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Laws on Odisha Tribal Lands

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The paper looks into the definition of Scheduled Tribes as per the Constitution of India and the legislative history related to them all over India, specifically in the state of Odisha. The forest lands are the traditional dwelling places of the Tribals, and until recently, they were unable to own a single plot of it due to legal issues. This was somewhat mitigated by the Central Government by enacting the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.[1] Back in Odisha, the scheduled areas are subjected to some laws enacted since independence, such as The Odisha Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Regulations, 1956[2] (amended in the year 2000[3]), and The Odisha Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Rules, 1959,[4] all this to protect the Tribals from the conniving people belonging to other well-to-do castes. The laws, although they were enacted with good intentions, with changing socio-economic landscape amid Odisha's industrialization, are long due for an overhaul. The laws, instead of protecting the beneficiaries, are rather hurting their economic development. Thus, some changes have been suggested and an appeal has been made to the government to take up the issue.

Keywords: *odisha, tribal, land, OSATIP.*

[1] Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006
[2] Odisha Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Regulations 1956
[3] Odisha Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) (Amendment) Regulations 2000
[4] Odisha Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Rules 1959

INTRODUCTION

Discussion of laws relating to Tribal lands in Odisha, or for that matter, India is rare. Very rarely one comes across actual on-the-ground facts and problems in dealing with such lands. Yes, all one can find all over the internet is how badly the Tribals are treated and their lands snatched away by big corporates, etc, or how the Tribals are deprived of ownership of the forest lands where they dwell traditionally. It's so convenient to paint a sad state of affairs and just leave the issue at that. Land being in List II (State list) is governed by a myriad number of laws differing from State to State and from Caste to Caste and finally by the type of ownership. In this write-up, we are going to discuss a small yet significant matter related to Tribal lands.

WHO ARE TRIBALS

Article 366(25) of the Indian Constitution,[5] defines "Scheduled Tribes" as such tribes or Tribal communities or subgroups within those groups which are declared as Scheduled Tribes in Article 342[6]. Article 342 in turn empowers the President of India to declare, notify, and de-notify a group as a Scheduled Tribe in consultation with and recommendation from the Governor of a State.[7] Thus, we deduce that it is the State legislature that decides, after all, which of its subjects shall be categorised as Scheduled Tribes. Generally, it is the traditional forest dwellers who are called the native, indigenous, or Tribal people. Tribals are distinct in their way of life. Although they live within nature, surrounded by forests, they barely alter or leave the forests to permanent damage.[8] Their way of living is sustainable and is the need of the hour to look at Global warming and Climate Change phenomena. There is a lesson or two to learn from them in this matter. In any country, it is the Tribals who are the original inheritors of property(land). Take the example of the Indians of America or the *Mool Niwasis* of India. We shall not delve into the technicalities or history of this term. For this article let's treat the collective body of all the Scheduled Tribes in India as *Mool Niwas*.

[5] Constitution of India, art 366(25)
[6] Constitution of India, art 342
[7] *Ibid*
[8] *Ibid*

ODISHA TRIBALS

The latest list of the groups designated as Tribals in Odisha can be found on various government website domains. This list is called The Constitution (Scheduled Tribes) Order, 1950[9]. It has been amended from time to time and as of date, as per the order, Odisha has 62 recognized Scheduled Tribes.[10] To bring in inclusive and equitable growth among the whole population of India, the Constitution and the Judiciary have always upheld laws that treat the Tribals especially. Article 14[11] of the Constitution talks about the Right to Equality, which doesn't essentially mean meeting laws to all citizens uniformly. It means equality before the law and equal protection of laws. Thus, laws are applied according to the stature and standing of a person in society. It can be understood from many laws which apply to one class of persons but not to the other. To administer the aboriginals, the Constitution has provisions as mentioned in Article 244[12] in Part X, which designates certain areas in India as "scheduled areas" and "Tribal areas". The Fifth Schedule deals with the administration and control of these areas except those in the four North Eastern states of Assam, Meghalaya, Tripura, and Mizoram, which are covered by the Sixth Schedule.[13] However, we are not going to discuss these scheduled areas or Tribal areas. In this article, we are concerned with the personal landed property of Tribals, specifically of Tribals in Odisha.[14]

LANDED PROPERTY OF TRIBALS, INDIAN PERSPECTIVE

Until 2006, the Tribals living in the forests were unable to own the land they have been occupying for generations, the forests. The **Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006[15]** was a welcome step in this direction. It provided a framework of a kind to facilitate the recognition of the occupancy and ownership of

