

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

MONDAY, THE 17TH DAY OF AUGUST 2015/26TH SRAVANA, 1937

MFA.No. 180 of 2008 ()

AGAINST THE ORDER/JUDGMENT IN OA 20/2008 of THE KERALA FOREST
(VESTING AND MANAGEMENT OF ECOLOGICALLY FRAGILE LANDS) TRIBUNAL,
PALAKKAD DATED 26-07-2008

APPELLANTS/APPLICANTS:

1. T.R. RADHAKRISHNAN IRS, COMMISSIONER OF CUSTOMS AND EXCISE
(RETD) 49/10, 8TH CROSS ROAD, SREERAM AVENUE, VADAVALLI,
COIMBATORE 641041. (BY POWER OF ATTORNEY HOLDER,
T.R. MOHANDAS, THE 2ND APPELLANT).
2. T.R. MOHANDAS, S/O. T.K. RAMACHANDRAN,
37/1, 7TH CROSS ROAD, SREERAM AVENUE
VADAVALLI, COIMBATORE 641041.
3. T.R. RAJESHWARY, W/O. S. MOHAN, A 3,
GAYATHRI APARTMENT, 56, WARRAN ROAD
MYLAPORE, CHENNAI
(REPRESENTED BY HER POWER OF ATTORNEY
HOLDER T.R. MOHANDAS, 2ND APPELLANT HEREIN).

BY ADV. SRI. P. RAMNDRAN (SR.)

RESPONDENTS/RESPONDENTS:

1. STATE OF KERALA, REPRESENTED BY THE
SECRETARY, FOREST DEPARTMENT, GOVERNMENT OF KERALA
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.
2. THE CUSTODIAN OF EFL & CCF (ECO & W.L),
FOREST HQ, VAZHUTHAKKADU, THIRUVANANTHAPURAM-14.
3. THE CUSTODIAN OF VESTED FOREST, ARANYA
BHAVANOLAVAKKODE, PALAKKAD DISTRICT.

R BY SPL. GOVERNMENT PLEADER SRI. M. P. MADHAVANKUTTY

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON
17-08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

AV

**K. SURENDRA MOHAN
&
MARY JOSEPH, JJ.**

M.F.A.No.180 of 2008

Dated this the 17th day of August, 2015.

J U D G M E N T

Surendra Mohan, J.

The appellants are the applicants in Original Application No.20/2008 filed under Section 10 of the Kerala Forests (Vesting and Management of Ecologically Fragile Lands) Act, 2003 (hereinafter referred to as the 'EFL Act' for short). The appellants had approached the Forest Tribunal challenging a notification issued by the respondents under Section 3 of the EFL Act.

2. The appellants jointly own an extent of 18.01 acres of land in Pirayiri Village of Palakkad District. The property originally belonged to the grandfather of the appellants. Upon death of the grandfather, the property devolved upon their father and on the death of their father, the appellants have succeeded to the same. The appellants assert absolute ownership, possession and right to enjoyment, in respect of the property.

3. In the year 1976, proceedings were initiated under the Kerala Private Forests (Vesting and Assignment) Act, 1971 (hereinafter referred to as the 'Vesting and Assignment Act' for short). The said proceedings were the subject matter of O.A.No.412/1976 before the Forest Tribunal. The Forest Tribunal by

its order dated 27.03.1987 found that, the land was not a private forest. However, in spite of the said order, according to the appellants, the land was not restored to their possession, for the reason that, according to the Revenue Authorities, the survey numbers shown in the original deed were different from the order of the Forest Tribunal. In view of the above confusion in the survey numbers, the appellants filed a petition for correction of the survey numbers in the order of the Forest Tribunal by filing I.A.No.1/1992. However, the Forest Tribunal rejected the request. The appellants thereupon challenged the said order in O.P.No.13649 of 1994 before this Court. This Court allowed the said writ petition and directed the Forest Tribunal to reconsider the petition. Accordingly, the petition was reconsidered and by Ext.A3 order dated 19.03.1998, the petition was allowed. In spite of the above, the land was not restored to the appellants.

4. While so, the father of the appellants died. Thereafter, the appellants filed O.P.No.20814/2001 before this Court seeking appropriate orders for restoration of possession of the property. As per judgment dated 26.07.2001, the writ petition was allowed and a direction to restore possession of the land to the appellants within a period of six months was issued. However, the land was not restored to the possession of the appellants in spite of the above order.

