

National Commission for Scheduled Tribes

F.No.: NCST-04/0mon/4/2022-RMDC

Date: 26/09/2022

I would like to draw your kind attention to the Ministry of Environment, Forest and Climate Change's Notification dated 28 June 2022 on Forest (Conservation) Rules, 2022 which supersedes the Forest Conservation Rules 2003 and the subsequent amendments 2004, 2014, and 2017.

2. The National Commission for Scheduled Tribes is a Constitutional body setup under Article 338A of the Constitution of India. Section (9) of Article 338A of the Constitution provides that "the Union and every State Government shall consult the Commission on all major policy matters affecting Scheduled Tribes." It is a matter of great concern that the NCST has not been consulted on such an important amendment which would have significant implication in the lives and forest rights of the ST and OTFDs.

3. The NCST has constituted a 'Working Group on the Forest Rights Act 2006 & other issue related to the Forest and Scheduled Tribes' with experts as members to assist the Commission for monitoring of FRA and make recommendations to the Union and the State Governments. In its first Meeting held on 8.8.2022, the Working Group deliberated and discussed the issue in detail and after thorough examination of recently notified Forest (Conservation) Rules, 2022 on 29 June, 2022 and discussion with some civil society actors and legal experts, the NCST understands that the FC Rules 2022 will have serious impacts on the rights of Scheduled Tribes and Other Traditional Forest Dwellers (STS and OTFDs). The Commission fail to understand the reason for such important provisions being diluted and undermined.

4. Both the MOTA and MoEFCC have stated in their responses on 27.07.2022 and 28.07.2022 respectively that FC Rules 2022 are not in violation of Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights Act) 2006 or the Forest Rights Act (FRA), as these are parallel statutory processes. It is important to mention here that the MOEFCC circular of 3rd Aug 2009, endorsed by the Supreme Court in its judgement in Orissa Mining

Corporation vs MoEFCC & Others (the Niyamgiri judgement in 2013) strengthened in 2014 and 2017 FC Amendment Rules, acknowledges the basic principle that, with the passing of the FRA the diversion of forests processes under the Forest Conservation Act (FCA) stand amended.

5. Evidence from the ground indicates that, even the August 2009 circular and the 2014 and 2017 Rules were being observed only in breach and needed to be further strengthened and more strictly monitored to be able to safeguard the rights of the STS and OTFDS. Approximately 25,000 30,000 ha of forests/year are currently being diverted, while the STS and OTFDS continue to face forest rights violations and displacement due to these. A study by Centre for Environment & Development, ATREE made available to NCST showed that, out of 128 applications for forest diversion for mining, over 100 ha processed between 2009 and 2018, 74 were approved (stage II) and 46 were given 'in-principle' approval (stage 1), with only 5 rejected and 4 closed for various reasons. None of the rejections were on grounds of FRA non-compliance or any adverse comments by rights-holding gram sabhas. Furthermore, in a subset of 14 cases (all post-2014) where complete documentation was available, the records showed that the Collectors' certification that the FRA process was complete was given in violation of ground realities: all sites were forested and inhabited by forest-dwellers but no CFR process had been completed anywhere. Further investigation on the ground revealed that gram sabha meetings, where held to discuss the project, made no mention of the possibility of the gram sabha having any community rights over the forest. Current changes will further increase such violations.

6. Additionally, despite 16 years of enactment, as per MOTA, less than 10% of the total potential of the FRA have been completed, of which less than 3% constitutes the Community Forest Resource Rights (CFRR), which include right to sustainably use, manage and conserve the forests within the customary boundaries of gram sabhas. The requirement for consent and recognition of rights, prior to stage I clearance in 2014 and 2017 Rules at least provided a legal space for ensuring completion of the processes for recognition and vesting of rights under the FRA in areas where forests are being diverted.

