

AN UNRESOLVED LEGAL QUESTION ABOUT FOREST RIGHTS

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Ghatbarra village, located in Sarguja district of the central Indian state of Chhattisgarh is home to Gondtribals, recognized under the Schedule V of the Constitution of India. Their home lies in HasdeoArand forest area, considered to be one of the last remaining contiguous patches of forests outside the legally recognized Protected Area (PAs) in Central India. The Gram Sabha (village assembly) of Ghatbarra and nineteen other villages has communicated their position to constitutionally oppose coal mining in the area back in 2015. Today, with a Supreme Court matter dealing with the validity of the 'forest clearance' affecting the village and the High Court case on the cancellation of forest rights pending decision, Ghatbarra is set to become a case in point in the near future.

In January 2016, the district level authorities revoked the Community Forest Rights (CFR) granted to this village as per due process of law. The reason cited was that the exercise of these rights was coming in the way of coal mining operations in the area. Even as the final decision on a petition challenging this revocation is pending in the Bilaspur High Court, this paper seeks to examine two legal questions that arise out of the case. First, is the cancellation of conferred forest rights legally permissible as per the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA, 2006)? Second, can the use of forestland for mining be approved under the Forest Conservation Act (FCA), 1980, without recognizing or compensating for the pre-existing rights of the tribal communities living in and dependent on the forests?

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On 8th January 2016, the district level authorities revoked the Community Forest Rights (CFR)¹ of a tribal village in Sarguja district of the central Indian state of Chhatisgarh. The District Collector, Divisional Forest Officer (DFO) and district level representative of the Tribal Development Department, signed the order jointly. All these officials located in the headquarters at Ambikapur town would have also been members of a District Level Committee (DLC) that had recognized these rights in the first place. Ghatbarra had received its CFR titles in September 2013 (Das, 2016; Sethi, 2016). With the CFR in hand², the constitutionally protected Gond tribal residents of Ghatbarra village were entitled to use the forest for their livelihoods including for the collection and sale of non-timber forest produce (NTFP).³

The reason for cancellation cited in the order was that the villagers had caused disturbances to mining operations in the area. The move was further justified by stating that the titles for CFR were received only following the approval for forest diversion was given to the mine in 2012.

This decision brings to light two legal questions. First, was the cancellation of the title a legally permissible decision as per the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA, 2006)? Second, could the use of forest land for mining have been approved under the Forest Conservation Act (FCA), 1980, without recognizing or compensating for the pre-existing rights of the tribal communities living in and dependent on the forests?

The laws in question

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act was enacted in 2006 and is popularly known as the Forest Rights Act or the FRA. The law put in place a clear legal mechanism for recognition of rights both at an individual and community level. This is both for

¹ Order from District Collector Office: No/Forest Rights/A.V/No. 42/2015-16/10669 (*letter number translated from Hindi*)

² The Ghatbarra CFR recognized three specific rights for the villages: Section 3 (1) b) community rights such as nistar, by whatever name called, including those used in erstwhile Princely States, Zarnindari or such intermediary regimes; Section 3 (1) (c) right of ownership, access to collect, use, and dispose of minor forest produce which has been traditionally collected within or outside village boundaries; and rights to grazing (both settled or transhumant) as per Section 3 (1) (d) of the FRA, 2006.

³ According to Centre for International Forestry (CIFOR) “*Non-timber forest products (NTFPs) are any product or service other than timber that is produced in forests. They include fruits and nuts, vegetables, fish and game, medicinal plants, resins, essences and a range of barks and fibres such as bamboo, rattans, and a host of other palms and grasses.*” Accessed from <http://www.cifor.org/publications/corporate/factSheet/NTFP.htm> on 31.7.2017

tribal other other traditional forest dwelling communities, including forest workers who have been living a designated forest area for seventy five years or three generations. The FRA and its Rules (2008 and 2012) elaborate the manner in which the process of recognition of rights needs to be carried out.

In particular sub section 3 or Section 12 B (in the 2012 Rules) related to the Process of Recognition of Community Rights is of particular significance. It states that the District Level Committee⁴ *"shall ensure that the forest rights...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 Ministry of Tribal Affairs (MoTA) has issued a series of guidelines and clarifications to address the ambiguities and multiple interpretations that have emerged during and as a result of the implementation of the FRA (Kohli, 2016).

