

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.SURENDRA MOHAN
&
THE HONOURABLE MRS. JUSTICE MARY JOSEPH

THURSDAY, THE 16TH DAY OF JULY 2015/25TH ASHADHA, 1937

MFA.No. 158 of 2011 ()

AGAINST THE ORDER/JUDGMENT IN OA 34/2008 of KERALA FOREST (VESTING
AND MANAGEMENT OF ECOLOGICALLY FRAGILE LANDS) TRIBUNAL, PALAKKAD
DATED 28-02-2011

APPELLANT(S)/RESPONDENTS::

1. STATE OF KERALA, GOVT.SECRETYARIAT
THIRUVANANTHAPURAM, REP.BY ITS SECRETARY TO
GOVERNMENT, DEPARTMENT OF FOREST
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.
2. CUSTODIAN OF ECOLOGICALLY FRAGILE
LANDS, FOREST HEADQUARTERS, THIRUVANANTHAPURAM.
3. THE DIVISIONAL FOREST OFFICER,
PALAKKAD.
4. THE FOREST RANGE OFFICER,
WALAYAR FOREST RANGE OFFICE, WALAYAR
PALAKKAD DISTRICT.

BY ADV.SPL. GOVERNMENT PLEADER SHRI. M.P.MADHAVANKUTTY

RESPONDENT(S)/APPLICANTS::

1. T.INDIRA NEITHIAR,D/O. NANIKUTTY
NEITHIAR, AMBATTU BUNGLOW, AKATHETHARA
PALAKKAD-8, REP.BY HER POWER OF ATTORNEY HOLDER
T.VIJAYAN, S/O.LATE NANIKUTTY NEITHIAR AND
E.K.K.ACHAN, AGED 53 YEARS, AMBATTU BUNGLOW
AKATHETHARA
2. T.SANTHAKUMARI NEITHIAR,
D/O.LATE NANIKUTTY NEITHIAR, RESIDING AT DO.
3. T.NALINI NEITHIAR, D/O.LATE NANIKUTTY
NEITHIAR, DO.
4. T.LEELA NEITHIAR,
D/O.LATE NANIKUTTY NEITHIAR, DO.
5. T.CHANDRIKA NEITHIAR,
D/O.LATE NANIKUTTY NEITHIAR, DO.

6. T.VIJAYAN, S/O.LATE NANIKUTTY NEITHIAR
AND E.K.K.ACHAN, AMBATTU BUNGLOW, AKATHETHARA
PALAKKAD-9.

R1-6 BY ADV. SRI.BABU JOSEPH KURUVATHAZHA
R BY ADV. SRI.T.K.BIJU (MANJINIKARA)
R1-R5 BY ADV. SRI.N.SHAMSUL HUDA

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON
16-07-2015, ALONG WITH WPC. 17647/2011, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

JJ

K. SURENDRA MOHAN & MARY JOSEPH, JJ.

M.F.A (Forest) NO.158 OF 2011 &
WPC 17647 OF 2011

Dated this the 16th July, 2015.

JUDGMENT

Surendra Mohan, J.

The State is in appeal challenging the order dated 28.2.2011 in O.A.34/2008 of the Kerala Forest (Vesting and Management of Ecologically Fragile Lands) Act, 2003 (the 'EFL' Act for short). The order under appeal has been passed on an application filed by the respondents under Section 10 of the EFL Act seeking a declaration that the application scheduled property having a total extent of 5.3760 hectares comprised in survey No:1/8A1A (resurvey No:187 pt) of Akathethara Village was not an ecologically fragile land. The application has been allowed by the Tribunal. WPC 17647/2011 is filed by the sixth respondent in MFA158/2011

seeking the issue of a writ of mandamus or any other appropriate writ or direction commanding the respondents, the Custodian of ecologically fragile lands to hand over the possession of the OA schedule property to the applicants forthwith. The order on the basis of which the relief has been sought is the order against which MFA 158/2011 has been filed. Since the issues are connected, both the appeal as well as the writ petition are considered and disposed of together. We shall consider the appeal first.

