

Role of the Courts and Implications for Community Forestry in Northeast India



by

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and

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COMMUNITY FORESTRY



INTERNATIONAL, INC.

Supporting Sustainable Management & Restoration of the World's Forests

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MACARTHUR

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LIST OF ACRONYMS

CEC	Centrally Empowered Committee
FCA	Forest Conservation Act
IFA	Indian Forest Act
HPC	High Powered Committee
HC	High Court
N-E	North East
NTFP	Non Timber Forest Produce
SC	Supreme Court
SIT	Special Investigating Team
W.P.	Writ Petition

Introduction

Judiciary has had a vital role in the forestry sector through out India. In North Eastern States judicial intervention can be traced to early fifties. A clear difference in the pattern of issues and their subsequent resolution can be seen in the pre and post the enactment of Forest Conservation Act, 1980 (FCA). The local forest laws in the different States of the N E region primarily focused on commercial usage and derivation of economic benefits from forest resources. But commencement of the FCA led to a noteworthy shift in focus of different State Governments and the Administration from deriving economic and financial gains from forest to conservation of forest.

Earlier issues, which came before the Judiciary essentially, revolved around commercial use of forest resources, which is evident from the various cases that were dealt by the courts. These include definition of forest produce, lease of forestland for non-forest purpose, transit of forest produce among others. In recent years a close look on the some of the important judicial decisions presents an evident change in judicial approach towards forestry issues. In one of the most landmark ongoing case popularly known as *Godavarman Case*¹ the Supreme Court has been attempting to reconcile the need for conservation with sustainable use of forest resource keeping in consonance with the Forest Policy as well as the FCA.

It is in this background that the present paper examines and analyses the possible trends that exist in cases relating to forest that have been addressed at the formal level in courts of law. This exercise is important as judicial precedents often sets the tone of policy making (as we will see later) within both the State and National context. It is thus imperative to see how the custodians of law have interpreted sensitive issues with regard to forest, which often has a far-reaching impact on local communities especially those that are dependent on forests resources. .

The analysis of the cases both in the High Courts and Supreme Court clearly shows that the focus of the issues have shifted from timber use in the colonial era to a more holistic conservation approach in the present. Whether the decisions of the courts would help community in managing its resources is the focus of the present inquiry. But before assessing the implications let us examine the kind of cases and trends that have emerged on the forest issues in the Northeastern States of India.

¹ T.N. Godavarman V. Union of India W. P. (C) 202 of 1995

Definition of Forest

The Supreme Court's orders have once again raised a fundamental concern of forestry legislations with regard to definition of the term 'forest'. As is well known that a universal definition of the same was missing in any of the Central or State legislations² the Apex Court has provided with a definition of the same in the ongoing *Godavarman case*³. Although it would be judicially incorrect to say that it is the first time that a Supreme Court has attempted to define forest it would definitely be proper to state that it is the first attempt of the Supreme Court to define forest in such a comprehensive manner. Here it must be added that it is not the objective of the paper to get into the merit of this definition but the inescapability of it in any policy formulation, which is the focus.

Earlier, under different legislation, 'forest' was either classified into different categories or defined as per vegetative specifications,⁴ but a universal definition of the term 'forest' was not in place. In the context of the Northeastern region, it was for the first time that the Apex Court in the ongoing *T.N. Godavarman* case gave a definition of forests, which was applicable to the entire country. While making a distinction between forests and forest lands, the Apex Court assigned dictionary meaning to the term 'forests.' "The word 'forest' must be understood according to its dictionary meaning. This description covers all statutorily recognised forests, whether designated as reserved, protected or otherwise for the purpose of Section 2(i) of the Forest Conservation Act." This definition broadened the ambit of the term "forests". The term 'forest land', occurring in Section 2, would not only include 'forest' as understood in the dictionary sense, but also as any area recorded as forest in the Government record irrespective of ownership."

The Court defined the ambit of forestlands and said that it not only includes the natural forests but also the area, which is to be developed as forests, i.e. plantation forests.⁵ This was the first time when the Apex Court defined forest irrespective of geographical location and positioning and interpreted statutory definition to the word forest. In the wake of this definition the Assam State Government for the first time defined forest under the Assam (Control of Felling and removal of trees from non-forest lands) Rules, 2002⁶. Forests under these rules include all the legal categories of forests; i.e. reserved forests, protected forests, and those that are recorded as forests in government records and continuous patch of 10 ha or more having not less 200 naturally grown

² Except in a District Council Legislation of Meghalaya namely the United Khasi and Jaintia Hills Autonomous District Act, 1958.

³ Order dated 12-12-1996 *T.N. Godavarman V. Union of India* W. P. (C) 202 of 1995

⁴ See Section 2 (f) of United Khasi Jaintia Hills Autonomous District (Management and Control of Forest) Act 1958

⁵ Order dated 12-12-1996 *T.N. Godavarman V. Union of India* W. P. (C) 202 of 1995

⁶ Formulated under The Assam Forest Regulation 1891

trees per hectare⁷. Thus it includes legal, administrative categories of forests as well as natural forests. What is crucial here is that the term forest, which has been so comprehensively defined, fails to address community forests or community managed forests. What it does definitely is to bring any forest, statutory or otherwise within the purview of the Forest Conservation Act and hence the role of the Central Government is strengthened. In my opinion, this fails to address any community managed forests which have also showed some exemplary forest management techniques based on traditions and customary law. The reasons for this omission could be manifold. One major reason is that any attempts to manage forests by communities were never addressed in this case, especially by the state where the Supreme Court could have taken a broader and a more holistic approach to the definition of forest. This brings out a fundamental lapse in the nature of arguments in the court of law on such sensitive matters. In this way they often fail to consider the comprehensive picture on how forests affect community and how communities impact forests.