The law also has special provisions for Particularly Vulnerable Tribal Communities (PVTGs)⁵ who have been categorized such by the Ministry of Home Affairs. These include seventy-five such tribal groups residing in eighteen States and Andaman & Nicobar Islands.⁶

The Forest Conservation Act was enacted in 1980, with the stated objective of conservation of forests. Since then, non-forest use or purpose of forest area requires any potential user agency to seek prior approval from central government, i.e. the Ministry of Environment, Forests and Climate Change (MoEFCC). There is a detailed procedure prescribed under Section 2⁷ of the Act. The law also clarifies what is 'non-forest purpose' and includes industrial activities, infrastructure expansion or de-reservation of the land to another administrative category. In order to use forests for an explicit non-forest purpose

⁴ Section 6 (5) of the FRA states that "State Government shall constitute a District Level Committee to consider and finally approve the record of forest rights prepared by the Sub-Divisional Level Committee."

⁵ Section 12 B of the FRA Rules (as amended in 2012) states: "The District Level Committee shall, in view of the differential vulnerability of Particularly Vulnerable Tribal Groups as described in clause (e) of sub-section (i) of section 3 amongst the forest dwellers, ensure that all 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, wherever necessary by recognizing floating nature of their Gram Sabhas."

⁶ Important information and instructions relating to PVTGs in A&N Islands and Statewise list of PVTGs is available at <http://www.tribal.nic.in/pvtg.aspx>

⁷ Section 2 of the FCA relates to the restriction on the dereservation of forests or use of forest land for non-forest purpose.

or dereserve it (from its Reserved Forest status), an approval needs to be sought from the environment ministry (Kohli et al, 2011).

With the enactment of the FRA, both these laws weremade applicable on the same forest area. The question of how would the non-forest use like mining of a forest be determined if people had rights under FRA pending or granted, as in the case of Ghatbarra above.

To address this issue, an advisory was issued by the MoEFCC on 3.8.2009 and sent to all state governments [F. No. 11-9/1998-FC (pt)]. It referred to the FRA process as “Settlement of rights” and clarified that while seeking diversion of forest land for non-forest use, the state governments are to provide evidence of having initiated and completed the process under the FRA.

The evidence provided by the state government also needs to include consent from the Gram Sabhas⁸ or village assemblies that they are agreeable for forest diversion. In particular the advisory states, “*A letter from each of the concerned Gram Sabhas, indicating that formalities/processes under the FRA have been carried out and that they have given their consent to the proposed diversion and the compensatory and ameliorative measures if any, having understood the purposes and details of proposed diversion.*”

The Ministry of Tribal Affairs (MoTA) Guidelines on the implementation of FRA [No. 23011/32/2010-FRA [Vol.II (Pt.)] dated 12.7.2012, reiterates that the instructions under the 3.8.2009 circular should be followed.

In addition to the above laws, the Hasdeo Arand area also attracts the provisions of the Panchayat Extension to Scheduled Areas (PESA) Act, 1996. This law was enacted with the explicit purpose of extending provisions of 73rd constitutional amendment to Panchayati Raj Institutions (PRIs) in the Scheduled Areas as recognized in the 5th Schedule of the Constitution of India. This amendment had ushered in the era of devolution of powers to *Gram Panchayats (village councils)* so that they can exercise authority and function as institutions of self-government. It was a committee headed by Dileep Singh Bhuria that had suggested back in 1995 that the mandate of the 73rd Amendment be extended to Fifth Schedule Areas (GoI, 1995). Through this gram sabhas (village assemblies)⁹

⁸ Section 2 (g) of the FRA, 2006 states: “Gram Sabha” means a village assembly which shall consist of all adult members of a village and in case of States having no Panchayats, Padas, Tolas and other traditional village institutions and elected village committees, with full and unrestricted participation of women.

⁹ Section 4(c) of the PESA Act, 1996, provides that every village shall have a ‘Gram Sabha consisting of persons whose names are included in the electoral rolls for the Panchayat at the village level.

were be empowered to take decisions¹⁰ related to the day-to-day life of tribal communities (Rao, undated).

Hasdeo Arand: Forests and a Coalfield

Ghatbarra village with its 300 Gond families (Das, 2016) is located in the Hasdeo Arand forest area with a 90% tribal population (Hasdeo Arand Bachao Sangharsh Samiti, 2014). It is considered to be one of the last remaining contiguous patches of forests outside the legally recognized Protected Area (Pas) in Central India, in particular between Palamu Tiger Reserve in Jharkhand and Kanha in Chhattisgarh. Most villages in the Hasdeo area including Ghatbarra are dependent on agriculture cultivation and forest produce for their livelihoods. The forest also the watershed of the Hasdeo Bango reservoir on the Hasdeo river, which is a tributary of the Mahanadi River a lifeline of the adjoining states of Chhattisgarh and Odisha.

