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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9310 OF 2012

Indrajeet Kashinath Kaiswal ...Petitioner
vs.
State of Maharashtra & Ors. ...Respondents

Mr.S.P.Kanuga i/b Sapna N. Nath for the Petitioner
Ms M.P.Thakur, AGP for the respondent Nos.1 to 6.
Mr.Dinesh Parmar i/b DSR Legal for respondent No.7

CORAM : A.S.OKA, & V.L.ACHLIYA, JJ.
DATE ON WHICH JUDGMENT IS RESERVED: OCTOBER 29, 2015
DATE ON WHICH JUDGMENT IS PRONOUNCED: NOVEMBER 21, 2015

JUDGMENT: (A.S.OKA, J)

1 The land subject matter of this writ petition
under Article 226 of the Constitution of India is
bearing survey No.148/9 (Part) situated at village
Asangaon, Taluka Shahapur, District Thane.

2 According to the case of the petitioner, the
said land bearing survey No.148/9, after obtaining
permission for non agricultural use, was divided in
34 layout plots. The case made out in the petition
is that by a registered sale deed 8th May 1998, the
petitioner purchased Plot No.16 (part) admeasuring
180 sq meters out of the said land bearing Survey
No.148/9 from Shrikrishna Deshpande and five others.

3 An order was made on 19th June 2006 by the
Assistant Conservator of Forest, Shahapur. In the
said order, he observed that in respect of the land

bearing survey No.148/9 admeasuring 1.76 Hectares, a notice under sub-section 3 of section 35 of the Indian Forest Act,1927 (for short `the Forest Act') was served. It is observed in the said order that in exercise of the powers under section 22A of the Maharashtra Private Forests (Acquisition) Act,1975 (for short `the Private Forests Act'), an area of 1.11 Hectares was ordered to be restored to the original owner Shri Mahadu Rama Chande (the original respondent no.8). The order further records that by order dated 30th September 1980, the area of 0.66 Hectare out of Survey No.148/9 was ordered to be placed in possession of the Forest Department as a forest. The order records that in the area of 87.10 sq meters out of survey No.148/9 which is a forest land, the petitioner has made an encroachment on the forest land and has carried out unauthorised construction of a bungalow. By the said order dated 19th June 2006, the Assistant Conservator of Forests directed that the encroached land and bungalow stands resumed and that the petitioner should be prosecuted. The said order was passed in exercise of the power under sub-section (2) of section 53 of the Maharashtra Land Revenue Code,1966. The petitioner preferred an appeal against the said order before the Additional Commissioner, Konkan Division. By order dated 11th April 2008, the said appeal has been dismissed. The first Appellate Authority relied upon the Judgment and order dated 11th February 2000 of the Apex Court in Civil Appeal No.781 of 2000 and observed that it was sufficient if a notice under sub-section 3 of section 35 of the

Forest Act was issued prior to 30th August 1975. Further appeal was preferred by the petitioner against the said orders which was dismissed by the Hon'ble Minister of the Forest Department by an order dated 9th/13th August 2012.

4 By this petition under Article 226 of the Constitution of India, the petitioner has challenged the aforesaid three orders. Another prayer made in this petition is for issuing a writ of mandamus directing the Deputy Collector to hold an enquiry under section 22-A of the Private Forests Act.

5 The submission of the learned counsel for the petitioner is based on the decision of the Apex Court dated 30th January 2014 in the case of Godrej & Boyce Manufacturing Company Limited and another vs. The State of Maharashtra and Others¹. He relied upon the affidavit in sur-rejoinder of the petitioner and urged that the notice under subsection (3) of section 35 of the Forest Act was not served to the predecessor-in-title of the petitioner, and therefore, the land bearing No.148/9 does not become a private forest within the meaning of the Private Forests Act.

6 The learned AGP relied upon the decision of the Apex Court in the case of Chintamani Gajanan Velkar vs. State of Maharashtra and others². Her submission is that the affidavit-in-reply of Shri

¹ Civil Appeal No.1102 of 2014 decided on 30th January 2014

² (2000) 3 SCC 143

S.K.Malve, the Assistant Conservator of Forests, Shahapur discloses that a notice under sub-section (3) of section 35 of the Forests Act, which is dated 15th June 1960 was issued to one Rama Jaitu Chande, the father of the original respondent No.8. She would therefore, urge that in view sub clause (iii) of clause (f) of section 2 of the Private Forests Act, the land bearing survey no.148/9 becomes a private forest. She submitted that the order dated 30th September 1980 passed under section 22-A of the Private Forest Act by the Sub Divisional Officer has attained finality in as much as the said order passed on 30th September 1980 has not been challenged by the petitioner or the predecessors-in-title of the petitioner. She would urge that no interference is called for with the impugned order.

7 We have carefully considered the submissions. The case made out by the contesting respondents is that as a notice under sub-section (3) of section 35 of the Forest Act was issued to the father of the respondent No.8 who was the original owner, by virtue of sub clause (iii) of clause (f) of section 2 of the Private Forests Act, the said land automatically becomes a private forest on 30th August 1975 and accordingly, by the order dated 30th September 1980 passed under section 22-A of the Private Forests Act, an area of 0.66 Hectares being the private forest out of survey No.148/9 has been placed in possession of the Forest Department. The case is that the petitioner has purchased a plot forming a part of the said area of 0.66 Hectares.

