND ORS.

..... **RESPONDENTS**

ADDITIONAL AFFIDAVIT ON BEHALF OF
RESPONDENT NO. 1

I, Harish Chandra Chaudhary S/o (L) Shri Bhagwan Singh, aged about 43 years, resident of D-II/8, West Kidwai Nagar, New Delhi 110 023, do hereby solemnly affirm and state as follows:-

1. That, I am working as an Assistant Inspector General of Forests in the Ministry of Environment and Forests ('MoEF', for short), and as such am aware of the facts and circumstances of the case on the basis of the office records and is duly authorised to file this affidavit.
2. That, this Hon'ble Court in their order dated 06.12.2012 in this matter *inter alia* directed as below:

"The Solicitor General, appearing for the Union of India, has submitted that the decision of the Central Government and the impugned order passed by MoS, Environment and Forests, Government of India, are mainly based on the provisions of the Scheduled Tribes

and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

In view of the stand taken by the Solicitor General, the provisions of the aforesaid Act have come under consideration and it would be necessary for this Court to examine the import and reach of the Act. Any decision of the Court on the construction of the Act will have a bearing not only on the proposed project and the mining operation in the bauxite mine at Niyamgiri Hills, but is likely to have a widespread impact on the economic and social life of the country.

We, therefore, direct the Union of India to file an affidavit making clear its stand on the Act and spelling out clearly how it understands the provisions of the Act.”

3. That, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 ('Act', for short) is an Act to recognise and vest the forest rights and **occupation** in forest land in forest dwelling Scheduled Tribes and other traditional forest dwellers who have been residing in such forests for generations but whose rights could not be recorded and to provide for a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land.
4. That, the preamble of Act further clarifies that the recognised rights of the forest dwelling Scheduled Tribes and other traditional forest dwellers include the responsibilities **and authority** for sustainable use, conservation of biodiversity and maintenance of ecological balance and thereby strengthening the conservation regime of the forests while ensuring livelihood and food security of

the forest dwelling Scheduled Tribes and other traditional forest dwellers.

5. The sub-section (1) of section 3 of the Act provides that for the purpose of the Act, the following rights, which secure individual or community tenure or both, shall be the forest rights of forest dwelling Scheduled Tribes and other traditional forest dwellers on all forest lands, namely:-
- (a) right to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood by a member or members of a forest dwelling Scheduled Tribe or other traditional forest dwellers;
 - (b) community rights such as *nistar*, by whatever name called, including those used in erstwhile Princely States, Zamindari or such intermediary regimes;
 - (c) right of ownership, access to collect, use and dispose of minor forest produce which has been traditionally collected within or outside village boundaries;
 - (d) other community rights of uses or entitlements such as fish and other products of water bodies, grazing (both settled and transhuman) and traditional seasonal resource access of nomadic or pastoralist communities;
 - (e) **rights including community tenures of habitat and habitation for primitive tribal groups and pre-agricultural communities;**
(Emphasis supplied)
 - (f) rights in over disputed lands under any nomenclature in any State where claims are disputed;
 - (g) rights for conversion of *Pattas* or leases or grants issued by any local authority or any State Government on forest lands to titles;

(h) rights of settlement and conversion of all forest villages, old habitation, unsurveyed villages and other villages in forests, whether recorded, notified or not into revenue villages;

(i) **right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use;**

(Emphasis supplied)

(j) rights which are recognised under any State law or laws of any Autonomous District Council or Autonomous Regional Council or which are accepted as rights of tribals under any traditional or customary law of the concerned tribes of any State;

(k) right of access to biodiversity and common right to intellectual property and traditional knowledge related to biodiversity and cultural diversity;

(l) **any other traditional right customarily enjoyed by the forest dwelling Scheduled Tribes or other traditional forest dwellers, as the case may be, which are not mentioned in clause (a) to (k) but excluding the traditional right of hunting or trapping or extracting a part of the body of any species of wild animal;**

(emphasis supplied)

(m) right to *in situ* rehabilitation including alternative land in cases where the Scheduled Tribes and other traditional forest dwellers have been illegally evicted or displaced from forest land of any description without receiving their legal entitlement to rehabilitation prior to the 13th day of December, 2005

6. That, the sub-section (2) of section 3 of the Act provides that notwithstanding anything contained in the Forest (Conservation) Act, 1980, the Central Government shall provide for diversion of forest land for the following facilities managed by the Government which involve felling of trees not exceeding seventy-five trees per hectare, namely:-

- (a) schools;
- (b) dispensary or hospital;
- (c) *anganwadis*;
- (d) fair price shops;
- (e) electric and telecommunication lines;
- (f) tanks and other minor water bodies;
- (g) drinking water supply and water pipelines;
- (h) water or rain water harvesting structures;
- (i) minor irrigation canals;
- (j) non-conventional sources of energy;
- (k) skill upgradation or vocational training centres;
- (l) roads; and
- (m) community centres;

Provided that such diversion of forest land shall be allowed only, if-

- (i) the forest land be diverted for the purposes mentioned in this sub section is less than one hectares in each case; and
- (ii) the clearance of such developmental projects shall be subject to the conditions that the same is recommended by the Gram Sabha.

