

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON

&

THE HONOURABLE MR.JUSTICE K.HARILAL

THURSDAY, THE 8TH DAY OF OCTOBER 2015/16TH ASWINA, 1937

MFA.No. 175 of 2004 ()

(AGAINST THE ORDER IN OA 25/2003 of FOREST TRIBUNAL, KOZHIKODE
DATED 18.03.2004)

APPELLANTS/RESPONDENTS:

1. STATE OF KERALA, REPRESENTED BY
CHIEF SECRETARY, THIRUVANANTHAPURAM.

2. CUSTODIAN OF VESTED FORESTS,
OLAVAKKODE, PALAKKAD DISTRICT.

BY SPL. GOVERNMENT PLEADER SHRI M.P. MADHAVAN KUTTY

RESPONDENT/APPLICANT:

SATHI R.NAIR, 14/1002 SAGARA,
C.V.RAMAN PILLAI ROAD, THIRUVANANTHAPURAM.

BY ADV. SRI.D.KRISHNA PRASAD
ADV. SRI.D.NARENDRANATH
ADV. SRI.M.HARISHARMA
ADV. SRI.T.P.ELDHOSE

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON
08-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**P.R. RAMACHANDRA MENON
&
K. HARILAL, JJ.**

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Dated this the 8th October, 2015

J U D G M E N T

P.R. Ramachandra Menon, J:

Correctness and sustainability of the verdict passed by the Forest Tribunal, Kozhikode in O.A.No.25 of 2003 arriving at a finding that the respondent herein who was the applicant before the Tribunal was entitled to have exemption of the property concerned from the purview of Kerala Private Forest (Vesting and Assignment) Act in terms of Section 3(3) of the said Act is under challenge in this appeal preferred by the State.

2. The factual sequence as reflected from the materials on record is that the respondent/applicant had approached the Tribunal seeking for exemption in respect of 23 acres of land comprised in Sy.No.51A1 in Kottopadam village in Mannarkkad Taluk in Palakkad District and to declare that the said land was not a private forest vested with the Government. It was contended that the parties concerned were having valid title,

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that they were holding properties with intent to cultivate; that they had obtained necessary clearance from the District Collector under the relevant provisions of law and further that they had obtained necessary clearance/certificate issued by the Rubber Board. The claim was vehemently opposed from the part of the State/Department contending that the property was very much vested with the Government ; that there was no intention to cultivate and that the applicant was not entitled for any relief. The evidence adduced before the Tribunal consists of oral testimony of P.Ws. 1 and 2; whereas the respondents sought to examine the Forest Range Officer as R.W.1. Documents were marked as Exts.A1 and A2 from the part of the applicant and Exts. B1 and B2 from the part of the respondent ; while Exts.C1 and C2 were the court exhibits.

3. After hearing both the sides, and after appreciating the evidence on record, the Tribunal arrived at a finding that, though clear-felling was done in the year 1966, no cultivation was being done after clear felling and the property had again

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become forest as on the appointed date i.e. on 10.05.1971; thus holding that it remained to be vested with the Government under Section 3(1) of the Act. The point was answered in favour of the Government. Thereafter, considering the question whether the applicant was entitled to get exemption under Section 3(3) of the Act and if so, to what extent, the Tribunal observed that as per the deposition of P.Ws. 1 and 2 and as per the contents of Ext.A1 partition deed, sanction for clear felling was obtained from the District Collector and a person by name Sivasankaran was entrusted to clear-fell the area, which was an indication to cultivate the land. It is also stated therein that after the clear felling, the non-vested area was being used as a rubber nursery and later it was planted with rubber. Based on the above observations, it was held by the Tribunal that on the relevant date i.e. as on 10.05.1971, there was intention to plant rubber and as such, the applicant was entitled to have the exemption under Section 3(3), to an extent of 14.20 acres. The aforesaid finding and the relief granted by the Tribunal are

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sought to be challenged by the State, mainly raising the grounds as to bar of limitation, non-satisfaction of burden of proof and non-consideration of the relevant ingredients to establish the provisions/circumstances under Section 3(3) and such other relevant aspects.