The Hasdeo region is considered to be the source of perennial water sources, rare flora and fauna, including elephants and leopards (Choudhury, 2015). According to a report by Greenpeace India (2012), *“around 450 sq. km., with no human habitations within, was approved by the MoEF as the Lemru Elephant Reserve in 2007, acting on a resolution passed by the Chhattisgarh State Assembly in 2005.”* The report also states that the inspection team for Lemru noted the area has *“dense cover, perennial water sources and moist riverine forest especially suitable for elephants.... There is an added advantage of having nearly 400-500 sq km free from human settlement.”* (ibid)

But in mining records, Hasdeo Arand is a coalfield of 1878 sq. km out of which 1502 sq. km is forest. It has 30 coal blocks with estimated reserves of 5.179 billion tones of which 1.369 billion tones have been proven till date (Hasdeo Arand Bachao Sangharsh Samiti, 2014). The coalfields are considered to be under the ‘ownership’ of the Coal India Limited (CIL), and select coal blocks are presently being auctioned out to potential bidders through the procedure laid out under the Coal Mines (Special Provisions) Act, 2015 (Ministry of Coal, 2014).

The legal tangles of the operational mines of Hasdeo

There are two operational mines in the Hasdeo region, and several others at different stages of approval (Ministry of Environment and Forests, 2011). First, the Chotia coal block which is on the fringe of this fragile forest area. The

¹⁰ Section 4 (e) (i) of the PESA Act says every Gram Sabha shall *“approve of the plans, programmes and projects for social and economic development before such plans, programmes and projects are taken up for implementation by the Panchayat at the village level”*

PEKB coal block and forest diversion has been granted in the favour of M/s Rajasthan Rajya Vidyut Utpadan Nigam Ltd (RRVUNL), a state government undertaking. In order to develop, excavate, transport and sell the coal from this mine, the RVUNL formed a JV company Parsa Kante Collieries Ltd. (PKCL) along with Adani Mining Ltd. This mine has a peak production capacity of 15 MTPA. At the time the approval was granted the Adani group had 74 percent equity in PKCL.

This coal block was also granted “forest clearance” under the Forest Conservation Act, 1980 on noting that it was on the “fringe” of the Hasdeo forests. The official letter was issued in favour of the diversion on 15th March 2012. Following which, the Government of Chhattisgarh operationalized this diversion of 1898.238 hectares through its order dated 28th March 2012.

The then Minister of Environment, Jairam Ramesh, had to make an exception for three coal blocks PEKB, Parsa East and Tara and granted approval that they are “*actually not in the biodiversity-rich Hasdeo-Arand forest region (a “no-go area”)*”, in order to grant approval for forest diversion. This is because; the entire Hasdeo Arand forest area in Sarguja, Surajpur and Korba districts of Chhatisgarh was recorded no-go¹¹ for coal mining by the same ministry (Ministry of Environment and Forests, 2011).

The decision to grant approval to PEKB was unsettled both in courts and questioned by the tribal communities residing in the area. Even before the final approval was granted, the *Gram Sabha* of Ghatbarra passed a resolution on 2.10.2011, protesting against the coal mining in their village area. The Village Forest Committee (VFC), Forest Rights Committee (FRC) and the Joint Forest Management (JFM) committee of Ghatbarra village also sent a letter to the state forest minister, divisional and range level forest officers. They indicated that their claims under the FRA were yet to be recognized, and that there was no question of the *Gram Sabha* having approved the mining operations.

They added that the *Gram Sabha* meeting claimed to be organized out to discuss this project was “fake”, and that it had nothing to do with the forest rights process as per the law.¹² The entire issue was reiterated by the villagers through another letter on 5th March 2012 prior to the diversion approval and yet again in November 2012, after the forest diversion was approved by the MoEFCC.

¹¹ The Hasdeo-Arand forests had been declared a “no-go” area back in 2010 when the ministries of coal and environment were finalizing the criteria to ascertain which forests could be opened up for coal mining and which others were to be saved as “critical energy reserves” for the future. Tree density was the primary basis on which the decision was taken. Given that Hasdeo Arand was a “no-go” area, none of the coal blocks there could have received approval at the time the ministry gave a go ahead.