2. As already noticed above, the application was filed under Section 10 of the EFL Act seeking an order that the application scheduled property was not an ecologically fragile land. The case of the applicants before the Tribunal was that, the entire property that was scheduled to the application forms part of a large quarry and stone crusher unit functioning strictly in accordance with the provisions of law on the strength of statutory licences. Therefore it was contended that the property does not satisfy the definition of an ecologically fragile land contained in the EFL Act. In spite of the above,

the property has been notified by a notification published in the gazette dated 2.1.2001. The notification has been produced and marked as Ext.A12 on the side of the applicants and as Ext.B1 on the side of the respondents. It is the further case of the applicants that on realising that the land had been notified by a mistake, the Divisional Forest Officer had recommended for denotifying the land as per Ext.A13 dated 27.9.2005. The Forest Range Officer had forwarded the pro forma as per letter dated 1.12.2005 which is Ext.A14. The pro forma itself is marked as Ext.A15. In view of the above, it was contended before the Tribunal that, the land was liable to be exempted and the notification set aside.

3. The application was contested by the respondents. It was contended that, the property was originally the subject matter of O.A.964/1975. The said O.A was filed by the mother of the applicants under Act 26/1971 (The Kerala Private Forests (Vesting and Assignment) Act, 1971) (the 'Vesting and Assignment Act' for short). The said O.A was allowed by the Forest Tribunal upholding the contention of the

mother of the applicants that the land was liable to be exempted in view of the intention of the applicant to cultivate the same. Though the said order was the subject matter of challenge before this Court, at the instance of the State in MFA 65/1978, the same was dismissed by Ext.A2 judgment. A review petition 133/1984 preferred by the State was also dismissed on 18.11.1993. The case of the respondents before the Tribunal was that, though the said proceedings had ended in favour of the mother of the applicants the property had not been restored to her, since formalities like survey measurement of the properties etc were not completed. Therefore it was contended that the applicants could not claim either ownership or possession over the property. It was also contended that, the officials had booked a case under the Kerala Forest Act as O.R.9/1997 against the applicants for illegally running a stone quarry and carrying out blasting of rocks in the property in the possession of the State. The applicants had thereupon filed O.P.5167/1997 which was disposed of by this Court directing that the matter should be

agitated before the Magistrate's Court. At the same time, the interim order that was granted by this Court was directed to remain in force, until the case was disposed of by the Magistrate's Court. It was contended that, only an extent of 3.1615 hectares was occupied by the quarry and that the rest of the land was ecologically fragile land. The contention was that, the application scheduled property forms part of the catchment area of the Malampuzha Reservoir. It was also contended that, the land contained naturally occurring forest growth and trees like Kanjiram, Manjapavatta etc. Other medicinal plants were also available in the property according to the respondents.

4. The Tribunal considered the application on the basis of the evidence adduced in the case and by the order appealed against allowed the application declaring that the application scheduled property was not ecologically fragile land.

5. According to Shri.M.P.Madhavankutty, Special Govt. Pleader, as per Ext.A1 the order in O.A.964/75 and 965/75 the land in question has been exempted for the only reason

that the applicant was desirous of cultivating the same. Therefore the land that had been declared as a private forest under the Vesting and Assignment Act, continued to be private forest without losing its character as such, entitled only to the benefit of exemption for the reason that the same was intended to be cultivated. Therefore, such a private forest would come within the definition of "forest" contained in the EFL Act and would attract the definition of ecologically fragile land. It is further contended that, though a commission was taken out and an inspection of the property was conducted, the commission report Ext.C1 shows that there were grown up trees around the quarry that was found to be in existence. The land in question was contiguous with Government land on the western side which has been reported by the Commissioner to be land that was being converted into forest land by the Social Forestry Department. In view of the above, according to the learned Special Govtr. Pleader, the land was ecologically fragile land. The above aspect has not been taken note of by the Tribunal. The learned Special Govt.