Forest Produce

Forest produce is one of the most significant source of conflict in courts especially because of its utility and economic returns, which has a direct bearing on the livelihood of communities, and various other stakeholders. Statutory definition of forest produce can be broadly divided into, produces which are essentially found in the forest and those, which are found in or brought from the forest. This broad classification is common to most of the forest legislations within the region. The Guwahati High Court has shown inconsistent trends in interpreting the scope of the word ‘forest produce’ as defined under different legislations and regulations.

A classic example of such a trend in interpreting the word forest produce can be seen in the way the Guwahati High Court has dealt with ‘veneer’ being a forest or not on different occasions within a short span of five years. Earlier the High Court did not consider veneer to be forest produce on the pretext that logs from the forest are brought to the factory and special devices are used for manufacturing of veneer⁸. Five years later the same High Court held that “the entire process of manufacturing goes to show that veneer retains all the qualities of timber both physical as well as chemical even as mechanical process is required for making veneer. The argument that since veneer is a finished product and is the outcome of the manufacturing process, the same cannot be termed as forest produce cannot be countenanced. Mere putting in the mechanical process to make veneer for manufacturing the plywood, the logs does not cease its basic character of timber”⁹. This reversal of decision is jarring in jurisprudence and hopefully the Apex Court

⁷ Sec 2 (b) The Assam (Control of Felling and removal of tress from non-forest lands) Rules, 2002

⁸ Tumda Saw and Veneer Mills V. State of Assam AIR 1997 Guahati 41

⁹ State of Assam Versus Tumda Saw and Veneer Mills AIR 2002 Guahati 97

would settle the position in law. The Guwahati High Court in a number of other cases has conclusively determined whether a particular article is forest produce or not. (See Box 1)

Box 1: Articles Held to be Forest Produce or Not

- Bamboo fit for Umbrella Sticks to be a forest produce [AIR 1963 Tripura 14 (V 50 C2)]
- Bamboo mat is not a forest produce [(1996) 10 SCC 397];
- Rubber sheets are forest produce [AIR 1994 SC 2218]
- Sand is a forest produce (AIR 1970 Assam & Nagaland 32)
- Stone is not a forest produce [AIR 1971 SC 694, AIR 1971 Gau 51, AIR 1982 Gau 88]
- Veneer is not a forest produce (AIR 1997 Gau 41)
- Earth, being a minor mineral is forest produce, if collected from the forest. [2003 (2) GLT 446]
- Beti and Chati to be forest produce. [2003 (3) GLT 368]

The Apex Court in the on-going Godavarman case held bamboo to be a Non Timber Forest Produce (NTFP) as bamboo belongs to family of grass. This had a mixed reaction and impact all over the country and especially in the North Eastern States, as bamboo is one of major forest produces, which caters to the livelihood of large number of people in and around the forest area. Here again, definitional unclarity and fluctuating positions of court on basic definitions of terms such as forests produce, has large implications on communities and their orientation towards forestry management. The Courts need to be more sensitive while they are defining such resources on which millions of livelihoods depend. Any fluctuating position would surely act to the already existing disincentives for community to participate in forestry management.

A similar concern arises in the case of transit as well as trade of forests produce which has been described below. Any restriction which unintentionally encompasses communities who not necessarily trade for profit but use timber or forests produce for a bonafide needs and sustainable livelihood opportunity, get affected if the decisions and orders of the court does not taken into account such pragmatic issues of the field. Here again, the role of the state representations by the Counsels are important. These pragmatic issues and concerns need to be brought along with conservation needs so that the court can take a balanced view and not be guided by only one view.

Forest Produce Transit

Most of the issues on the transit of forest produce which were brought before the Guwahati High Court revolved primarily around whether or not a particular article could be termed as forest produce and, thus, whether it could be transported or not. Thus, its transit hinged on whether it qualifies to be forest produce or not. This section should be read in conjunction with the above section on the definition of forest produce. The other important aspect relating to transit of forest produce is when there is transfer of ownership of forest produce. The High Court in a significant

case,¹⁰ while dealing with the issue of transfer of transit passes to the transferee, held that “a person having sold his forest produce to another could not transfer the transit pass for the same to the purchaser” and, hence, the purchaser will have to apply for fresh passes.” This simply means that when there is transfer of ownership due to a sale, such a sale does not automatically transfer the rights under the transit pass to the buyer. Further, it was held that “the permits are issued not only on the ground that the person owns the timber/log.”¹¹ The authority issuing the transit pass is required to see whether “the person to whom the passes are issued are genuine persons and they are not likely to do mischief regarding the forest produce.”¹²

On the issue of the need for transit passes in the case of movement of timber and other forest produce cut or brought from private land, the Guawahati High Court was of the view that the forest department does have the statutory authority to regulate transit of timber or other forest produce irrespective of their being found in reserved forest or brought from any private land.¹³ The question of origin becomes irrelevant when it comes to transit of forest produce. In fact, the Apex Court has dealt with the issue relating to transit of forest produce at length in the ongoing *Godavarman case*. Right from the very beginning, the Apex Court gave specific directions with regard to transit of timber from Northeastern States to the rest of India. Initially, the Court allowed transit of certified timber for government use only. This was to be done after proper inventorisation of the timber under the supervision of a High Powered Committee (HPC) constituted by the Supreme Court.¹⁴ Subsequently, when a railway wagon containing 200 logs of illegal timber coming from Tinsukhia (Assam) was seized in Delhi, the Apex Court took a stringent view on the incident. A Special Investigation Team (SIT) was constituted to investigate the matter and HPC was directed to monitor this investigation.