¹² The letter also clearly indicates that a subsequent meeting of the *Gram Sabha* on October 2, 2011 officially declared the earlier mentioned meeting of 11th August 2009 as fake.

On 24th March 2014, the National Green Tribunal (NGT) set aside the approval for forest diversion granted to the PEKB coal block. The NGT's decision came in an appeal (Appeal No.73/2012) filed by Sudiep Srivastava, a Bilaspur based advocate and activist. It was argued before the principle bench and argued by senior advocate Raj Panjwani.

FRA was not part of the grounds of this appeal. However, one of the main arguments before the NGT was the manner in which the “go” and “no-go” criteria was interpreted in PEKB's case by the environment minister. It was argued that the joint study by the ministries of coal and environment was “*not merely an administrative exercise but a requirement in pursuance to the Forest (Conservation) Rules 2003*”.¹³ It was further argued that there is enough coal deposit available in areas classified “Go” areas to cater to the requirements of coal for the next 60 years. Therefore, there is no need to allow mining in dense forest areas like Hasdeo Arand.

The NGT in its judgment upheld the Minister's premise that the PEKB coal block was indeed on the fringe of the Hasdeo Arand forests, but did not agree to the minister's decision that this indeed meant that the area was not actually in the biodiversity rich region of the forest. This is especially because the ministry itself had rejected the diversion three times over on the grounds that the coal block was indeed in the “no-go” area.

The case of the “cancelled” CFRs

When Ghatbarra's Community Forest Rights were revoked stating that it was coming in the way of mining, what was being referred to was the PEKB mine and its proposed expansion. This action was taken by the District Level Committee when the validity of the mine's forest clearance was itself under question. After the NGT set aside the abovementioned approval and remanded to the MoEF with directions to seek fresh advice of the FAC¹⁴, the miners took the matter to the Supreme Court (SC). The SC in its order of 28.4.2014¹⁵ allowed for the continuation of mining operations in the coal mine, but only “*till further orders are passed by the Ministry of Environment and Forests,*”

¹³ Judgment dated 24.3.2012 of the National Green Tribunal in Appeal No. 73 of 2012, Sudiep Shrivastava v/s Union of India

¹⁴ The Forest Advisory Committee (FAC) is set up under the FCA, 1980 to review application of use of forestland for non forest if the diversion is above 40 hectares. If below 40 hectares, the applications are reviewed at the regional offices of the MoEFCC located in ten cities across India.

¹⁵ Civil Appeal No. 4395 OF 2014 (RAJASTHAN RAJYA VIDYUT UTP.NIGAM LTD v/s SUDIEP SHRIVASTAVA & ORS)

From 2014 till date the Forest Advisory Committee (FAC) of the MoEFCC did not move on the issue citing reasons of the matter being subjudice.¹⁶ Meanwhile, the action to revoke the CFR was taken. The Hasdeo Arand Bachao Sangharsh Samiti (Save Hasdeo Arand Struggle Group) immediately wrote to the State Level Management Committee constituted under the FRA, 2006 objecting to this decision. Their letter dated 26.2.2016 raised a multiple set of points:

- a) The forest diversion was approved in violation of the FRA and the 30.7.2009 and 3.8.2009 advisory of the environment ministry.
- b) The residents of Ghatbarra had written atleast three letters to stating that the forest diversion should not be approved, as the recognition of rights was pending.
- c) The revocation of the CFR by the District Level Committee (DLC) is illegal and therefore should be reversed.

The SLMC is a body to be constituted by every state government; *“to monitor the process of recognition and vesting of forest rights and to submit to the nodal agency such returns and reports as may be called for by that agency.”* Not surprisingly, the function of this body is to monitor the processes upto the recognition and vesting of rights under the FRA. There is nothing in the law, which provides for the SLMC or any other institution to step in if rights are revoked. It is perhaps because such a scenario was never envisaged as part of the FRA’s design or implementation. Ghatbarra is a unique case in point.

The Hasdeo Samiti also wrote to the Ministry of Tribal Affairs (MoTA) and the Chief Secretary, Government of Chhatisgarh. For MoTA too this was a first, primarily because such a scenario was never envisaged in the design of the FRA. The ministry of was implementing a law to undo historical injustice that occurred while denying forest access and rights to tribal and forest dwelling communities. The Preamble of the FRA clearly states *“the forest rights on ancestral lands and their habitat were not adequately recognised in the consolidation of State forests during the colonial period as well as in independent India resulting in historical injustice to the forest dwelling Scheduled Tribes and other traditional forest dwellers who are integral to the very survival and sustainability of the forest ecosystem.”* When a law is designed to undo long-term damage, its makers did not consider a situation that rights once recognized and vested will get reversed or revoked.