Pleader finds fault with the Tribunal for having placed reliance on Exts.A13, A14 and A15 which are only copies of internal communications among the forest officials. The competent authority in so far as ecologically fragile lands were concerned is the Custodian of ecologically fragile lands. Therefore, the recommendation made by the subordinate officers does not and cannot bind the statutory authority who alone is entitled to take a decision in the matter. The counsel also places reliance on the decision of the Supreme Court in State of Haryana v. M.P. Mohla [(2007)1SCC 457] to drive home the point that an admission against law would not bind the State. The Custodian having issued the notification cannot be held bound by the stand taken by his subordinates in Exts.A13 and A14. It is the further contention of the learned Special Govt. Pleader that Exts.A1 and A2 proceedings do not inhibit the power of the State to declare a land as ecologically fragile land for the reason that, Section 3 of the Act opens with a non obstante clause that overrides anything contained in any other law for the time being in force, or in any judgment, decree or

order of any Court or Tribunal or in any custom, contract or other documents, with effect from the date of commencement of the Act. The land being ecologically fragile, the power of the State Government to notify the same under the EFL Act is not fettered in any manner by the previous proceedings evidenced by Exts.A1 and A2. Therefore, according to the learned Special Govt. Pleader the order of the Tribunal is unsustainable and liable to be set aside.

6. Adv. Babu Joseph Kuruvathazha appears for the respondents in the appeal. According to the learned counsel the land in question is the ancestral property that belonged to the family of the applicants before the Tribunal. Exts.A8 to A11 are referred to, to put forward a contention that, the quarry is being conducted on the strength of valid licences issued by various authorities. The Kerala State Pollution Control Board has issued a consent which has been subsequently renewed. Ext.A10 No Objection Certificate dated 13.6.2003 is issued by none other than the Divisional Forest Officer, who is the 3rd appellant. Reliance is placed on

Ext.C1 commission report to point out that, the land does not contain any forest growth. In accordance with the stipulations contained in the consent that has been granted by the Pollution Control Board, trees have been planted by the respondents to form a green belt around the quarry and crusher unit. Apart from the above vegetation the land is principally barren and devoid of any vegetation. According to the learned counsel, the remaining land that is not occupied by the quarry is being cultivated with crops like tapioca and ginger. The above being the state of affairs, according to the learned counsel the land does not satisfy the definition of an ecologically fragile land. The counsel also refers to the boundaries of the adjacent lands surrounding the property to point out that, there is no forest land anywhere nearby. Therefore, according to the learned counsel the appeal is only to be dismissed and the writ petition to be allowed as prayed for.

7. Heard. We have been taken through the records of the case in detail. It is not in dispute that, before the

notification under the EFL Act was issued the land had been notified under the Vesting and Assignment Act. The sustainability of the said notification was the subject matter of O.A.964/75 before the Forest Tribunal at the instance of the mother of the respondents in appeal. As per Ext.A1 order, the said O.A was allowed. It is true that, the O.A has been allowed finding that the land was liable to be exempted under the Act, taking into account the intention of the applicant to cultivate the same. On the basis of the above finding, a contention is advanced by the learned Special Govt. Pleader that the land though exempted under the provisions of the Vesting and Assignment Act nevertheless continued to be private forest and therefore should be considered to be forest land for the purpose of the definition of ecologically fragile land under the EFL Act. Viewed in the above perspective according to the learned Special Govt. Pleader the notification under the EFL Act is fully justified since it relates to forest land. We are not satisfied that the above contention could be accepted. It is true that, the land was exempted under the provisions of the

Vesting and Assignment Act taking into account the intention of the applicant therein to cultivate the same. Ext.A1 is dated 30.11.1977. The said order, as already noticed above, had been the subject matter of challenge before this Court in MFA 65/78 and thereafter in a review petition which were both dismissed. As per interim orders issued by this Court in a writ petition filed by the applicant they were in possession of the property and were conducting the quarry therein. Exts.A8 to A11 clearly show that, the quarry was functioning at least from the year 1990 onwards. It is the case of the respondents that they had been cultivating the property till then, though there is no evidence to support the above contention. Be that as it may, the notification under the EFL Act has been published as per Ext.A12 on 2.1.2001. Therefore, the quarry has apparently been functioning for about 11 years, prior to the issue of the said notification. The commission report shows that, there are craters present in the property evidencing that blasting of rocks had been continuing for a substantially long period of time.