7. That, the section 6 of the Act provides for authorities and procedure for vesting of forest rights.

8. That, the sub-section (1) of the section 6 of the Act provides that the Gram Sabha shall be the authority to initiate the process for determining the nature and extent of individual and community forest rights or both that may be given to the forest dwelling

Scheduled Tribes and other traditional forest dwellers **within the local limits of its jurisdiction** under this Act by receiving claims, consolidating and verifying them and preparing a map delineating the area of each recommended claim in such manner as may be prescribed for exercise of such rights and the Gram Sabha shall, then pass a resolution to that effect and thereafter forward a copy of the same to the Sub-Divisional Level Committee.

9. That, the Sub-Section 6 of Section-6 of the Act provides that decision of the District Level Committee on the **record of forest rights shall be final and binding**. Further the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Right), Amendment Rules, 2012 in Rule 12 B (3) emphasize that the District Level Committee shall ensure that the forest rights under clause (i) of sub-section (1) of section 3 relating to protection, regeneration or conservation or management of any community forest resource, which forest dwellers might have traditionally been protecting and conserving for sustainable use, are recognized in all villages with forest dwellers and the titles are issued. The Rule 12 B (1) of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Right), Amendment Rules, 2012 states that District Level Committee in view of the differential vulnerability of Particularly Vulnerable Tribal Groups receive habitat rights in consultation with the concerned traditional institutions of Particularly Vulnerable Tribal Groups and their claims for habitat rights are filed before the concerned Gram Sabhas.
10. That, the sub-section (1) of the section 4 of the Act provides that notwithstanding anything contained in any other law for the time being in force, and subject to the provisions of the Act, Central Government hereby **recognises and vests** forest rights in-
 - (a) the forest dwelling Scheduled Tribes in States or areas in States where they are declared as Scheduled Tribes in respect of all forest rights mentioned in section-3;

(b) the other traditional forest dwellers in respect of all forest rights mentioned in section-3;

11. That, the sub-section (2) of the section 4 of the Act, however provides that the forest rights recognised under this Act in critical wildlife habitats of National Parks and Sanctuaries may subsequently be modified or resettled, provided that no forest right holders shall be resettled or have their rights in any manner affected for the purposes of creating inviolate areas for wildlife conservation except in case all the following conditions are satisfied, namely:-

(a) the process of recognition and vesting of rights as specified in section 6 is complete in all the areas under consideration;

(b) it has been established by the concerned agencies of the State Government, in exercise of their powers under the Wild Life (Protection) Act, 1972 that the activities or impact of the presence of holders of rights upon wild animals is sufficient to cause irreversible damage and threaten the existence of said species and their habitat;

(c) the state Government has concluded that other reasonable options, such as, co-existence are not available;

(d) a resettlement or alternative package has been prepared and communicated that provides a secure livelihood for the affected individuals and communities and fulfils the requirements of such affected individuals and communities given in the relevant laws and the policy of the Central Government;

(e) the free informed consent of the Gram Sabha in the areas concerned to the proposed resettlement and to the package has been obtained in writing;

(f) no resettlement shall take place until facilities and land allocation at the resettlement location are complete as per the promised package:

Provided that the critical wildlife habitats from which right holders are thus relocated for purposes of wildlife conservation shall not be subsequently diverted by the State Government or the Central Government or any other entity for other uses.

12. That, the sub-section (4) of the section 4 of the Act provides that a right conferred by sub-section (1) of section 4 of the Act **shall be heritable but not alienable or transferable** and shall be registered jointly in the name of both the spouses in case of married persons and in the name of the single head in the case of a household headed by a single person and in the absence of a direct heir, the heritable right shall pass on to the next of kin.
13. That, the sub-section (5) of the section 4 of the Act provides that save as otherwise provided, no member of a forest dwelling Scheduled Tribe or other traditional forest dweller shall be evicted or removed from land under his occupation till the recognition and verification process is complete. Further the Guidelines issued by the Ministry of Tribal Affairs dated 12.07.2012 (No 23011/32/2010-FRA [vol.II (pt)]) provide that this clause being of an absolute nature, excludes all possibilities of eviction of forest dwelling Scheduled Tribes or other traditional forest dwellers without settlement of their individual as well as community forest rights under the Act
14. That, the section 5 of the Act *inter alia* provides that the **holders of the forest right, Gram Sabha and village level institutions in areas where there are holders of any forest rights under this Act are empowered to ensure that habitat of forest dwelling Scheduled Tribes and other**

traditional forest dwellers is preserved from any form of destructive practices affecting their cultural and natural heritage.

