

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.7924 OF 2018

1. Shri Ananta Waman Tanki
Age : Adult Occ. Farmer
2. Shri Ganesh Waman Tanki
Age : Adult Occ. Farmer
3. Shri Dattatray Waman Tanki
Age : Adult Occ. Farmer
4. Smt. Kalibai Yashwant Patil
Age : Adult Occ. Farmer
5. Shri Krushna Balaram Shinge
Age : Adult Occ. Farmer
6. Shri Mahendra Balaram Shinge
Age : Adult Occ. Farmer
7. Shri Ganesh Balaram Shinge
Age : Adult Occ. Farmer
8. Shri Prakash Balaram Shinge
Age : Adult Occ. Farmer
9. Smt. Indubai Shivadas Patil
Age : Adult Occ. Farmer
10. Smt. Archana Anil Keni
Age : Adult. Occ. Farmer
through their POA holder
Shri Rajan Narayan Bandelkar
Add. Unnathi Garden, Pokharan Road No.2,
Majiwade, Thane (West)-400 610 ... Petitioners

V e r s u s

1. The State of Maharashtra
Through its Secretary (Forests),
Revenue & Forest Department,

Add. : Mantralaya, Mumbai-32.

2. The Ld. District Collector, Thane
Add. : Collector Office, First Floor,
Court Naka, Thane (West),

3. The Ld. Sub-Division Officer, Thane
Add. : Collector Office, Second Floor,
Court Naka, Thane (West)

4. The Ld. Tahasildar, Thane
Add. Tahasildar Office, Thane,

5. Taluka Inspector of Land Records,
Thane
Add. : T.I.L.R. Office, First Floor,
Collector Office Compound, Court Naka,
Thane (West)

6. The Chief Conservator of Forests
Add. : Revenue and Forest Department,
Mantralaya, Mumbai-400 032.

7. The Principal Chief Conservator of
Forests,
Add. : III Floor, Van Bhavan, Ramgiri
Road, Civil Lines, Nagpur-400 001.

8. The Assistant Conservator of Forests,
Thane
Add. : Forest Office, Teen Hath Naka, Thane

9. The Municipal Commissioner,
The Municipal Corporation of the
City of Thane Office at Mahanagar
Palika Bhavan, Dr. Almeda Road,
Chandanwadi, Panch Pakhadi,
Thane West-400 602

10. Union of India,
through the Secretary,
Ministry of Environment, Forest
and Climate Change, Indira Paryavaran
Bhavan, Aliganj, New Delhi-110 003.

... Respondents

* * *

Dr. Milind Sathe, Senior Advocate a/w Saurabh Butala i/b Harshad Bhadbhade for the Petitioners.

Dr. Birendra B. Saraf, AG, a/w Shri A.I. Patel, Addl. G.P., Shri A.M. Kulkarni "A" Panel, Shri K.S. Thorat, AGP for the State.

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**CORAM : DHIRAJ SINGH THAKUR &
SANDEEP V. MARNE, JJ.**

PRONOUNCED ON : 26th JULY 2023

J U D G M E N T

Per DHIRAJ SINGH THAKUR, J.

. Petitioners claim to be in possession of land as owners falling under Survey No.245/4B, admeasuring 630 sq. mtrs. in village Kavesar, Taluka and District Thane. The Petitioners, *inter alia*, challenge the legality and validity of an order dated 27th March 2015 passed *suo motu* by the District Collector, Thane under section 22(5) of the Maharashtra Private Forest Act, 1975 ('the Forest Act') in respect of the aforementioned land. The Petitioners also seek the issuance of a writ of certiorari for setting aside the impugned Notification dated 5th November 1960 by virtue of which, the land claimed to be in the ownership and possession of the Petitioners has been declared as a forest land.

2 With a view to understand the genesis of the controversy, it would be pertinent to mention a few material facts in brief :

Section 35(1) of the Indian Forest Act, 1927 ('the Act, 1927') authorizes the State to issue a notification in the official gazette to regulate or prohibit in any forest or waste land (a) the activity of breaking up or clearing of land for cultivation; (b) the pasturing of cattle; or (c) the firing or clearing of vegetation; when such regulation or prohibition appears necessary for the purposes mentioned in section 35(1).