4. The learned Special Government Pleader appearing for the Forest Department submits that the question of limitation is not much pressed, for the reason that by virtue of the relevant rules, the notification had to be published at least in two dailies, apart from publication to be effected in various Government Offices such as Panchayat Offices, Village Offices, Tribunal etc. The evidence brought in was only with regard to Ext.B2 paper publication in 'Deshabhimani' daily dated 26.11.1981 and that alone. Since all the relevant requirements as envisaged under the above rule were not satisfied, the learned Government Pleader fairly submits that the challenge requires to be considered only with regard to other grounds. It is held accordingly.

5. The scheme of the statute provides for benefit to the parties concerned under two separate heads, notwithstanding the vesting of the property upon the Government by virtue of proclamation of the Act. As per the scheme of the statute, the property concerned will come automatically vested with the Government and notification to be issued is only a procedural aspect so as to enable the party concerned to raise the dispute if any before the appropriate Forum. A dispute had arisen before this Court as to whether the notification was a pre-requisite to have vesting. After considering the facts and relevant provisions of law, it was held that vesting was automatic, as per the decision reported in **Bhargavi Amma vs. State of Kerala** (1997 (2) KLT 513).

6. The vesting of the property, by virtue of Section 3(1), however cannot bar the way of the owners of the property who were having a claim either under Section 3 (2) or 3(3) of the Act. To have the benefit under Section 3(2), the applicant has to plead and establish that he is holding the property concerned

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within the ceiling limit and that it is being personally cultivated. Coming to Section 3(3), it stands on a different footing, where the personal cultivation as such is not necessary, but 'intention to cultivate' the property as on the relevant date , i.e. 10.05.1971 is sufficient, subject to the condition that the party was having valid title and further that the property concerned was within the prescribed limits in relation to the areas specified under the Kerala Land Reforms Act. The claim mooted before the Tribunal was mainly with reference to the eligibility of the applicant to have exemption under Section 3(3) of the Act, ie . with reference to intention to cultivate.

7. It is brought to the notice of this Court that the applicant was having valid title and a copy of the relevant partition deed of the year 1966 was produced before the Tribunal and marked as Ext.A1. There is no dispute with regard to the extent of property concerned and the same is within the specified limits under the Kerala Land Reforms Act. The remaining question is whether the applicant was actually having any 'intention to

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cultivate' the property.

8. The Tribunal raised the following three points for consideration:

“1. Whether the application is barred by limitation?

2. Whether the disputed land is a forest vested in the Government?.

3. Whether the applicant is entitled to get exemption u/s 3(3) of the Act and if so what is the extent. ?

9. With regard to Point No.2, the Tribunal has made a detailed discussion in paragraph 8, which is extracted below for convenience of reference:

“8. xxxxx According to the Commissioner the extent of this southern non vested area is 80 cents. RW1 has stated pundas are put up to separate the non vested area from the vested area. PW1 has stated clear felling permit was obtained from the District Collector in 1966 and clear felling was completed in 1966. It shows that area was covered by M.P.P.F Act. According to PW1 after clear felling rubber was planted in 2 acres and the remaining area was cultivated with tapioca and other crops. Though the applicant has taken

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out a commission, the commissioner was not asked to report about the nature of the vested area in the disputed property. Respondents have given the details of large number of forest trees with their number and ages in the counter statement. According to RW1 the trees have come up after clear felling in 1996 (presumably 1966). It means no cultivation was done after clear felling and again it became a forest in 1971 and so it is vested in the Government u/s.3(1) of the Act. Point found in favour of the respondent.