15. That, the section 13 of the Act provides that save as otherwise provided in the Act, and the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996, the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.
16. That, after a careful examination of the provisions of the Act, the MoEF is of the view **that no eviction of eligible forest dwellers can take place till the process of recognition and vesting of individual and community forest right under the Act is complete.** Further the MoEF is of the view that as far as possible, diversion of forest land over which forest rights have been recognised or are likely to be recognised or vested should be avoided, and it **should be the last resort after examination of all alternatives.**
17. That, wherever diversion of forest land over which forest rights have been recognised or vested, or are likely to be recognised or vested, under the Act is unavoidable, such rights may be **circumscribed or extinguished using the eminent domain of the State,** by following the procedure stipulated (principles established under- as technically the land is not private land per se but forest land with a perpetual right) in the Land Acquisition Act, 1894 or any such other Act which provides for acquisition (transfer or diversion) of land, only if the following conditions are satisfied:
 - (i) Process for settlement and vesting of rights as specified in Section-6 of the Act is complete in all the areas under consideration;

- (ii) A resettlement or alternative package has been prepared communicated and accepted by the affected forest right holders that provides a secure livelihood for the affected individuals and communities and fulfils the requirements of such affected individuals and communities given in the relevant laws and policies of the Central Government; and
- (iii) Diversion of forest land for facilities managed by the Government as required under section 3(2) of the Act has been completed and that the Gram Sabha have consented to it.

18. That, in case the diversion of forest land over which forest rights have been recognised or vested, or are likely to be recognised or vested, is for a project such as mining projects, projects leading to submergence and the consequent displacement of large number of people, *etc.*, which affects the quality of life of the people whose rights have been recognised or vested, or are likely to be recognised or vested, which in turn may severely hamper such person(s) and concerned Gram Sabha(s) to perform duties assigned on them under section 5 of the Act, may be **circumscribed or extinguished using the eminent domain of the State**, by following the (principles established under) the Land Acquisition Act, 1894 or any such other Act which provides for acquisition (transfer or diversion) of land, only if, apart from fulfilment of conditions stipulated in para 17 above, the free informed consent of the Gram Sabha in the areas concerned to the proposed resettlement and to the package is obtained in writing;
19. That, keeping in view that Act provides for special safeguards to recognise rights, including community tenures of habitat and habitation (as provided in clause (e) of sub-section (1) of section 3 of the Act) and the traditional right to worship and protection of the sacred place of worship customarily enjoyed by them (as provided in clause (l) of the sub-section (1) of section 3 of the Act)

for primitive tribal groups and the pre-agricultural communities, the most vulnerable among the forest dwelling Scheduled Tribes and other traditional forest dwellers, diversion of forest land which adversely affects any right of these communities should ordinarily be not allowed, even if the conditions specified in para-17 and para-18 above are satisfied. Thus diversion of forest land on the proposed mining site of the Lanjigarh bauxite mining lease is violative of the fundamental rights of the Dongria Kondh tribal as well as the spirit of Forest Rights Act especially for particularly vulnerable tribal groups such as the Dongria Kondh and thus cannot be allowed for this reason alone.

20. That, more than 7 square kilometers of the sacred undisturbed forests on top of the mountain where the proposed mining lease area of the Lanjigarh bauxite mining lease is located has been protected for centuries by the Dongria Kondh, a primitive tribal group (now termed as particularly vulnerable tribe) as sacred to their deity. Diversion of these sacred areas for mining will undermine the customary rights of the Dongria Kondhs to protect their sacred places of worship and thereby amount to a violation of their fundamental right to manage their own affairs in the matter of religion and fundamental right to conserve the culture of their own in direct violation further of the specific provisions of the Forest Rights Act.
21. That, the Lanjigarh bauxite mining lease is located in Scheduled Areas as referred to in **Clause (1) of Article 244 of the Constitution**. Circumscribing or extinguishing of forest rights in such areas, apart from the conditions stipulated in para-17 to para-19 above shall additionally **be in conformity with the provisions of the clause-5 of the fifth schedule to the Constitution**.

DEPONENT

VERIFICATION:

I, the above named deponent do hereby verify that the contents of the above affidavit are true and correct to my knowledge and are based on official records and nothing material is concealed therein.

Verified at New Delhi on this fourteenth day of February, 2013.

DEPONENT