Sub-section (3) of section 35 however envisages that no notification shall be made under sub-section (1) until after the issuance of a notice to the owner of such forest or land calling on him to show cause why such a notification should not be made and until his objections, if any, and any evidence that he may produce in support of the same, have been heard by an officer duly appointed in that behalf and have been considered by the State Government.

3 It appears that a notice in terms of sub-section (3) of section 35 was issued, dated 19th September 1950 which required the predecessors in interest to show cause as to why the accompanying

notification be not made by the Government under section 35(1) in respect of the forest specified in the schedule appended to the said notification. The schedule appended to the notification (draft notification) reflected the survey No.245 of Village Kavesar which the Petitioners claim belonged to them.

4 The case set up by the Petitioners is that the notice (supra) although issued was never served upon either the predecessor-in-interest of the Petitioners or the Petitioners. A specific averment in this regard regarding the notice not having been served on the Petitioners is reflected in ground 5(J), which reads as under :

“5(J) : The Petitioners most respectfully state that the petitioners are also not served with the notice u/s. 35 of the Forest Act.”

5 In the response filed by the State, the reply submitted reads as under :

“With reference to paragraph No.5J, the proof regarding service of notice is not available.”

6 The service of notice issued in terms of section 35(3) of the Act, 1927 assumes significance in view of the Apex Court judgment in the case of *Godrej and Boyce Manufacturing Co. Ltd. and Another Vs. State of Maharashtra & Ors.*, (2014) 3 SCC 430 which shall be

referred to by us a little while later.

7 Maharashtra Private Forest (Acquisition) Act, 1975 ('Private Forest Act, 1975') came to be enacted and was notified in the Government gazette on 29th August 1975. Section 2(f) of the Private Forest Act defines a private forest to mean any forest which is not the property of the Government and includes, -

- (i)
- (ii)
- (iii) Any land in respect of which, a notice has been issued under sub-section (3) of section 35 of the Forest Act, but excluding an area not exceeding two hectares in extent as the Collector may specify in this behalf.

7A. Section 3 of the said Act further envisages that with effect from the appointed day all private forests in the State shall stand acquired and vest free from all encumbrances and shall be deemed to be the property of the State Government.

8 Section 22(A) further envisages an application to be made by any owner of private forest, within a period of six months from the date of commencement of the Maharashtra Private Forest (Acquisition) (Amendment) Act, 1978 seeking restoration

of such land, where the Collector after holding an enquiry is satisfied that the total holding of the land of such owner became less than twelve hectares on the appointed day on account of acquisition of his forest land under Act of 1975.

9 After issuance of notice dated 5th November 1960, a mutation came to be attested bearing Mutation Entry No. 2181 by virtue of which, the property of the Petitioners falling under survey No.245/4B situated at village Kavesar was shown as a forest area.

10 Dr. Milind Sathe, learned Senior Counsel for the Petitioners stated that aforementioned mutation came to be attested pursuant to the general directions issued in PIL No. 17 of 2002 following which a circular was issued on 14th July, 2005 whereafter the Assistant Conservator of Forest, Thane issued a letter dated 24th January 2006 to the Tehasildar, Thane to make necessary changes in the 7/12 extracts and mutation entries and submit the same to the office of the Conservator of Forests based upon which it is stated that Mutation Entry No. 2181 duly certified on 6th March 2006 came to be attested reflecting the name of the forest department.

11 The case of the Petitioners is that on 20th May 2006, the Sub-Divisional Officer, Thane issued a notice under section 22A of the

Maharashtra Private Forest (Acquisition) Act, 1975 inviting objections from the concerned parties, with a view to determine whether the total area of the land held by the owner was greater than twelve hectars. The Petitioners' case is that it submitted its reply to the notice claiming that the property was less than twelve hectars and that the Petitioners would become landless if the same was acquired by the Forest Department.

12 It is stated that while going through the Government gazette of 1960, the Petitioners realized that the same suffered from a mistake inasmuch as the boundaries described in the notification for survey No. 245 were in fact boundaries of survey No. 145 and were erroneously shown against the Survey No. 245.