7. This is the reason why implementation of the FRA and processes under the FCA cannot be seen as separate parallel processes. Instead both these laws

need to be implemented in conjunction with each other in order to uphold the intention of the FRA to recognise and protect the forest rights of the STS and OTFDs. The MoEF&CC circular of 3rd August 2009 was issued precisely to honour this commitment under the FRA to recognise and protect the forest rights of the STS and OTFDs. This required that the provisions of the Forest Conservation Act (FCA) and the Forest Rights Act (FRA) are harmonised with each other. This has been further clarified in point 5 on page 5 of the guidelines issued by the MOTA on 12th July 2012 and was provided a legal backing through amendments to FC Rules 2003 in 2014 and 2017. Hence, the 2022 FC Rules by seeing FCA and FRA as separate parallel processes will not only lead to large scale perpetuation of historic injustice and undermining of the very purpose of the FRA but also be in violation of statutory requirements. Furthermore, by using the wording "ensuring the settlement of rights under [FRA]" (section 9(6)(b)(ii)) instead of using the wording "ensuring the recognition of rights under [FRA]", a strong impression is created that the MoEF&CC assumes that any forest rights affected by the diversion will be 'settled' through some form of compensation, rather than allowing rights-holders to exercise their right to give or withhold consent for the diversion.

8. The NCST sees violation of the FRA in the following two major ways:

i. Removal of the consent clause and of the requirement for completion of processes under the FRA prior to stage I clearance:

The FRA vests substantial access and management rights over forest land and forests with STs and OTFDs who have been traditionally residing in those areas. This then requires that any diversion of such forest land to non-forest purposes must have the consent of the rights-holders. To ensure this, FRA compliance in FC processes (as laid down in the 2014 amended Rules) requires that recognition of rights has been completed in the proposed forest to be diverted, that titles have been issued, details of the proposal and impacts on STS and OTFDs have been placed in front of the gram sabhas, and their free prior informed consent has been sought before sending the proposal for stage I clearance. The current Rules have done away with the requirement of seeking consent all together and have left the process of recognition of rights to be carried out after stage I clearance or even stage II clearance. We understand that the project proponents having received stage I clearance and deposited

compensatory levies as a sign of approval to the project by the central government, will pursue State Governments or Union Territories for the diversion of forests at the earliest seriously impacting the process of recognition of rights under the FRA.

ii. Violation of FRA in the processes of setting up land banks and Accredited Compensatory Afforestation

FC Rules 2022 provide for setting up of land banks for compensatory afforestation by identifying community common lands and degraded forest lands. This will facilitate speedy clearance of the proposals, however no safeguards or mechanism for compliance with FRA have been mentioned. FC Rule 2022 also propose that non-forest lands from where villages have been relocated from a National Park, Wildlife Sanctuary or Tiger Reserve and non-forest lands in designated or identified tiger or wildlife corridors shall qualify for compensatory afforestation and also Accredited Compensatory Afforestation can be earned out of the use of such lands (Rule 11 (3)(f)). This will further encourage relocation from PAs instead of exploring possibilities of co-existence based conservation using the relevant sections of the FRA.

9. Given the above, the NCST recommends the following corrective actions:

i. To immediately keep the 2022 Rules in abeyance. ii. Reinstate, strengthen and strictly monitor for compliance of the following existing provisions of FC Rules 2014, further strengthened in 2017:

a. Request the relevant District-Level Committee to rigorously complete the process of Recognition and vesting of Rights under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, for the entire forest land indicated in the proposal and for any land identified for compensatory or ameliorative afforestation;

b. Obtain consent of each Gram Sabha having jurisdiction over the whole or part of the forest land indicated in the proposal for the diversion of the forest land for the project and any land being proposed for compensatory and ameliorative measures, having understood the purposes and details of diversion, and with the Gram Sabhas' participation in such measures wherever implemented.

iii. Forest Advisory Committee (FAC) to include a member of MOTA, a social science expert thoroughly familiar with forest issues, an anthropologist and an expert on gender issues to ensure socio-cultural, livelihoods and other concerns of the forest dwelling STS and OTFDs are squarely taken into account while considering diversion of forests.

iv. Any amendments to FC Rules, if done, must be only after due consultations, including consultations with the Commission.

With anticipation for immediate corrective action as recommended above, I look forward for a response from you.

Yours sincerely,

(Harsh Chouhan)

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