5. In the above circumstances, the State filed M.F.A.No.338/2003 before this Court against Ext.A3 order of the Forest Tribunal allowing correction of the survey numbers. The appeal was filed along with a petition for condonation of the delay in filing the appeal. The petition for condonation of delay was dismissed by a Division Bench of this Court by Ext.A6 order. Consequently, by Ext.A5 judgment, M.F.A.No.338/2003 was also dismissed. Thus, the proceedings initiated under the Vesting and Assignment Act, came to an end.

6. According to the appellants, thereafter by a communication Ext.A8 dated 23.12.2006 the appellants were informed by the Divisional Forest Officer, Palakkad that their land had been notified under Section 3(1) of the EFL Act, by virtue of a notification dated 11.09.2006 published in the official gazette dated 10.10.2006. Faced with the above situation, the appellants approached the Custodian (Ecologically Fragile Lands) and Chief Conservator of Forests seeking a revocation of the notification. However, their request was rejected. Thereupon, the appellants challenged the rejection of their request before this Court in W.P.(C).No.5050/2007. The said writ petition was disposed of by judgment dated 18.02.2008 relegating the appellants to their remedy of approaching the Forest Tribunal. It was pursuant to the said judgment that, the appellants had filed O.A.No.20/2008 before the

Forest Tribunal as stated above. Their application has been rejected by the Tribunal finding that, the property of the appellants is private forest, that the same is lying contiguous to vested forest on the east, south and west and that, the circumstances clearly established that the land in question comes within the meaning of Ecologically Fragile Land under Section 2(b) of the EFL Act. The appellants are aggrieved by the said order. The appellants have filed I.A.No.2734/2012 under Order XLI Rule 27 for the permission to produce an additional document Annexure A1, copy of the revised order passed by the Forest Tribunal, Palakkad in I.A.No.239/1985 in O.A.No.412/1976. It is stated that, originally the Tribunal had allowed exemption of only 7.50 acres of land, while dismissing the claim of the appellants with respect to the rest of the property. The said order was reviewed at the instance of the father of the appellants and thereafter, the revised order Annexure A1 was passed.

7. According to the learned Senior Counsel Sri.P.Raveendran who appears for the appellants, the Forest Tribunal has in Annexure A1 order found that, the property in question was not a private forest, as defined under the Vesting and Assignment Act. In view of the above finding, that has become final and binding inter parties with the dismissal of M.F.A.No.338/2003, it is not open to the respondents to contend that, the property of the appellants answers

the definition of an Ecologically Fragile Land contained in Section 2 (b) of the EFL Act. In view of the above, it is further contended that the impugned proceedings issued under the EFL Act are unsustainable and liable to be set aside. The property in question is not one that supports any natural vegetation that could be described as a forest but, is predominantly barren land covered with rock formations. Therefore, according to the learned Senior Counsel, the Tribunal erred in dismissing the application submitted by the appellants finding that, the land was private forest.

8. According to Adv.Sri.M.P.Madavankutty, the learned Government Pleader who appears for the respondents, the additional document sought to be produced under Order XLI Rule 27 cannot be accepted in evidence for the reason that, necessary conditions for the receipt thereof are not satisfied in the present case. The learned Government Pleader points out that, in Ext.A1 revised order there is a further finding by the Forest Tribunal that, the land was liable to the exempted under the Vesting and Assignment Act. Our attention has been drawn to the definition under Section 2(f) of the Vesting and Assignment Act to point out that, any land that does not come within the exemptions enumerated therein would qualify as a private forest. The present land being land not specifically exempted under the Vesting and Assignment Act, is private forest, according to the learned

Government Pleader. The learned Government Pleader also places reliance on the observations of another Division Bench of this Court in paragraph 116 of the decision reported in ***Planters Forum v. State of Kerala [2015 (2) KLT 783]*** to mount a contention that, the order of the Forest Tribunal, Ext.A1 on which reliance has been placed, cannot be relied upon for the purpose of determining the issues that arise for consideration under the EFL Act. The opening words of Section 3(1) is also relied upon to point out that, by employing the *non obstante* clause findings in all judgments to the contrary have been specifically excluded by the enactment. It is the further contention of the learned Government Pleader that, the burden of proving that the land that has been notified is one that does not answer the definition of an Ecologically Fragile Land is squarely on the applicant and in this case, on the appellants. They have not discharged the said burden. Annexure C1 and C1(a) reports of the Advocate Commissioner are referred to, to point out that, according to the Commissioner the land was not capable of being identified on the basis of its boundaries. It is also pointed out that, on and from the date of commencement of the Act, the land in question being an Ecologically Fragile Land has vested in the State and therefore, the delay in the issue of a notification, Ext.A8 is of no consequence at all. For the above reasons, it is contended that the Tribunal has rightly dismissed the application of the appellants.