13 This error is stated to have been brought to the notice of the Sub-Divisional Officer who after satisfying himself based upon the report prepared by the Taluka Inspector of Land Records, passed an order on 16th March 2015 cancelling the mutation entry bearing No.2181 in respect of the Petitioners' property.

14 The order passed by the Sub-divisional Officer, dated 16th March 2015, however, was stayed by the Collector, Thane vide a

suo-motu order dated 17th March 2015 which is one of the orders impugned in the present petition. The Collector appears to have stayed the order so passed *suo-motu* primarily with a view to get some guidance from the Government in regard to the rights of the Petitioners in the light of the decision rendered by the Apex Court in the case of Godrej (Supra).

15 In the backdrop of the aforementioned facts, the case of the Petitioners as was urged by learned Senior Counsel Dr. Milind Sathey is primarily two fold. Firstly, that the land of the Petitioners could not have been declared as forest in the absence of actual service of the notice dated 5th November 1960 upon the predecessor-in interest of the Petitioners and secondly, that the notification of 1960 could not have been made the basis of declaring the land of the Petitioners as forest as it was never intended by the Government to issue such a notification in regard to the land of the Petitioners and that the Government always intended to notify the land falling under survey No.145.

16 It is not denied that the Sub-Divisional Officer has deleted the mutation entry No.2181 in respect of the Petitioners' property on the ground of seeking guidance from the Government as regards

the judgment of the Apex Court in the case of *Godrej and Boyce Manufacturing Co. Ltd. and Another (Supra)*.

17 In the reply affidavit while the stand taken is that a notice under Section 35(3) of the Act, 1927 was issued to the then land holders in respect of the subject land falling under Survey No.245 of village Kavesar and that due procedure had been followed and the land notified under Section 35(1) of the Act, 1927, yet there is no specific denial to the averment that the notice issued under Section 35(3) of the Act, 1927 was not served upon the then land holders. In fact the stand taken is that proof regarding service of notice was not available. The stand of the State further is that under the provisions of Section 21 of the Act, 1975, the State Government has the authority to notify and declare any land as a private forest. In the reply affidavit the State in fact admits the mistake committed by the authorities while issuing the notice and the draft notification by reflecting the boundaries of Survey No. 145 instead of Survey No. 245.

18 Dr. Birendra Saraf, learned Advocate General appearing for the State urged that there must be a presumption raised regarding service of notice issued in terms of Section 35(3) of the Act, 1927, inasmuch as it was against human conduct that property belonging

to an owner if were to vest in the State in terms of the deeming provisions of the Act, 1975 would not be challenged by an owner in appropriate proceedings either before the authorities or this Court. It was urged that in fact upon a notice having been issued by the empowered officer under Section 22(A) of the Act, 1975 on 20th May, 2006, the Petitioners instead of raising an issue regarding the non-service of notice under Section 35(3) of the Act, 1927 did not raise any question at all as to why their property was declared as a private forest and instead sought to justify that the total holding of the land being less than 12 hectares on the appointed day, ought not to have been so acquired. It was contended that under Section 2(c-i) of the Act, 1975, so long as a tract of land fell within the definition of a forest under the aforementioned definition clause, the Government would have the authority to issue a notification which would have the effect of vesting such a tract of land in the State as such forest.

19. Admittedly, the notice issued under Section 35(3) of the Act, 1927 which was otherwise issued, had not been served upon the Petitioners as there is no specific denial to the assertion made by the Petitioners in that regard either in the reply affidavit or during the course of hearing before us. Although learned Advocate

General had tried to raise doubts regarding the factum of the service upon the Petitioners with reference to the conduct of the Petitioners in not having challenged the mutation earlier on that ground, yet in our opinion we cannot base a judgment on that premise and raise a presumption on mere conjectures and surmises. If the Petitioners had in fact been served, the Respondents would have certainly taken such a stand in their reply affidavit which is conspicuously missing in the present case. It was not enough for a notice under Section 35(3) of the Act, 1927 to only have been issued but even the service upon the noticee is mandatory as per the ratio of the judgment of the Supreme Court in the case of *Godrej & Boyce*, wherein it is held :