8 Clause (f) of section 2 of the Private Forest Act reads thus:

“(f) ‘**private forest**’ means any forest which is not the property of Government and includes—

(i) any land declared before the appointed day to be a forest under Section 34-A of the Forest Act;

(ii) any forest in respect of which any notification issued under sub-section (1) of Section 35 of the Forest Act, is in force immediately before the appointed day;

(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;

(iv) land in respect of which a notification has been issued under Section 38 of the Forest Act;

(v) in a case where the State Government and any other person are jointly interested in the forest, the interest of such person in such forest;

(vi) sites of dwelling houses constructed in such forest which are considered to be necessary for the convenient enjoyment or use of the forest and lands appurtenant thereto;”

9 The contention of the State Government is that as a notice dated 15th June 1960 under sub-section (3) of section 35 was issued to Rama Jaitu Chande (the father of the respondent No.8), by virtue of sub clause (iii) of clause (f) of section 2 of the Private Forests Act, the said land has become a private forest vesting in the State Government.

10 Now, we turn to the decision of the Apex Court

in the case of Godrej & Boyce Manufacturing Company Limited and another. The question which arose for consideration of the Apex Court is set out in paragraph 2 of the said decision which reads thus:

"2 The principal question for consideration is whether the mere issuance of a notice under the provisions of Section 35(3) of the Indian Forest Act, 1927 is sufficient for any land being declared a "private forest" within the meaning of that expression as defined in Section 2(f)(iii) of the Maharashtra Private Forests (Acquisition) Act, 1975. In our opinion, the question must be answered in the negative. Connected therewith is the question whether the word "issued" in section 2(f)(iii) of the Maharashtra Private Forests Acquisition Act, 1975 read with section 35 of the Indian Forest Act, 1927 must be given a literal interpretation or a broad meaning. In our opinion the word must be given a broad meaning in the surrounding context in which it is used."

(emphasis added)

11 The Apex Court considered its earlier decision in the case of Chintamani Gajanan Velkar and has expressly held that the said Judgment does not lay down the correct law. In paragraph 61 of the said decision, the Apex Court held thus:

"61....By making a reference in Section 2(f) (iii) of the Private Forests Act to 'issue'

in Section 35 of the Forest Act, it is clear that the word is dressed in borrowed robes. **Once that is appreciated (and it was unfortunately overlooked in Chintamani) then it is quite clear that 'issued' in Section 2(f)(iii) of the Private Forests Act must include service of the show cause notice as postulated in Section 35 of the Forest Act."**

(emphasis added)

In paragraph 62, the Apex Court specifically held that to that extent, the decision delivered in the case of Chintamani was no longer a good law. In paragraphs 56 to 58, the Apex Court held thus:

"56 A notice under section 35(3) of the Forest Act is intended to give an opportunity to the owner of a forest to show cause why inter alia, a regulatory or a prohibitory measure be not made in respect of that forest. It is important to note that such a notice pre-supposes the existence of a forest. The owner of the forest is expected to file objections within a reasonable time as specified in the notice and is also given an opportunity to lead evidence in support of the objections. After these basic requirements are met, the owner of the forest is entitled to a hearing on the objections. **This entire procedure obviously cannot be followed by the State and the owner of the forest unless the owner is served with the notice. Therefore, service of a notice**

issued under section 35(3) of the Forest Act is inherent in the very language used in the provision and the very purpose of the provision.

57 Additionally, Section 35(4) of the Forest Act provides that a notice under Section 35(3) of the Forest Act may provide that for a period not exceeding six months (extended to one year in 1961) the owner of the forest can be obliged to adhere to one or more of the regulatory or prohibitory measures mentioned in Section 35(1) of the Forest Act. On the failure of the owner of the forest to abide by the said measures, he/she is liable to imprisonment for a term upto six months and/or a fine under section 35(7) of the Forest Act. Surely, given the penal consequence of non-adherence to Section 35(4), direction in a Section 35(3) notice, service of such notice must be interpreted to be mandatory. On the facts of the case in Godrej, such a direction was in fact given and Godrej was directed for a period of six months, to refrain from the cutting and removal of trees and timber and the firing and clearing of vegetation. Strictly speaking, therefore, despite not being served with Notice No.WT/53 and despite having no knowledge of it, Godrej was liable to be punished under section 35(7) of the Forest Act if it cut or removed any tree or timber

or fired or cleared any vegetation.