9. Heard. We have been taken through the records of the case, both oral and documentary. Arguments have been addressed before us by the counsel on both sides in detail, placing reliance on the decisions of this Court on the point. We have considered the rival contentions anxiously.

10. The sequence of events leading up to the notification that has been marked by the Tribunal as Ext.A8 are not in dispute. Proceedings had been taken against the land of the appellants in the year 1976 under the Vesting and Assignment Act alleging that, the land was private forest. The said notification had been challenged by the father of the appellants in O.A.No.412/1976 before the Forest Tribunal. It is not in dispute that, Ext.A1 is the revised order passed by the Tribunal on the said application. Though objections have been raised against the admissibility of Ext.A1 revised order, we are not satisfied that the objections have any substance. This is for the reason that, Ext.A1 is an order to which the respondents herein were also parties. Therefore, the same is an order that is binding inter parties. According to the affidavit filed in support of the petition to receive the said document, the explanation for non production thereof before the Forest Tribunal is that, the second appellant had entrusted the said document with their lawyer for being produced before the Tribunal. The fact that the said document had not been produced was

noticed, only when the order appealed against was received. No counter affidavit has been filed disputing the above statement. Therefore, we accept the explanation as sufficient reason for its production at the appellate stage.

11. A perusal of Ext.A1 shows that, the Tribunal has considered the question as to whether the land could be described as private forest coming within the definition thereof contained in the Vesting and Assignment Act. It has been held that, the property of the appellants was not a private forest as defined under the Act. The said finding has become final and binding inter parties. Therefore, what has to be examined is whether the property that has been excluded from the provisions of the definition of private forest contained in the Vesting and Assignment Act, would come within the definition of an Ecologically Fragile Land, as defined by the EFL Act.

12. The definition of Ecologically Fragile Land contained in Section 2(b) of the Act reads as follows :

“(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, in order to be an Ecologically Fragile Land, the land has to be :

- i. any forest land or
- ii. any portion thereof held by any person and
- iii. lying contiguous to or
- iv. encircled by a reserved forest or a vested forest or any other land owned by the Government and
- iv. predominantly supporting natural vegetation.

It could also be any land declared to be ecologically fragile land by Government notification under Section 4. It is clear from the above definition that, the land has to be any “forest land”. The above expression has not been defined by the Act but, “forest” and “land” have been separately defined. Sub Sections (c), (d) and (e) of Section 2 read as follows :

- “(c) “forest” means any land principally covered with naturally grown trees and undergrowth and includes any forests statutorily recognised and declared as reserved forest, protected forest or otherwise, but does not include any land which is used principally for the cultivation of crops of long duration such as tea, coffee, rubber, pepper, cardamom, coconut, arecanut or cashew or any other sites of residential buildings and surroundings essential for the convenient use of such buildings;
- (d) “land” includes rivers, streams and its origin and other water bodies;
- (e) “natural vegetation” means a growing stock predominantly of a plant species or of a number of plant species occurring naturally on the land;”

13. The above definitions make it clear that, forest means any land principally covered with naturally grown trees and undergrowths and includes forests statutorily recognised and declared as reserved forest, protected forest or otherwise. Therefore, the expression forest would include any land that is principally covered with naturally grown trees and undergrowths. It would also include forests statutorily recognised and declared as reserved forest, protected forest or otherwise. In the present case, the allegation of the respondent State was that, this particular land was private forest. The said allegation has been found against by the Forest Tribunal in O.A.No.412/1976, as per Ext.A1 judgment. Therefore, the land that we are presently concerned is not a forest that is statutorily recognised or declared as any kind of forest. In view of the above, what requires to be examined is whether the land would answer the first part of the definition of forest, namely, whether it is land principally covered with natural grown trees and undergrowths. The use of the expression “principally covered” presupposes that, a substantial portion of the land should be covered with such “natural grown trees and undergrowths”. Natural vegetation has been defined as the growing stock predominantly of a plant species or of a number of plant species occurring naturally on the land. It is also necessary to bear in mind that, the definition has to be satisfied as on the date of coming into force of the EFL

Act, i.e. the 2nd day of June 2000. It is necessary to scan the evidence available before us to find out whether the land in question is one that comes within the definition of “forest” contained in Section 2(c) of the Act.