[9] Constitution (Scheduled Tribes) Order 1950
[10] *Ibid*
[11] Constitution of India, art 14
[12] Constitution of India, art 244
[13] Constitution of India, schedule VI
[14] *Ibid*
[15] Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006

the Tribals on the forest lands. Sections 3(g)[16] and 3(h)[17] give the Tribals the rights of conversion of Pattas or leases or grants on forest lands to titles, and settlement and conversion of all forest villages into revenue villages. Section 4(f)[18] provides that there shall be no resettlement of Tribals for any project unless they are provided with a resettlement location complete with all facilities and land allocation. This has prepared the ground for sound economic and social development of the Tribals and converged with the mainstream. It is a well-meaning law enacted showing the will of the legislature to practically translate the Directive Principles of State Policy into action.

LEGISLATIVE HISTORY OF S.T. LAND LAWS

Against this backdrop, it is worth noting that Odisha has taken care of its subjects belonging to the Scheduled Tribes in matters of land laws since independence. Odisha is an agrarian State which is now turning into an industrial hub gradually, The State is full of mines and steel plants. In contrast, it is worth noting that as per the latest 2011 census, Odisha is ranked third (numerically) in terms of the ST population in the country. The ST population in Odisha in absolute numbers was 95,90,756 and stood at 22.85% of the total population of Odisha.[19] Time and again, there has been a tussle between the State government and the local Tribal groups to open new mines or for starting other projects, one glaring example being the Niyamgiri Bauxite mines. This is a matter to debate between the development of the State's economy versus the preservation of natural habitat for the indigenous Tribals. I leave aside this question, to explore the other side of the State legislative where so many acts have been enacted since the 1950s to safeguard the interests of the Tribal landowners. The government can be seen to be the benevolent protector of all its ST population.

But is it so? This question needs to be asked definitely in the changing socio-economic status of the ST population in the State. In this article we shall examine the following State Acts, Rules,

[16] Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, s 3(g)
[17] Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, s 3(h)
[18] Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, s 4(f)
[19] *Ibid*

Regulations, case law, etc:

- The Odisha Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Regulations, 1956[20]
- The Odisha Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Rules, 1959[21]
- The Odisha Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Amendment Regulation, 2000[22]

Case law: ***Jami Ramesh v State of Orissa***[23]

The story of a common man residing in a village is that his basic occupation is farming. Although many families are engaged in other trades traditionally such as blacksmiths, leather workers, animal husbandry, etc, all have the primary occupation of agriculture.[24] The rural people depend on their land to yield them a handsome profit by the end of the harvest season. You take away the land from them, and they have nothing to do. Thus, land does play a major role in the social and economic status of a person in the rural setup, and more so for a person belonging to the Scheduled Tribes. It is a matter of common observation that the ST people being innocent, are coerced into transferring their land for paltry sums even today.

Thus, the legislators at that time in 1956 brought about the above-mentioned Regulations. The preamble of the Regulations itself mentions, "Whereas it is expedient to control and check the transfer of immovable property by the Scheduled Tribes in the Scheduled Areas of the State of Odisha."

- Section 2(e)[25] says, '"Scheduled Areas" and "Scheduled Tribes" shall respectively mean the Scheduled Areas specified in respect of the State of Orissa in the Scheduled Areas

[20] Odisha Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Regulations 1956
[21] Odisha Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Rules 1959
[22] Odisha Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Amendment Regulation 2000
[23] *Jami Ramesh v State of Orissa* 2019 (II) OLR 94
[24] *Ibid*
[25] Odisha Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Amendment Regulation 2000, s 2(e)

(States of Bihar, Gujrat, Madhya Pradesh, and Orissa) Order, 1977 and the "Scheduled Tribes" specified in respect of the State of Orissa in the Constitution (Scheduled Tribes) Order, 1950 as modified from time to time;' It means that there are certain areas in the State of Odisha declared as Scheduled Areas in an Order of 1977.