58 This interplay may be look at from another point of view, namely, the need to issue a direction under section 35(4) of the Forest Act, which can be only to prevent damage to or destruction of a forest. **If the notice under section 35(3) of the Forest Act is not served on the owner of the forest, he/she may continue to damage the forest defeating the very purpose of the Forest Act. Such an interpretation cannot be given to Section 35 of the Forest Act nor can a limited interpretation be given to the word "issued" used in the context of Section 35 of the Forest Act in Section 2(f)(iii) of the Private Forests Act."**

(emphasis added)

12 Thus, the Apex Court held that a limited interpretation cannot be given to the word 'issued' used in sub clause (iii) of clause (f) of section 2 of the Private Forests Act. Moreover, the Apex Court held that sub clause (iii) of clause (f) of Section 2 was intended to apply to a live notice and not a stale notice under sub-section 3 of section 35 of the Forests Act. In the facts of the case before it, the Apex Court held that a notice under sub-section (3) of section 35 of the Forest Act issued in 1957 on the basis of which no notification was issued under sub-section (1) of section 35 of the Forests Act till 1975 will have to be treated as having become a dead letter for all intends and

purposes.

13 Thus, going by the law laid down by the Apex Court in the case of Godrej & Boyce Manufacturing Company Limited and another, sub-clause (iii) of clause (f) of section 2 of the Private Forests Act will be applicable provided a notice under sub-section (3) of section 35 of Forest Act is served to the owner. Mere act of issuing a notice under sub-section (3) of section 35 of Forest Act will not attract sub-clause (iii) of clause (f) of section 2 of the Private Forests Act. From the affidavits filed by the contesting respondents, the case made out is that sub-clause (iii) of clause (f) of section 2 of the Private Forests Act is applicable to the land bearing survey no.148/9.

14 In the writ petition, there is no specific assertion that there was no actual service of notice under sub-section 3 of section 35 of the Forest Act which is dated 15th June 1960 to the person who was the owner of the said land on the date of the notice. The said contention is raised by way of a rejoinder dated 27th October 2014. Therefore, it is necessary to make an enquiry on the issue whether the said notice was actually served to Rama Jaitu Chande, the father of the original respondent No.8 as per the case made out in the affidavit in reply of Shri S.K.Malve. If the Forest Department or the State of Maharashtra is unable to prove that the notice was served to the said Rama, obviously, sub-clause (iii) of clause (f) of section 2 of the

Private Forests Act will not apply to the said land.

15 Therefore, it will be appropriate if the said enquiry is held by the Additional Divisional Commissioner so that the Forest Department will get an opportunity to produce evidence, if any, in support of the contention that a notice under sub-section (3) of section 35 of the Forest Act was served to the original owner. If the Divisional Commissioner finds that there is no evidence to prove the service, obviously, it will have to be held that sub-clause (iii) of clause (f) of section 2 of the Private Forests Act is not applicable to the plot of land purchased by the petitioner. Hence, the orders dated 9/13th August 2012 and 11th April 2008 will have to be set aside.

16 We, however, make it clear that we have not decided the question whether the said land is otherwise a private forest or a forest under any other provisions of the Forest Act or the Private Forests Act, as the case may be. The said question is kept expressly open. We have examined the issue only in the context of the applicability of sub-clause (iii) of clause (f) of section 2 of the Private Forests Act.

17 Accordingly, we pass the following order:

- (I) Impugned orders dated 9/13th August 2012 and 11th April 2008 are quashed and set aside;
- (II) The appeal preferred by the petitioner being Appeal/Desk/LND/248/06 is restored to the file of

the Additional Commissioner, Konkan Division, Mumbai;

(III) We direct the petitioner and the respondents to appear before the Divisional Commissioner, Konkan Division, Mumbai on Tuesday 2nd December 2015 at 11am only for the purposes of fixing the schedule of the hearing;

(IV) The Additional Commissioner shall give an opportunity to the Forest Department to produce evidence/material in support of their contention that the notice dated 15th June 1960 issued under sub-section (3) of section 35 of the Forest Act was duly served upon the said Shri Rama Jaitu Chande;

(V) After giving an opportunity of being heard to the petitioner, to the Forest Department, to the respondent No.7 as well as to the legal representatives of the respondent No.8, the Additional Commissioner shall decide the issue whether the said notice was duly served upon the said Rama in accordance with law;

(VI) If the Additional Commissioner comes to the conclusion that the Forest Department has failed to prove the service of notice, it is obvious that the order dated 19th June 2006 will have to be set aside. If the service of notice is established, the said order dated 19th June 2006 will have to be affirmed ;

(VII) The Additional Commissioner, Konkan Division, Mumbai shall pass final order as expeditiously as possible and in any event on or before 30th April 2016;

(VIII) The order passed on the appeal shall be communicated to the petitioner;

(IX) Till the date of service of the communication of the order to the petitioner, ad-interim relief granted in this Petition on 28th September 2012 shall continue to operate;

(X) If the order passed on the appeal be adverse to the petitioner, the said ad-interim order shall continue to operate for a period of four weeks from the date on which the communication of the order is served to the petitioner;

(XI) Rule is made partly absolute on above terms;

(XII) All concerned including the Additional Commissioner to act upon an authenticated copy of this order;

(XIII) In terms of the order dated 30th September 2015, the enquiry report shall be submitted by the Registrar (Judicial-I) on or before 30th November 2015;

(XIV) For considering the enquiry report, the petition shall be placed before the regular Bench hearing this category of petitions on 2nd December 2015.

(V.L.ACHLIYA, J.)

(A.S.OKA, J.)