14. The proceedings under the EFL Act were initiated on the basis of Ext.A12. Ext.A12 is a statutory proforma by which the Divisional Forest Officer, Palakkad has recommended to the Conservator of Forests and Custodian of Vested Forests that the property in question is an ecologically fragile land. The property has been shown to be comprised in the survey numbers mentioned in Ext.A12 and the extent is shown as 18.01 acres. Serial No.9 of Ext.A12 describes the boundaries of the land in question. The northern boundary is shown to be the Kalpathy river and private property belonging to one V.V.Krishnan Moothan, son of Ponnappa Moothan. Reference to the private parties who own the abutting properties are also mentioned as part of the northern boundary of the property. In short, the description clearly shows that, the northern boundary is comprised of private forest. The eastern boundary is shown as 2004 medicinal plantation. It is admitted that, the medicinal plantation belongs to the State. It is clear from the entry in Ext.A12 that the plantation is of the year 2004 whereas, the Act has come into force on 02.06.2000. The southern boundary is described as forest and road while the western boundary is

described as forest and school. Serial No.10 in Ext.A12 specifically poses a question as to whether the property is surrounded by forest land. The answer given is that it is not. Serial No.11 poses a question as to whether any portion of the property is lying contiguous to forest land. The answer has been given in the affirmative. Serial No.12 requires furnishing of details regarding the sides of the property that are lying contiguous to forest land. In answer to the above query, it is seen stated in A12 that, the eastern portion is entirely forest land. The above information is in sharp contrast to what has been stated at Serial No.9. As already noticed above, the eastern boundary is shown to be the medicinal plantation of the year 2004. Therefore, the answer given to query at Serial No.12 appears to be factually incorrect. With respect to the southern side, what is stated is that there is forest land up to five metres. The above information also lacks clarity for the reason that, at Serial No.9 what is stated is that there is forest land as well as road on that side. Ext.A12 further shows that, the property is mostly barren. At Serial No.14 to the query regarding availability of naturally grown trees what is stated is that about 1000 trees were available aged about 2 to 6 years. The date of Ext.A12 being 05.07.2006, the only conclusion possible is that the trees were not available in the property on 02.06.2000, the date of coming into force of the enactment. Further, at Serial No.15 it is stated in

Ext.A12 that the natural vegetation available in the property has been estimated to be 35 to 50%. It is also made clear at Serial No.18 that, the property is not private forest. It is clear from Ext.A12 that, the land is not one principally covered with naturally grown trees and undergrowths, which is a necessary condition for attracting the definition under Section 2(c) of the Act. As rightly contended by the learned Senior Counsel who appears for the appellants, the natural vegetation have appeared after the property was taken possession of by the State in the year 1976. The land has been left without being put to any use, from 1976 onwards, permitting the undergrowths to grow and become the present trees.

15. Ext.A3(b) is the final report submitted by the Advocate Commissioner in O.A.No.412/1976. He had inspected the properties on 05.02.1998 and on 13.02.1998. He has stated in paragraph 2 of Ext.A3(b) that, the properties “are part of a hillock with no trees in it” and that, “at the time of inspection, the Forest Officials, the petitioner and the Village Officer told me that, the properties are part of “Kurissimala”. It is necessary to notice that, the Advocate Commissioner had inspected the property under orders of the Forest Tribunal, after giving notice to the respondents also. The Forest Officials, Village Officer as well as other Officials were present. The Advocate Commissioner had visited the property and had survey measured the same, since it was necessary to properly identify the

property for the purpose of passing orders on the correction petition filed by the petitioner to correct the survey numbers. The boundaries of the property have been given in Ext.A3(b), as follows :