10. From the above, it is clear that a finding was rendered on the basis of the evidence that the property concerned was a 'vested forest' as there was no cultivation after the clear felling and the property became a forest in the year 1971; thus coming to be vested with the Government under Section 3(1). Coming to the third point as to whether the applicant is entitled to get exemption under Section 3(3) of the Act, the observation, finding and reasoning given by the Tribunal as discernible from paragraph 11 of the verdict is as follows:

“11. Intention to plant rubber in the land is

spoken to by PW1 and PW2. Ext. A1 partition deed mention about the clear felling permit obtained from the District Collector and one Sivasankaran was entrusted to clear fell the area. It is an indication of the intention to cultivate the land. After clear felling the non vested area was used as a rubber nursery and subsequently it was planted with rubber . Therefore, the intention to plant the area with rubber is evident. Ext. A1 partition deed also mention about the advantage and benefits of partition and separate possession. The evidence of PW2 is that the properties on the east and west of the disputed property have been improved by the respective owners subsequent to the partition. PW1 has stated the purchase of the property in 1965 itself was with the intention to plant rubber. He has also stated that in the year 1970-71 Madhava Menon was holding possession with intention to plant rubber. I therefore hold that the property was possessed by Madhava Menon with intention to plant rubber during 1970-71.

11. According to the Tribunal, the 'intention to cultivate' was reflected in Ext.A1 partition deed and it was revealed from the deposition of the concerned witnesses as to the clear felling permit obtained from the District Collector and the clear felling completed in the year 1966. But based on the evidence

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adduced, the Tribunal came to the conclusion that no cultivation was done after the clear felling and the property turned back to a forest in the year 1971, thus holding the position in favour of the Government with regard to Point (2). But the observation made by the Tribunal and the finding in paragraph 11 that there was intention to cultivate, based on the very same set of facts and evidence appears to be rather contradictory to the observations in paragraph 8. This is for the reason that, the only evidence discussed by the Tribunal in paragraph 11 is to the effect that P.W. 1 and 2 had deposed with reference to Ext.A1 partition deed, wherein mentioning of clear felling and obtaining of permit from the District Collector was mentioned in support of the indication to cultivate the land. Reference is also made to the version of PWs. 1 and 2 that the property was used as a rubber nursery and later, it was planted with rubber. This is relied on to hold that it was a clear indicator as to the intention of the party to cultivate the land as on 10.05.1971. But this, as such, may not be true, if the observation and finding of the Tribunal in

paragraph 8 are let to stand; wherein it has been clearly held that, after the clear felling in the year 1966, no cultivation was done and the property turned back to a forest in 1971, thus getting it vested with the Government under Section 3(1). In short, it appears to be a matter of paradox and the observation and finding of the Tribunal do not reconcile with each other, particularly between paragraphs 8 and 11.

12. The learned Special Government Pleader points out that the ingredients to be proved so as to extend the benefit under Section 3(3), (i.e. with regard to existence of valid title, that there was intention to cultivate and that the property was within the ceiling limits and such other relevant aspects) came to be analysed by a Division Bench of this Court way back in the year 1987, as per the decision in **State of Kerala vs. Thomas** (1987(1) KLT 530). The intention to cultivate and the evidence to be adduced to infer the same were highlighted therein. Another Division Bench considered the issue in the year 2002 as per the verdict reported in **2002 (2) KLT 847 (State of Kerala**

vs. Joseph), wherein reference was made to **1987(1) KLT 530**
(State of Kerala vs. Thomas). We are in full agreement with the observations made by the above Benches as to the ingredients to be proved.