In the wake of this seizure, the Court ordered a blanket ban on movement of timber from the North Eastern States to rest of India.¹⁵ In the year 2001, the Apex court gave detailed directions for transit of timber.¹⁶ HPC and the Special Investigation Team were directed to come up with detailed guidelines for transportation of timber. All the concerned State Governments, the Union Government and its concerned departments like the Railways, were directed to strictly follow these guidelines. These guidelines included determining the number of wagons to be transported at a time, issuance of transit passes only on watermark paper, periodic reconciliation of records

¹⁰ Mohd. Jinnat Goni V. Chief Conservator of Forest AIR 1995 Gua 111

¹¹ *ibid* pg 112 para 6

¹² *ibid*.

¹³ Nripendra Chandra Dutta Mazumdar V. Administration of Tripura AIR 1969 Tripura 62 (V 56 C 13)

¹⁴ Order dated 04-03-1997 in CWP No. 202 of 1995

¹⁵ See 2000 (1) SCALE 422 and 2001 (3) SCALE 187

¹⁶ See 2001 (4) SCALE 228

regarding use and transportation of timber by various wood based units or industries, etc. The apex court in the same case also issued some other state specific directions.

Box 2: Direction Issued by the Apex Court in Godavarman Case For the Transportation of Timber

- State to formulate Guidelines for transportation of timber.
- These guidelines to be approved by the Ministry of Environment and Forests
- Movement permitted on the indent of DFO. Movement of timber and timber only if sourced from HPC cleared wood based unit located inside approved industrial estates (except for Mizoram)
- Movement of timber and timber products for Mizoram regulated as per the guidelines of SIT
- All concerned State Government and Ministries of the Union Government like Railways strictly to abide by these guidelines.
- HPC and SIT conferred with the power of confiscation of vehicles transporting illegal timber
- Format and time period of the transit passed fixed by the Court

Forest Produce Trade

Forests and wood based industries are major sources of livelihood all over Northeastern India. The Apex Court in the ongoing Godavarman case passed several orders relating to trade in forest produce, which had vast implications on the livelihood of the people of North Eastern States. The Court in its very first order¹⁷ while directing the implementation of section 2 of the FCA banned all non-forest activity in any forest area without the prior approval of the Central Government. In the very same order Court also imposed an interim ban on all such timber felling which was not being carried in accordance with the working plan¹⁸. In a subsequent order Court dealt with implementation of its earlier order in great detail¹⁹. In this order Court suspended all earlier license given to the sawmills and plywood industries. Wood based industries were required to get clearances from the HPC (High Powered Committee), constituted to oversee the implementation of the Courts order in North Eastern India, without any penalty and shall have the option to shift to Industrial Estates to be identified by the State Governments. Court further directed to review the prices of timber and other wood products. Licenses of these industries were to be renewed on yearly basis. This renewal was to be done only after assuring that the industry is not involved in any kind of irregularities. Government was restrained from issuing fresh licenses to any wood based industry or to come up with any wood based industries of its own. Subsequently in the year 2001 Court directed the Union Ministry of Environment and Forest to come up with proper guidelines for sawmills and plywood/ veneer industries. Effect of this order was that working of

¹⁷ Order dated 12.12.1996 in Writ Petition No. 202 of 1995.

¹⁸ Working Plans are technical guiding documents for management of any forest in a forest division. This has also been confirmed by the SC in the order dated 12-12-1996 in the ongoing Godavarman case

¹⁹ Order dated 15.01.1998 in Writ Petition No. 202 of 1995

all these industries was banned. This had a great impact on the employment of the region, as these industries are a major source of livelihood in the region.

Use of Forest Land

The use of forestland especially by communities as well as for commercial or other wise non forest purposes have been another major source of contention before the courts. Generally such issues, which have come before the High Court, include regulation of grazing, eviction of people from forestland and allotment of reserve forest for non-forest purposes. In a case where the dispute was regarding the change of site of '*khutis*'²⁰ by the deputy commissioner, the High Court held that “ the deputy commissioner or the sub-divisional officer when exercising his power of fixing or refixing the sites is not bound by any objective standards. He is not bound to give any reasons and there is no provision of appeal against these orders. Fixing of sites or their alteration is left to his discretion²¹.” Even the Apex Court in another case²² has held that if the State Government follows the due process then alteration of the boundaries of national parks and sanctuaries is not illegal and procedural flaws can be overlooked. Here the of the appellants had challenged a notification for alteration of boundaries of national park and a wild life sanctuaries on the ground that name of some of the villages have been missed out in the notification.