“The eastern boundary of item No.1 is കുരിച്ചിമലയും, 1-ാം, 2-ാം നമ്പ്രം. It is found to be correct. The northern boundary of item No.1 is described as “ തെങ്ങുതോട്ടത്തിന്റെ തെക്കുള്ള ചാലിന്റെ തെക്കുഭാഗം നീളിപറമ്പ്.”. But at present there is a coconut garden having coconut trees aged 25 to 30 years. But that boundary property is plane on the ground. The eastern boundary of item No.2 is Kurichimala which is correct. The southern boundary of the said item is shown as part of the property of item No.1. At present it's western boundary is the coconut garden mentioned earlier and its northern boundary is shown as river. Even at present it's northern boundary is Kalpathi river. The eastern boundary of item No.3 is Kurichimala. It is correct. The southern boundary shown in the document is the property of Venkiteswara Pattar. In Ex.X-1 the jenmi of R.S.3/7 is one Parameswara Pattar's son Venkiteswara Iyer. The western boundary of item No.3 is item Nos.1 and 2. It's northern boundary is shown as കുരിച്ചിമലയും 1-ാം നമ്പ്രിൽ പെട്ട സ്ഥലവും.. It may be part of item No.1 but reference to Kurichimalayum is confusing.”

The Advocate Commissioner has stated in Ext.A3(b) that on the basis of the field measurement book and the particulars given by him in his report, it was possible to clearly identify the schedule properties. It is clear from the above document that, in the year 1998, when the property was inspected by the Advocate Commissioner there were no trees available therein. Ext.C1(a) final report submitted by the Advocate Commissioner in O.A.No.20/2008

to the Forest Tribunal also describes the property as extending sloping over the side of a hill. Portions that were level comprised of rock formations and other vegetations. No mention is made therein about any trees that would answer the definition of a forest.

16. The above being the factual scenario, we are not satisfied that the property is one that would come within the definition of an Ecologically Fragile Land as defined by Section 2(b) of the EFL Act. The property is neither a vested forest, reserved forest, protected forest or private forest nor is it a land principally covered with naturally grown trees and undergrowths. The evidence available in this case clearly shows that, the property is barren, comprised of rocky formations and naturally occurring undergrowths forming part of the steep slope of a hill. The boundaries do not show that, it is surrounded by forest land or that, it is contiguous to any forest land except to the extent noted hereinabove. The Tribunal has however, placed reliance on the evidence of RW1 to find that, the property in dispute is forest land and that, the same is lying contiguous to vested forest on the east, south and west. The above conclusion is unsupported by the evidence on record and therefore, the same is unsustainable.

17. The learned Government Pleader has put forward a contention that, Section 2(f) of the Vesting and Assignment Act enumerates under it, the categories of lands excluded from the

definition of private forest by the said provision. Section 2(f) of the Vesting and Assignment Act reads as follows :

“(f) “private forest” means-

(1) in relation to the Malabar district referred to in sub-section (2) of Section 5 of the State Reorganisation Act, 1956 (Central Act 37 of 1956)-

(i) any land to which the Madras Preservation of Private Forests Act, 1949 (Madras Act XXVII of 1949), applied immediately before the appointed day excluding-

(A) lands which are gardens or nilams as defined in the Kerala Land Reforms Act, 1963 (1 of 1964);

(B) lands which are used principally for the cultivation of tea, coffee, cocoa, rubber, cardamom or cinnamon and lands used for any purpose ancillary to the cultivation of such crops or for the preparation of the same for the market.

Explanation.- Lands used for the construction of office buildings, godowns, factories, quarters for workmen, hospitals, schools and playgrounds shall be deemed to be lands used for purposes ancillary to the cultivation of such crops;

(C) lands which are principally cultivated with cashew or other fruit bearing trees or are principally cultivated with any other agricultural crop and

(D) sites of buildings and lands appurtenant to and necessary for the convenient enjoyment or use of, such buildings;

(ii) any forest not owned by the Government, to which the Madras Preservation of Private Forests Act, 1949 did not apply, including waste lands which are enclaves within wooded areas.

(2) in relation to the remaining areas in the State of Kerala, any forest not owned by the Government, including waste lands which are enclaves within wooded areas.