13. The ingredients to infer the 'intention to cultivate' and how the same is to be established, came to be considered by the Apex Court and the position has been made clear as per the decision in **2007 (2) KHC 619. (Joseph and another vs. State of Kerala)**. Paragraph 16 and 17 of the said judgment read as follows:

“16. Several questions arose for consideration before the High Court. The High Court indisputably had a limited role to play. We, as at present advised, are not inclined to accept the submission of Mr. Iyer that sub-sections (2) and (3) of Section 3 of the 1971 Act would operate in the same field. In our opinion, both operate in different fields. However, on a plain reading of the impugned order passed by the High Court, we are of the opinion that the High Court was not correct in its view in regard to its construction of Section 3(3) of the 1971 Act. The Tribunal, while exercising its power under Section 8 of the 1971 Act, had taken into consideration

the question which arose before it, viz., as to whether the appellants herein had intention to cultivate the land on the appointed day. Appointed day having been defined in the 1971 Act, the relevant aspect was the situation as it existed on that day, i.e. On 10/05/1971. For the purpose of attracting sub-section (3) of Section 3 of the 1971 Act, it was not necessary that the entire area should have been cultivated for arriving at a decision as to whether the owner of the land had the intention to cultivate or not. Also, it was required to be considered having regard to the activities carried on by the owner from the day of purchase till the appointed day. For the said purpose, subsequent conduct of the owner of the land was also relevant. Development of the land by plantation of rubber plants is not in dispute. The Explanation appended to Section 3(2) of the 1971 Act clearly suggests that cultivation would include cultivation of trees or plants of any species. Intention to cultivate by the owner of the land, we think, has to be gathered not only in regard to the fact situation obtaining at a particular time but also with regard to the subsequent conduct of the parties. If the activity in regard to cultivation of land or development thereof is systematic and not sporadic, the same also may give an idea as to whether the owner intended to cultivate the land. The words 'intend to cultivate' clearly signify that on the date of vesting the land in question had not actually been cultivated in its

entirety but the purchaser had the intention of doing so. Such intention on the part of the purchaser can be gathered from his conduct in regard to the development of land for making it fit for cultivation preceding to and subsequent to the date of vesting.

17. The High Court, in our opinion, was not correct in opining that for applying Section 3(3) of the 1971 Act, the cultivation of the property subsequent to the vesting cannot be taken into account. The High Court also was not correct in arriving at finding that there had been no evidence whatsoever that the owners intended to cultivate the land prior to 10/05/1971. As the provision contained in sub-section (3) of Section 3 of the 1971 Act clearly provides for exclusion of the operation of sub-section (1) thereof, the same has to be construed liberally. So construed, the conduct of the parties was a relevant fact. The High Court, in our opinion, therefore was not correct in ignoring the findings of the Tribunal. Also, the High Court should bestow its attention to the findings arrived at by the Tribunal having regard to the limited nature of the scope and ambit of appeal in terms of Section 8A of the 1971 Act and, particularly, in view of the fact that the order dated 21/02/1979 had not been appealed against. ”

14. Now comes to the question of 'burden of proof'. It is settled law that the burden of proof to establish the existence of

the ingredients is upon the claimant and on nobody else. This has been asserted by a Full Bench of this Court in **1995 (2) KLT 152 (State of Kerala vs. Chandralekha)**, wherein the law already declared by a Division Bench of this Court in **1990 (1) KLT 382 (*State of Kerala vs. Kunhiraman*)** was affirmed. The question is whether the said burden has been satisfactorily discharged by the respondent/applicant in the instant case. If the finding of the Tribunal as given in paragraph 8 is accepted, the answer cannot be anything other than the 'negative'. But the inference drawn by the Tribunal in paragraph 11 is something the other-way round; which virtually run contrary to each other.

15. In the above circumstance, this Court finds that the matter requires to be reconsidered in the light of the law declared by the Apex Court and this Court as to the ingredients of the relevant provision, the burden of proof and the circumstances which are to be established so as to have the benefit of Section 3(3) of the Act. Accordingly, we set aside the order passed by the Tribunal and remit the same for

reconsideration and finalisation in accordance with law.

Since the matter is an old one, we direct the Tribunal to have the proceedings finalised at the earliest , at any rate, within six months from the date of receipt of a copy of this judgment.

Appeal is allowed to the said extent. No cost.

**P.R. RAMACHANDRA MENON,
JUDGE**

**K. HARILAL,
JUDGE**