There was an additional demand of alternate pasture ground for grazing their cattle. However it must be noted that the present position of alteration of national parks and boundaries especially in the light of the ongoing case of Centre for Environmental Law –WWF-India versus Union of India²³ any alteration of boundary would require a mandatory approval from the recently constituted National Board of Wildlife. In another case²⁴ issue of allotment of land for forest village was brought before the Apex Court. Here the allotments of forest land for forest village was cancelled. The appellants approached the apex court on the contention that this was breach of the principle of promissory estoppel²⁵ and was against the principles of natural justice. The Apex Court held that as far as the principle of promissory estoppel is concerned, it had no application since no clear and unequivocal promise was given to the petitioners that the land would not be resumed. Further, the Apex Court expressed the view that the power of the forest department for resuming occupation of land allotted to a forest villager on the grounds and according to the

²⁰ *Khuti* means land allotted for grazing purposes in unclassified state forests by the Deputy Commissioner or SDO.

²¹ Sandhiram Mahajan V. Deputy Commissioner, Kamrup AIR 1953 Assam 168

²² M/s Chandramari Tea Company V. State of Assam AIR 2000 Gua 13

²³ C.W.P. No. 337 of 1995

²⁴ Anchar Ali V State of Assam AIR 1989 Gua 12

²⁵ Promissory Estoppel is technically defined as “a promise, which promisor should reasonably expect to induce action or forbearance of a definite and substantial character on part of the

procedure laid down in the rules is a statutory power provided under Rule 14 of the Assam Forest Regulation of 1891 (AFR) and hence question of natural justice would not arise. This view of the Supreme Court was further confirmed in the ongoing *Godavarman Case*.²⁶

The Apex Court while directing for adherence of section 2 of the FCA held that no non-forest activity should be carried out in any forest area without prior approval of the Central Government. Subsequently a spate of orders followed and specific directions were given for the northeastern region. Some of the relevant directions such as time bound removal of encroachment from forestland and a conditional ban on felling of timber had vast implications on the land usage in the forest areas. The Apex Court in the Godavarman case also discussed the procedure for applying to the central government for the grant of permission for the use of forest for non-forest activities or dereservation of reserved forests. As per Rule -4, which prescribes as to what an application should contain, details of the compensatory afforestation scheme should also be given (Cl-4) the Court placed great emphasis on this aspect and it observed that primary responsibility of afforestation is on the party, which is going to use the reserved forests. The Court also suggested certain guiding principles for the grant of such permission, which reflect Court's concern for ever-increasing degradation of forests (see Box 3).

Box 3: Factors to be Considered while Granting of Permission for De-reservation of Forests or use of Forests for Non-forest Purposes*

- Provisions in FCA and FC Rules;
- Central Govt to specify the time limit within which afforestation is to be commenced and completed;
- Requirement of Environmental Audit;
- Applicant's ability to carry-out afforestation tasks;
- Responsibility of carrying afforestation on person using the land
- Government to monitor the process of afforestation
- Permission directly related to afforestation: if afforestation not being carried properly then it can be cancelled
- Identification of industrial estates for wood based industrial units and shifting of old units to new estates.

*As suggested by the Supreme Court of India

Even the Guwahati High Court in another case cancelled allotment of land for 25 families in a reserve forest on the ground that the allotment was for non-forest purpose and prior approval of the Central government was not obtained.²⁷ Here again, due importance was given to procedural propriety.

promisee, and which does induce action or forbearance, and such promise is binding if injustice can be avoided only by enforcement of promise”.

²⁶ Order dated 12-12-1996 in T.N. Godavarman V Union of India W. P. (C) 202 of 1995

²⁷ Shri Lakshmi Chauhan V State of Assam AIR 1996 Guahati 35

Powers of Autonomous District Councils

The unique status that most of the Northeastern States enjoy under the Constitution of India has also led to some conflicts in courts. A number of areas have been declared as autonomous districts within the state structure, which broadly can be construed as areas of special administration under the aegis of the District Council. A preference of District Councils over State Administration has been recognized under the Constitution of India which govern the administration of these regions. It is believed that such areas are best left in the hands of the local councils who best know their area and thus should manage their resources in accordance with their traditions and customs rather than by a formal state machinery.

However, major issues relating to autonomous districts councils have come up before Courts. These include *inter alia* powers of the council in terms of levying of royalty on forest produce and management of reserve forest. The Apex Court while deciding the issue of levying of royalty by the District Council on forest produce of private forests held that there is no specific reference to the power to levy any royalty in respect of any matter mentioned in Para 3 in the Sixth Schedule to the Constitution.²⁸ similar to the corresponding provisions in the penultimate entry in List I and the last entry in the other two lists in the Seventh Schedule. The Supreme Court also rejected the

²⁸ Para 3- Powers of the District Councils and Regional Councils to make laws:

- (1) The Regional Council for an autonomous region in respect of all areas within such region and the District Council for an autonomous district in respect of all areas within the District except those which are under the authority of Regional Councils, if any, within the district, shall have the power to make laws with respect to—

- a) The allotment, occupation or use, or the setting apart of land, other than any land which is a reserved forest for the purpose of agriculture or grazing or for residential or other non-agricultural purposes or for any other purpose likely to promote the interests of the inhabitants of any village or town:

Provided that nothing in that law shall prevent the compulsory acquisition of any land whether occupied or unoccupied, for public purposes by the Government of the State concerned in accordance with the law for the time being in force authorizing such acquisition.