8. The commission report Ext.C1 shows that a major portion of the property is occupied by the quarry and the stone crusher unit. The property is devoid of any other vegetation except grass. It is true that a green belt of trees has been created by the respondents which according to them is in compliance with the condition stipulated by the Kerala State Pollution Control Board. At any rate, nobody has a case that such trees had grown up naturally. Since there were trees planted and nurtured to form a green belt, they cannot be considered to be natural growth. In the above factual background, it has to be examined whether the land answers the definition of ecologically fragile land.

9. Section 2(b) is reproduced hereunder for convenience of reference:—

2. Definitions.—In this Act, unless the context otherwise requires,—

(b) “ecologically fragile lands” means,—

i) any forest land or any portion thereof held by any person and lying contiguous to or encircled by a reserved forest or a vested forest or any other

forest land owned by the Government and predominantly supporting natural vegetation; and

ii) any land declared to be an ecologically fragile land by the Government by notification in the Gazette under Section 4.”

As per the above definition, “an ecologically fragile land” means:

i) any forest land or

ii) any portion thereof held by any person

iii) lying contiguous to or

iv) encircled by a reserved forest or

v) a vested forest or

vi) any other forest land owned by the Government and predominantly supporting natural vegetation.

Therefore, in order to answer the above definition of an ecologically fragile land, the land has to be either a forest land or any portion thereof held by any person and lying contiguous to and encircled by a reserve forest. The above two conditions are to be satisfied conjunctively. In other words, the land has to be any forest land or any portion thereof and it

should also be lying contiguous to or encircled by reserve or vested forest or any other forest. It should in addition be predominantly supporting natural vegetation.

10. In the present case Ext.C1 commission report has shown the boundaries of the scheduled property. They have also been referred to in the order appealed against. It is clear that, the application scheduled property is bounded on all sides by private property except on the west where it abuts government land. The said Government land has been reported to contain trees which are aged approximately 7 to 8 years. There is also evidence of the fact that they were planted in the year 2001. Since the Commissioner has inspected the property in the year 2009 the approximate age reported appears to be more or less correct. Even assuming the said Government land to be forest land, it cannot be said that the application scheduled property answers the definition of ecologically fragile land. Admittedly a quarry and a stone crusher unit is functioning there. According to Ext.C1 commission report there are no trees or other vegetation in

the property except grass. Even the trees found to be present are not naturally grown trees. It is evident from Exts.A8 to A11 that, the quarry and metal crusher have been functioning in the property since 1990. Ext.A10 shows that, the quarry and crusher unit were functioning with the knowledge of the forest officials. Therefore, it cannot be presumed that the appellants were not aware of the existence of the said units in the property. In view of the above factual scenario it cannot be said that the property in question is an ecologically fragile land liable to be notified under the EFL Act. The Tribunal was therefore justified in allowing the application filed by the respondents.

11. In view of the above we find no grounds to interfere with the order appealed against. The appeal is only liable to be dismissed. We do so.

Since we have found that, the order of the Tribunal is liable to be sustained the petitioner in WPC 17647/2011 is entitled to succeed. The writ petition is therefore allowed. In the result:

i) MFA 158/2011 is dismissed.

ii) WPC 17647/2011 is allowed. The respondent in the writ petition is directed to handover possession of the O.A. Scheduled property, to the applicants within three months of the date of receipt of a copy of this judgment.

Sd/-
K. SURENDRA MOHAN
Judge

Sd/-
MARY JOSEPH
Judge

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