¹⁶ Right to Information response (F. No. 16-194/2015-FC) by Ministry of Environment and Forests to Alok Shukla dated 14.10.2015

The two legal questions

The Ghatbarra matter is being argued at the High Court of Chhattisgarh at Bilaspur. A decision in this case is likely to set precedence on of the two legal questions raised earlier in the paper.

First, is whether the District Collector and the District Level Committee¹⁷ had the power to revoke the CFR as they did? Clearly, the FRA is silent on this, with no clause of the law allowing for it. The role of DLC ends with the vesting of rights.

This role of the DLC also needs to be read with Section 12 B (3) of the FRA Amendment Rules, 2012. This clause clearly lays down the responsibility of the District Level Committee to ensure that CFRs relating to traditional roles and forest access for protection, regeneration or conservation or management, are recognized in all villages with forest dwellers and the titles are issued. Section 12 B (4) the committee is required to record why no CFRs have been recognized, if such a situation arises.

Internal discussions within the MoTA in response to the Hasdeo Samiti's complaint point to some crucial aspects related to whether the committee could have sent a notice to Ghatbarra villagers as they did. The fifth paragraph of the official note sheet received by Alok Shukla, of Chhatisgarh Bachao Andolan¹⁸ concludes on two crucial aspects:¹⁹

a) *“therefore the reason for cancellation of the community title as provided by the District Collector Sarguja by saying that the forest land was already diverted before the issue of community title to Ghatbarra is not a ground for cancellation of the title and cannot be accepted.”*

b) *“The Forest Rights Act does not provide for cancellation of any rights recognized under the Act. Therefore, cancelling of the community title is a violation of the law.”*

The *second* question is whether, the approval for PEKB itself is valid, given the questions raised on the recognition of rights being incomplete at the time the approval was given. If that maybe so, does the mine have the right to continue operating or seeking expansion (Koshy, 2017).

¹⁷ Section 6 (5) of the FRA states that “State Government shall constitute a District Level Committee to consider and finally approve the record of forest rights prepared by the Sub-Divisional Level Committee.”

¹⁸ Received in response to Right to Information (RTI) application filed by Alok Shukla of Chhatisgarh Bachao Andolan on 11th April 2016. The MoTA replied on 12th May 2016

¹⁹ Ministry of Tribal Affairs Notesheet number F.No.23011/16/2015/FRA, signed by Roopak Chaudhari, Deputy Secretary on 3.3.2016

The MoTA notesheets have important observations to make even on this. On 4.3.2016, the Deputy Secretary writes, “*it may be pertinent to note here that the issue of FRA process in the area was not completed.*” A reference is made to the decision of the then environment minister Jairam Ramesh who had over-ruled the recommendations of the Forest Advisory Committee (FAC). The FAC had concluded against the diversion of the forest area in favour of PEKB, with one of the reasons being non-compliance with the FRA.

Based on both the above aspects, MoTA Joint Secretary Ashok Pai on 14.3.2016 concludes, “*Hence, both on facts and matter of law the said cancellation of CFR is arbitrary and violation of letter and spirit of the law ie FRA.*”

But the ministry did not take any final view on this matter and did not initiate any specific action. It instead noted on 5th April 2016, that a letter be written to the Chhattisgarh state government to clarify the matter. Soon after, in June 2016, Ghatbarra villagers approach the High Court.

With the Supreme Court matter dealing with the validity of the forest clearance and the High Court case on the CFR cancellation awaiting the formal response of the Ministry of Tribal Affairs (MoTA), Ghatbarra is set to become a case in point in the near future.

Even as the executive delays actions and the law is argued out between lawyers and judges, Ghatbarra and many other villages await justice. Justice that includes the legal and constitutional powers of *Gram Sabhas* to be consulted and say no to mining in Hasdeo as conferred under the FRA, 2006 and PESA, 1996. It also includes the freedom to exercise the CFRs that allow allows them to conserve, use and manage the forests as they have done so for generations. Afterall, they did all of it before the coal mine came in their way, and it not the other way round as the DLC has ordered.