- b) The management of any forest not being a reserved forest;
- c) The use of any canal or watercourse for the purpose of agriculture;
- d) The regulation of the practice of *jhum* or other practices of shifting agriculture;
- e) The establishment of village or town committees or councils and their powers;
- f) Any other matter relating to village or town administration, including village or town police and public health and sanitation;
- g) The appointment or succession of chiefs or headmen;
- h) The inheritance of property;
- i) Marriage and Divorce;
- j) Social Customs.

- (2) In this paragraph, a “reserved forest” means any area, which is a reserved forest under the Assam Forest Regulation, 1891, or under any law for the time being in force in the area in question.

- (3) All laws made under this paragraph shall be submitted forthwith to the Governor and until assented to by him, shall have no effect.

contention the levy came within para 8 sub – para (1) and (2) of the sixth schedule of the Constitution.²⁹ The Apex Court was of the view that since the Council had levied royalty vide a notification and a royalty can only be issued in lieu of a service hence this royalty was not maintainable in the eyes of law³⁰. On the other issue of management of reserve forest by the district council the Guwahati High Court held that executive powers of the district council in respect of management of reserve forest is subject to the provisions of the Constitution of India, law made by the parliament including FCA, law made by the state legislature and the AFR 1891. But the Court was of the view that function for management of reserve forest can be entrusted to the Council by the Governor of the State under paragraph six (2) of the sixth schedule and the source of the executive power of the Governor in relation to forest is article 162 of the Constitution of India³¹ and not any law made any parliament or any state legislature³². In light of the above cases it can be thus said that although the constitution of District Council was intended to govern local areas in accordance with their customs and practices their own authority and scope of power has been subject to judicial scrutiny.

As far as community forestry is concerned, the authority or district council, which has been subjected to judicial scrutiny as shown above clearly has wide implications on community forestry management. The courts need to make it clear that the district councils, if they are representative of the community, has the authority to manage the forest in a participatory manner. It is not our case here to suggest that a management strategy, which is bad in law needs to be encouraged. But the courts must take into account the uniqueness of the authority and autonomous districts in the

²⁹ Para 8 Powers to assess & collect land revenue and impose taxes:

- (1) The Regional Council for an autonomous region in respect of all lands within such region and the District Council for an autonomous district in respect of all lands within the district except those which are in the areas under the authority of Regional Councils, if any, within the district, shall have the power to assess and collect revenue in respect of such lands in accordance with the principles for the time being in followed by the Governmnet of the State in assessing lands for the purpose of land revenue in the State generally.
- (2) The Regional Council for an autonomous region in respect of areas within such region and the District Council for an autonomous district in respect of all areas in the district except those which are under the authority of Regional Councils, if any, within the District, shall have power to levy and collect taxes on lands and buildings, and tolls on persons resident within the areas.

³⁰ The District Council of The Jowai Autonomous District V. Dwet Singh Rymbai 1986 AIR SC 1930

³¹ Para 6- Power of the District Council to establish Primary School etc: Sub para 2 reads as under: (2) The Governor, may with the consent of any District Council, entrust either conditionally or unconditionally to that Council or to its Officers functions in relation to agriculture, animal husbandry, community projects, cooperative societies, social welfare, village planning or any other matter to which the executive power of the State extends.

North-East and the decisions should reflect this unique position to facilitate any form of participatory forestry management where the community benefits at large and at the same time the forests are managed on a sustained basis.

Working Plans

The Working Plans, hitherto a planning and working document, was never considered to be a legally enforceable document. However with the intervention of the Supreme Court for the first time in the Godavarman case it has now been recognized that working plans are guiding legal documents for management of any forest. The Court has specifically directed that no felling of timber shall be carried on except for as provided in the working plan of that forest area where felling is to be done. This significant Order thus for the first time gave a legal hue to an otherwise technical document such as the working plan. In the same order the Court directed that where there are no working plans all felling would be suspended till the time the States do not come up with new working plans. In the same row Court also directed the states to come up with working plans and to get these working plans approved by the Ministry of Environment and Forest.

But as per the data of the Regional office of the MoEF in the North Eastern States of India, quoted in a report, in a span of five years only 14% of working plans were completed despite courts order³². The State governments have been blaming the managers of the community owned forest for their non-cooperative attitude. Whereas the states' track record of managing its own forest, which constitutes 3% of the total forest in the area is very critical³⁴. In the year 2001 the Apex Court while clarifying its earlier order said that this conditional ban is not only on felling of trees from any government area but also from any non-government area which is required to be treated as 'forest' as per the Courts earlier order.³⁵

Here again while prima facie the courts order seems to be totally in conformity with the requirements of the Forest Conservation Act however, it falls short of addressing the precise reasons for which such working plan documents were not made. Issues of infrastructure, competence, skill, staff, etc. were never addressed during either the arguments or the submissions before the court, before such order. It is apparent that by mere court order, forcing an authority to do something which they have not done, without addressing the causes of its capacity to deliver may not be the most appropriate strategy for effective forest management.

³² M/s. Hills Syndicate V. North Cachar Hills Autonomous Council AIR 2001 Gau 83

³³ Chawi Lian: 2002: Logjam: The Accused: Down To Earth March 15, 2002: Ceneter for Science and Environment.