“58. Finally, Section 35(5) of the Forest Act mandates not only service of a notice issued under that provision “in the manner provided in the Code of Civil Procedure, 1908, for the service of summons” (a manner that we are all familiar with) but also its publication “in the manner prescribed by rules”. This double pronged receipt and confirmation of knowledge of the show-cause notice by the owner of a forest makes it clear that Section 35(3) of the Forest Act is not intended to end the process with the mere issuance of a notice but it also requires service of a notice on the owner of the forest. The need for ensuring service is clearly to protect the interests of the owner of the forest who may have valid reasons not only to object to the issuance of regulatory or prohibitory directions, but also to enable him/her to raise a jurisdictional issue that the land in question is actually not a forest. The need for ensuring service is also to prevent damage to or destruction of a forest.

In the absence of service of notice under Section 35(3) of the Act, 1927 and in the absence of a notification having been issued under Section 35(1) of the said Act, the provision of Section 2(f)(iii) of the Private Forest Act, 1975 would not apply to the subject land. Notice to be treated as “pipeline notice” even otherwise as held by the Supreme Court in the case of *Godrej & Boyce*, Section 2(f)(iii) of the Private Forest Act, 1975 was never intended to apply to notices that had passed their shelf life and that only “pipeline notices” issued in reasonably close proximity to the coming into force of the Private Forest Act would be considered as “live” and could be acted upon.

20 In the present case the notice that was issued under Section 35(3) of the Act of 1927 is dated 5th November, 1960 which was thus issued at a point of time which is considerably long before the promulgation of the Private Forest Act, 1975 could not have been acted upon. Such a view was expressed in the case of *Godrej & Boyce* in the light of the show cause notice that had been issued to *Godrej* in 1957 on which no decision had been taken based thereupon till 1975, for a period of 18 years, which was held to be an unusually long period of time for enabling the State to take a decision on the show cause notice. It was held that failure on the part of the State to take any decision on the show cause notice for

decades was indicative of its desire not to act on it and accordingly held that the notice could be acted upon only if it was in close proximity to the coming into force of the Private Forest Act, 1975. The ratio of the Judgment in the case of **Godrej & Boyce** (*supra*) applies squarely in the present case as well, inasmuch as no decision appears to have been taken by the Government pursuant to the issuance of notice dated 05th November, 1960 and the mutation came to be effected pursuant to a circular issued by the Government and the directions which had its genesis in the directions issued in PIL No.17 of 2002. Needless to say that even the mutation bearing No.2181 has since been set aside by the Sub-divisional Officer.

21 Similar issues based upon similar facts have already been dealt with by this Court in a number of cases wherein the principles of law as stated by the Apex Court have been reiterated. Reference in this regard can be made to **Sinhagad Technical Education Society V/s. Dy. Conservator of Forest & Ors.** {Writ Petition No. 7235 of 2013 decided on 3rd February, 2015} and **Reveal Aluminum Pvt. Ltd. & Anr. V/s. Union of India & Ors.** {Writ Petition No. 319 of 2019, decided on 27th July, 2022}.

22 As far as the issue regarding erroneous boundaries of land in the notice is concerned, since we have arrived at a conclusion that land of the Petitioners is not a private forest within the meaning of Section 2(f)(iii) of the Private Forest Act, 1975, it is not necessary to go into any factual dispute about error in mentioning boundaries of the land in question.

We make it clear that we have only recorded our finding in this judgment to the extent that the land of the Petitioners is not a private forest within the meaning of Section 2(f)(iii) of the Private Forest Act, 1975 and did not vest in the State Government under Section 3 of the said Act.

Be that as it may, we allow the petition and set aside the notice dated 5th November, 1960 as also the order dated 27th March, 2015 passed by the District Collector in respect of land falling under Survey No. 245H/4b admeasuring 630 square meters falling in village Kavesar, District Thane.

(SANDEEP V. MARNE, J.)

(DHIRAJ SINGH THAKUR, J.)

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