- Section 2(f)[26] says, '"Transfer of immovable property" means mortgage with or without possession, lease, sale, gift, exchange or any other dealings with such property not being a testamentary disposition and includes a charge or contract relating to such property.' Transfer of property as per this definition means any kind of contractual transfer of property except testamentary disposition. Thus testamentary transfer is allowed, barring other contractual transactions for the interest in the ST lands.
- Section 3[27] of this Regulation lays down the procedure to transfer the property to a person not belonging to any Scheduled Tribe. The Proviso (ii) to the Section 3(1)[28] says, "in the execution of any decree for the realisation of the mortgage money, no property mortgaged as aforesaid shall be sold in favour of any person not being a member of a Scheduled Tribe". This means when ST land is mortgaged against any debt in any financial institution, in the event of default on repayment of the debt, the mortgaged land cannot be sold to any person not belonging to ST.
- Proviso (iii) of Section 3(1)[29] says, "a member of a Scheduled Tribe shall not transfer any land if the total extent of his land remaining after the transfer will be reduced to less than two acres in case of irrigated land or five acres in case of un-irrigated land." This provision safeguards ceilings on minimum land holding in the case of agricultural lands as well as non-agricultural land.
- Further, the Explanations to Section 3(1) are as follows: "Explanation-I:- For this sub-section, a transfer of immovable property:- (a) in favour of a female member of a

[26] Odisha Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Amendment Regulation 2000, s 2(f)
[27] Odisha Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Amendment Regulation 2000, s 3
[28] Odisha Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Amendment Regulation 2000, s 3(1)
[29] Odisha Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Amendment Regulation 2000, s 3(1), proviso (iii)

Scheduled Tribe, who is married to a person not belonging to any Scheduled Tribe, shall be deemed to be a transfer made in favour of a person not belonging to a Scheduled Tribe; and (b) shall include a transfer of immovable property to a person belonging to a Scheduled Tribe for consideration paid or provided by another person not belonging to any such Tribe.". If once a female belonging to ST marries a person not belonging to ST, the such female cannot henceforth purchase any ST land in her name, and such transfer of ST land in her land shall be held as a transfer of the ST land to a person not belonging to ST. Also, if the transfer of ST land is made to any ST person, and if the consideration money is paid by any non-ST person, such transfer of land shall be held against this Act.

- Section 3(2)[30] provides for administrative quasi-legal action by the District Authorities to restore such ST land to the original owner, of any other member of ST, or if it is not reasonably possible, then settle the land as per Orissa Land Settlement Act, 1962.
- Section 4[31] provides that any deed in contravention of this legislation shall not be allowed to be registered under the Registration Act of 1908.

Thus, we see adequate steps have been taken to discourage the persons not belonging to ST from buying ST land. Complementing the above Regulations, we have the Rules of 1959 vide Notification No. 34538-AG-60/59-R/dated 17.8.1959. Any ST person who intends to transfer his or her St land to a non-ST person has to apply to the Sub-Collector in a prescribed form (Form 2), and the Sub-Collector may himself or through any of his subordinate officers shall conduct an enquiry of summary nature using Form 1. How the enquiry is to be conducted is laid out in Section 7[32] of these Rules. Also, Section 4(1)[33] says, "There shall be no attachment or sale of immovable property in execution of money decrees against a member of Scheduled Tribes within any Scheduled Area without the written permission of the competent authority. The property at such sale shall be sold only to members of Scheduled Tribes unless otherwise

[30] Odisha Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Amendment Regulation 2000, s 3(2)
[31] Odisha Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Amendment Regulation 2000, s 4
[32] Odisha Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Rules 1959, s 7
[33] Odisha Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Amendment Regulation 2000, s 4(1)

specifically directed in writing by the competent authority." Thus this rule restricts the mortgage of ST land to any financial institution and also subsequent sale or auction of the land to any non-ST person becomes invalid. The mortgage is subject to permission from the Sub-Collector or the Collector (in general control as per Section 5).

Now we come to the year 2000 when the 1956 Regulations were amended. This Amendment made the Administration answerable to the Gram Panchayat regarding any instances of ST land being in the possession of non-ST persons (Section 3-A (3)). The most important of this Amendment was Section 3-B. It stated that any person who does not belong to ST, has agricultural land (as on the date of commencement of this Amendment) which was originally ST land(more particularly belonging to ST person any time since 4th October 1956), shall inform the Sub-Collector within two years of the Amendment as to how he came into possession of that land. If he complies, the Sub-Collector shall make enquiries and find out if the land was transferred fraudulently. If such is the case, then the land in question shall be restored to the ST person and the non-ST person shall be liable to criminal prosecution under section 7 of the Regulations (introduced by this Amendment). If the person fails to comply with this Section 3-B, then the land in question is automatically forfeited and the Sub-Collector shall restore it to the original owner. Thus, this Amendment sought to correct the historical wrongs committed by the member of the Scheduled Tribes and their ownership of Tribal land. It is an acknowledgement by the Executive of the failure of the State machinery to curb frauds and tricksters from cheating the members of ST in the State.