³⁴ Chawi Lian: 2002: Logjam: The Accused: Down To Earth March 15, 2002: Center for Science and Environment.

³⁵ Order dated May 12, 2001 in Writ Petition No. 202 of 1995.

Court Appointed Committees

The Courts have been devising several strategies in resolving conflicts that come before them. The formation of numerous Committees ranging from Inquisitionary, to advisory to quasi-judicial have all been used in assisting the Courts to come to fair decisions. In this order the Godavarman Case, perhaps one of the biggest ever forest case in the history of Public Interest Litigation have also witnessed the Formation of several committees constituted specifically for the North Eastern region as well as at national level to assist the Court on forestry related issues. These Committees are briefly discussed hereunder.

*a) High Powered Committee*³⁶

Initially the HPC was constituted by the Court to oversee the implementation of the Courts order³⁷ in the northeastern region of India and for certain ancillary purposes. Subsequently the powers of HPC were expanded. Almost all the aspects of transit and trade relating to timber were brought under direct supervision of the HPC. HPC undertook inventorisation of timber, which was in the stock of various wood based industries to legitimize the stock. It was only after the inventorisation that these units were allowed to utilise their legitimate stock. Disposal of the finished products of such units and issuance and disposal of passes for movement of rounded timber within and outside the northeastern region were also to be supervised by the HPC. The apex Court suspended all the licenses given to wood based industries and only those units, which were cleared by the HPC and were ready to shift to the new industrial estates, identified by the state Government, were issued fresh licenses.³⁸

Subsequently, the Committee was assigned the task of supervising the investigation in the Tinsukhia timber seizure incident. The Committee was even conferred powers to adjudicate matters relating to cancellation and issuance of licenses of wood based industries. Thus we see that the Apex Court has been devising strategies to over see and control a number of administrative functions through such Court appointed Committees. Whether such a trend is welcome or not is a serious point to be debated especially in a democratic set up where all arms are supposed to compliment each other and not overlap or conflict with each other. The usurpation of one arm by another on grounds of inefficiency, ineffectiveness defeats the very purpose for which such arms were created. There is a need to reassess this trend and as first step generate a national level debate to discuss the positives as well the negatives of such trends.

³⁶ Constituted under Order dated May 04, 1997 in Writ Petition No. 202 of 1995.

³⁷ Order dated Dec 12, 1996 in Writ Petition No. 202 of 1995.

³⁸ Order dated Jan 15, 1998 in Writ Petition No. 202 of 1995.

*b) Arunachal Pradesh Forest Protection Authority*³⁹

In another instance in the same Godavarman case the Court being overloaded with the Intervention Applications by the State and various private parties thought it to be feasible to constitute a separate forest protection authority for the State of Arunachal Pradesh. The Court directed transfer of all pending applications before the authority for disposal in accordance with its earlier orders. All new intervention applications from the State of Arunachal Pradesh were to be filed before this committee. Apart from disposal of these applications the court directed the authority to supervise and inform the Court about the implementation of its various directions and orders passed from time to time in this ongoing case.

*c) Central Empowered Committee*⁴⁰

The Apex Court felt necessary to constitute a national level authority called as central empowered committee till the time the National Government does not coming up with a statutory agency as contemplated by Section 3 of the Environment Protection Act 1986. The task assigned to this Committee was to monitor the implementation of the court's order and to place the cases of non-compliance before the Court. Some specific issues, which were mentioned by the Court in its order, were issues of encroachment of forestland, implementation of working plans, compensatory afforestation and other conservation issues. This committee constituted of nominees from the Union Ministry, NGO's and a representative of the Amicus Curiae⁴¹. The Court even made it clear to those individuals who were aggrieved by any implementation and non-implementation of the court's order that they could also approach this committee. Any application, which cannot be appropriately disposed off by the committee, may be referred by it to the court. The committee was given powers to decide and formulate its own procedures for dealing with the application filed or brought before it. The Committee has been since notified under the Environment Protection Act vide notification dated 03-06-2002

The courts strategy of appointing committees which are supposedly expert bodies some times results in leading to a different set of unforeseen problems while solving disputes. The Centrally Empowered Committee, for e.g., which was constituted vide a court's order is perhaps emerging as the most glaring example. Almost an equal number of cases or more as compared to the Supreme Court, which are undecided, lie pending in the Centrally Empowered Committee today. Numerous applications and lack of teeth of the Committee has made such Committee only partially affective. The procedural requirements mandate that the Centrally Empowered Committee can recommend certain things to the Supreme Court in light of facts presented before

³⁹ Order dated Sept 17, 1998 in Writ Petition No. 202 of 1995.

⁴⁰ Constituted vide Order dated Jan 15, 1998 in Writ Petition No. 202 of 1995.

them. Again, it is only when the Supreme Court endorses such recommendations that the order would be more effective.

There have been serious concerns over the functioning, composition of such court appointed committees. It is also being strongly felt that this statutory obligations of the Executive is being diluted by creation of such committees, which now have assumed a status of permanent statutory bodies as such committees are now being created under the Environment Protection Act as Special Environment Protection Authorities and their terms depends on the Central Government's will. In other words, court initiated committees or commissions are being converted into statutory authorities and thus creating a parallel power structure within the governance frame.