Finally, we come to the case law Jami Ramesh and another v State of Orissa. Although it is not a piece of legislation, still it holds significance in the topic being discussed. A total of 105 Writ petitions were clubbed together and disposed of by the 2-judge bench of CJ KS Jhaveri and Justice KR Mohapatra on 12.04.2019. The petitioner challenged the OSATIP proceedings and the orders passed against him by the Sub-Collector, who held that the Petitioner had fraudulently obtained the ST land and reverted the same to the ST persons. The fact was, the Petitioner had purchased the land from a vendor who in turn had purchased the land from the ST person, after following all due procedure (obtaining permission under the Regulations of 1956). The

Honorable High Court, Cuttack, directed the Authorities to reconsider the cases of respective petitioners in the Writ and pass appropriate orders keeping in mind the observations made by the High Court and by giving due opportunity to the petitioner to be heard and allowing them to file replies. The following order was passed:

- The Amendment Regulations, 2000 will have a prospective effect.
- The impugned order passed based on the Amendment Regulation, 2000 is required to be set aside and the same is accordingly set aside.
- The matter is remitted back to the authority concerned and the petitioners are directed to appear before the concerned authority in the first week of June 2019 and file their replies. The authority will consider and decide the matter within six months from the date of receipt of such replies.
- The possession of the petitioners will not be disturbed till the matter is heard by the authority.

Thus, we observe that the Court stepped in and saved the parties who had entered into lawful and genuine ST land transactions.

PROBLEMS FACED

In the discussion above we may superficially feel that the laws are very well meant and executed. However, in the changing dynamics of today's modern society, these laws need a recheck. Some pertinent questions to ask in this matter are:

- Since the mortgage of ST land needs prior approval from District Authorities, is it not hindering the simple process of availing of mortgage loans by referring the matter to a slow-moving bureaucracy? An efficient bank, for example, the State Bank of India, has a Turn Around Time of day, seven days for Housing Loans. Because of this provision, the process gets lengthier beyond measure by referring the land to Sub-Collector, Tahasildar, and Revenue Inspector, for identification of the land, enquiry in Form 1, and subsequent approval by the competent authority.
- Since a mortgaged ST land is supposed to be auctioned and sold to an ST person only, it

decreases the marketability of the land, by narrowing down the prospective buyers only to a select few belonging to the Scheduled Tribes. If the land was open to all, it could have yielded a better bargain for the owner. Thus, this provision affects the ST owner adversely.

- It was laid out that a female belonging to the ST is deprived of the right to purchase ST land when she marries a person who is not from the ST community. However, it is still a question of law about what happens to her capacity to purchase ST land after she gets divorced or widowed, or remarries a ST person again.
- Proviso (iii) of Section 3(1) fixes ceilings to adhere to while selling ST land even after following all due procedures. In today's age and economic advancement of the ST community, in such an age when the President of India belongs to the ST community, is it worthwhile to ask the ST person to retain her agricultural land? We even have the concept of a creamy layer to distinguish the members of the ST community and categorize them into deprived society on one hand and affluent middle and upper-class groups on the other. Why apply the same norms to the two groups which are miles apart? The well-to-do individuals don't depend on agriculture anymore. Why shall they be subjected to so many restrictions regarding their choice of dispensing their property?

SOLUTIONS

It has to be acknowledged that the problems discussed above cannot be avoided or eradicated overnight. However, some changes may be introduced gradually, by bringing Amendments to that effect. Say for example:

- Suitable clauses can be introduced to remove the difficulties of the widowed, divorced, or remarrying ST females.
- The ST belonging to the creamy layer can be treated to separate provisions based on their Income Tax Returns. The well-to-do persons may be identified and be allowed to sell off their landed properties fully. It is very questionable if those modern high-earning individuals of the ST community will ever go back to farming.
- The overall suggestion shall be to base the treatment of land ownership on the socio-

economic status of the person, and not on casteist lines. However, it is a matter of public discourse and rigorous debates which should give result in such overwhelming changes.

CONCLUSION

The State has done well and deserves appreciation for the steps in ensuring the non-alienation of ST people from their ancestral lands. However, these bracelets on their wrists are turning into handcuffs unknowingly in the present day and age. The legislature must look into the matter and the media should highlight the issues on the glaring mobile screens of the young generation and ask for change.