How much of such centralisation of power is really beneficial to communities or people who are affected by forestry activities is a serious question to ponder. Preliminary experience shows that centralised committees with very little knowledge of the field where such communities operates often lack the understanding or the vision to solve disputes which have not been able to resolved by the court itself. It would thus be appropriate to say that the court in its strategy for solving disputes and while constituting such committees should be extremely careful in how such committees are constituted, how they operate and what are the constitution and credentials of the members and last but not the least whether they are representative of the various facets of the society affected by such issues or not.

Influence of Executive Action on the Judiciary

A close look on executive actions of both the Union and the State Government, in respect of the North Eastern States in the recent past, shows that the orders of the Apex Court in the Godavarman Case have influenced the policy making and working of the Executive of the States. Some of the policy actions of the State and the Union Government in respect of the State of Assam substantiate the above position. Executive actions as well as legislative actions by state Government are discussed here to emphasize the influence of Court Action. In this regard some of the important decisions made by the state and Union executive pertaining to the state of Assam are discussed here.

In an order⁴², the Court asked all the northeastern States to ensure that the timber and forest produce is supplied to industries including government undertakings at full market rates. The existing rates of the royalty were also ordered to be revised upwardly. For this purpose a committee chaired by the PCCF was to be constituted. Accordingly the Forest Department of

⁴¹ Amicus Curiae as defined in the Blacks Law Dictionary is friend of a court appointed by the Court to assist the court in a case

⁴² Order dated 15.1.98

Assam issued a notification⁴³ revising the rates of the royalty on timber, superseding the notification, which had been passed recently.⁴⁴

As per the directions of the Apex Court⁴⁵ a revolving fund was created consisting of the amount realized out of the penalties levied on the wood based industries and the proceeds from the sale of seized timber as well as timber products. The administration of the fund was entrusted to the Committee constituted for this purpose.⁴⁶ Following the Supreme Court's directions it was envisaged that half of the amount would be utilized for raising forest plantations by tribals and as assistance to tribals and the other half would go towards meeting the expenses involved in collection, transportation of the seized timber. After meeting the expenses if any amount remains it would be deposited to the State coffers for other developmental activities.

Under the authority vested with the Ministry of Environment and Forests vide a Supreme Court's order⁴⁷, the MOEF issued comprehensive guidelines for regulating movement of timber through railways from NE States.⁴⁸ Following this, the Ministry of Railways issued similar guidelines,⁴⁹ Following another order of the Court the State of Assam notified the industrial estates where the wood based industries⁵⁰ of the State could be shifted. It was mandated by the Court that the industries⁵¹ have to shift to the designated industrial estates, or face closure.⁵²

It would also be pertinent to consider the Assam (Control of Felling and removal of tress from non-forest lands) Rules, 2002, which were framed in pursuance of the Apex Court's order,⁵³ The court had asked the State governments of all northeastern states to frame rules with respect to felling of tress from non-forest lands, with the concurrence of the MOEF. It is important to see how the State has implemented this order. The said rules were framed under section 40& 72 (c) of the Assam Forest Regulation. This should read as Section 72 (e) and not (c)⁵⁴ Similarly section 40 provides for the transit of forest produce, while the rules regarding transit of felled trees from non-

⁴³ No. FRM 4/98/58, dated: 17 Aug 1998.

⁴⁴ No. FRM 4/98/38 dated 24.4.98.

⁴⁵ Order dated 15.1.98 para 29-32

⁴⁶ FRM 150/96/Vol.I/pt. VIII/132, dated 15 Feb 2000

⁴⁷ Dated 13.01.2000

⁴⁸ No. 8-15, NEC/2000, dated 22.05.2000

⁴⁹ No. 97/ICI/224/I dated 31.05. 2000

⁵⁰ No. FRM 150/96/Vol.I/Pt. V/450 dated 4th May, 1999

⁵¹ Only those which have been cleared by the High Powered Committee, constituted by the court.

⁵² Court's order dated 15.1.98

⁵³ Dated 12.05.2001

⁵⁴ Section 72 (c) empowers the State to formulate rules providing for the ejection of unauthorized occupants from the forest reserves, or disposal of crops, building or any construction activity from the forest reserves. On the other hand the rules center around felling of trees from

forest lands do fall under the ambit of this section, other aspects with which the rules deal like, registration of tree plantations in non-forest lands, requisition of permission for felling of such trees etc. do not find any basis either in section 72 (c) or 40. Thus the State needs to clarify the exact provision under which the Rules have been framed.

It is further interesting to see the way forests⁵⁵ have been defined under the rules. The definition is much wider, being influenced by the definition accorded to forests by the Apex Court in one of the orders passed in Godavarman case.⁵⁶ Forests under these rules include all the legal categories of forests; reserved, protected; areas recorded as forests in government records and continuous patch of 10 ha or more having not less 200 naturally grown trees per hectare. Thus, it includes legal and administrative categories of forests as well as natural forests.

Conclusion

Strategies

In light of the above discussion it is evident that Courts are a major player in policy formulations. The courts, especially the Supreme Court of India, has transcended its role form being an Arbiter to a trigger for enforcement of laws; from a Monitoring Authority to a Conflict Resolution Body. It has acted as a Guiding Body on technical issues through Inquiry Committees as well as Advisory Body advising Governments through recommendations of Advisory bodies constituted by it. It has also attempted to facilitate local conflict resolutions by appointing Local Commissioners and Special Commissioners and numerous such methods and strategies influencing policy making in the Country. In fact on several occasions Court's Orders are being used in Executive Orders as a basis for new policy directions. This is evident on a number of occasions in forestry matters including and especially in the North East.

1) Commerce to Conservation

There has also been a shift of focus in dealing with forest issues by the Courts, from forest being a mere commercial resource to it being a natural resource worthy of being preserved and conserved. In recent years, the courts have dealt with a host of issues and have come up with innovative Orders and Judgments. From a definition of what can be forest to the complexity of forest produce- its own definition, trade and transit, a variety of uses of forest lands both for forestry and non forestry purposes and the conditions for the same, detailed guidelines of transportation of timber and other forest products are some of the issues that have emerged within the context of Northeastern states both in the Guwahati High Court and its benches and also in the Apex Court.

non-forest lands. Thus apparently the objective of the Rules does not correspond to that of the section under which the same have been framed.

⁵⁵ Sec 2 (b)

2) Polarisation of Conservation and livelihood concerns

The responses of the petitioners as well as the respondents have been a mixed one. The conservationist lobby termed the pro conservation moves of the Supreme Court as the best way to achieve forest protection and conservation. While the organisations working in the field of human rights and tribal welfare termed this approach of the Apex Court to be an activist's approach rather than a judicious one. Convenient interpretation of the Court's orders as per the convenience of the Government has also come across as a major stumbling block in the actual implementation of Court's order and in realising the ultimate result of it. This is quite evident in the case of working plans where managers of the community owned forest were used as an excuse by the State Government for non-implementation of Courts order in the ongoing Godavarman case.

3) Non Implementation of Court Orders

The non- implementation of Courts orders has been another issue, which has drawn great attention. The Apex Court after recording its distress on non-implementation of its orders by the State Government constituted several regional and national committees for implementation of its orders. However, even after formation of these committees the problems persist as it is now evident that the solution perhaps does not lie in formation of committees but more effort needs to be made on the Executive which is the actual implementing body. Unless full-fledged co-operation from it is sought, real and effective implementation of any Court Order is impossible.

4) Onus of petitioners

Another key issue that emerges is the fact that it is not important only to state the problem but there is an onus on petitioners and those who approach the Court that they should also spend considerable time in working out alternatives as the Courts neither have the time nor the expertise to get itself involved in evolving alternatives on its own.

5) Community forestry and Courts

But apart from the above especially in the context of community forestry management there are some larger concerns that have arisen due to an active Judiciary. Foremost concern is that Community participation per se has never attained Courts attention. There are numerous factor that may be attributed to this one sided approach that is prima facie evident in Court decisions.

⁵⁶ Dated 12.12.96

6) *Courts have sparingly used powers under Suo Motu*⁵⁷ *Action:*

Till date to the best of our knowledge the Supreme Court or the High Court of Guahati and its benches in the North Eastern States have not taken any *suo motu* cognizance of any case relating to community participation in forest management or community rights over natural resources. The reasons for this may be several but perhaps the most prominent one is the presence of a strong conservationist lobby on one hand and a relatively weak representation from community leadership or communities themselves. Media invariably finds conservation issues more newsworthy and may also be partly responsible for this skewed representation. The depletion of forests and adverse impact of community is often highlighted. It is seldom depicted as to how the community has managed forests and whether there is clear evidence that communities are primarily responsible for exploitation of the forest or is it due to excessive demand of natural resource in the development process, which is actually affecting the forests.

7) *States' Role sans Community before Courts*

The role of states have been very critical on issues relating to community participation in forest management both before the courts and while giving effect to policies relating to community based forest management. In most of the cases relating to forests, brought before the courts, State in its representation before the court, has either been silent on the issue of community participation or has presented a villainous picture of the community. This approach has been taken with a motive to enhance state control over the natural resources and to mitigate hindrance in exploitation of natural resource as per the states wish. On the other hand most of the policies propagating community participation lack any kind of proper legal backing that is either they are backed up with very weak laws or as in some cases they are totally policy backed. This gives the Court a convenient way out for overlooking the community issues related to forest.

8) *Inadequate and Unclear Representation before the Courts:*

It has been found most of the time especially in ongoing forest related cases that either the community has not at all been represented or has been very inadequately represented. Here the role of *Amicus Curiae* (friend of the court) becomes critical. It is through the *Amicus* that the interventions are routed and thus a lot depends on the bias of the *Amicus*. In the on going Godavarman case the *Amicus* as emerged as the most important Officer of the Court whom everyone has to rely on in approaching the highest court. There are mixed reactions to this strategy adopted by the court. While the intent is noble in assisting the court through able counsels, a case of this magnitude perhaps is beyond one *Amicus*. It is estimated that since 1995 when the case was initiated a couple of thousand Interlocutory Applications or Intervention Applications have been filed representing different Interest Groups from different States, different Sectors, Non

⁵⁷ When Court takes cognizance of the case all by itself then such an action is a suo motto action

Government Organizations, Industrial Sectors, Traders, Political interest, Social Activists, Environmentalists, forest dwellers, etc., the list is endless. These diverse stakeholders who approach the court have thus necessitated numerous approaches to solving the disputes. In our considered view the Amicus or his assistants may not always be adequately equipped to solve these various disputes, which represent varied interests. The Court needs to devise new methods in addressing such large concerns which involve not only millions of hectares of forests, but millions of people, too.

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