Explanation.- For the purpose of this clause, a land shall be deemed to be a waste land notwithstanding the existence thereon of

scattered trees or shrubs;"

It is pointed out by the learned counsel that, the property in question is located in the erstwhile Malabar District and therefore, unless the land could be termed as coming within one of the exclusions enumerated from A to B, the same would be private forest. The exclusion contained in C to D are lands used for cultivation. The types of cultivation which are entitled to exemption under the said provision are specified there. However, the said contention of the learned Government Pleader cannot be accepted for the reason that, admittedly, in the present case proceedings had been initiated under the Vesting and Assignment Act. The said proceedings were the subject matter of O.A.No.412 of 1976. It has been found by the Forest Tribunal that, the land is not a private forest as defined under the Vesting and Assignment Act. The said finding has become final and binding inter parties, since M.F.A.No.338 of 2003 filed by the State was also dismissed as per Ext.A5 judgment. The property having been found not to be private forest by the said proceedings, no contention to the contrary can be advanced on behalf of the State. Therefore, the said contention is rejected.

18. The learned Government Pleader has placed reliance on the decision of this Court in ***Planters Forum v. State of Kerala [2015 (2) KLT 783]*** to contend that, Ext.A5 judgment does not

have any effect on the question as to whether a land is an ecologically fragile land under the EFL Act or not. The declaration under the Vesting and Assignment Act that, a particular land is private forest does not in any way affect the power of the Government to issue a notification declaring the very same land to be an ecologically fragile land under the EFL Act. Paragraph 115 and 116 of the said judgment are pressed into service to drive home the above point. The counsel also places reliance on the opening words of Section 3(1) of the EFL Act to point out that, the said provision has been given overriding effect by the *non obstante* clause, over the judgment decree or order of any Court or Tribunal. Therefore, the notification in this case, Ext.A8 issued under Section 3(2) of the EFL Act, has the effect of overriding Ext.A3 order of the Forest Tribunal also. Paragraph 115 of the judgment in ***Planters Forum v. State of Kerala*** (supra) reads as follows :

“115. Whether Section 3(1) of the Act overrides the judgment given by Forest Tribunal, High Court and Supreme Court in the context of 1971 Act is a question to be answered. The 1971 Act was in force with effect from 10.05.1971. i.e., the vesting of ownership and possession of all private forests in the State was with effect from 10.5.1971. Private Forest is defined in Section 2(f) and Section 3(2) of the Act which exempts the land comprised in private forests held by an owner under his personal cultivation and is within the ceiling limit applicable with effect from 10.5.1971. When vesting of private forests took place on 10.5.1971 by virtue of operation of law, the judgments of Forest Tribunal, High Court and Supreme Court

obviously determined the issue of vesting of private forests as on 10.05.1971. The 2003 Act has been enforced with effect from 02.06.2000 and vesting of Ecologically Fragile Lands in the State shall be deemed to have been taken place on 02.06.2000. Thus the Ecologically Fragile Land as defined in the 2003 Act under Section 2(b) read with Section 2(c) is of a particular category of land. There cannot be any assumption that the land which had already been vested with the state has again to be vested in the State on 02.06.2000. The relevant date for vesting of Ecologically Fragile Land under Section 3 being entirely different from vesting of private forest under the 1971 Act or exemption from private forest as on 10.05.1971 are two distinct and different happenings and events. The *non obstante* clause in Section 3(1) is to give overriding effect to Section 3(1) despite any judgment/decreed or order of Tribunal. The judgments rendered in the context of the 1971 Act were on a different operation of law and the definition of Ecologically Fragile Land being different from private forest under the 1971 Act, Section 3(1) of the 2003 Act can in no manner be faulted. The judgment and decree or order which is referred to in Section 3(1) of the 2003 Act are obviously the judgment and decree or order which were rendered prior to 02.06.2000. The 2003 Act envisaged definition on the concept i.e. Ecologically Fragile Land, and gave the overriding effect to override the judgment or order is fully covered within the valid legislation and Section 3(1) cannot be treated to be a legislation overriding the judgment rendered on the 1971 Act.”

There can be no dispute regarding the proposition that has been laid down by the Division Bench in the above passage. The EFL Act as well as the Vesting and Assignment Act operate on the basis of distinct and different happenings and events. Therefore, the fact that, the notification issued by the State under the Vesting and

Assignment Act had been set aside by the Forest Tribunal in the earlier proceedings does not affect the power of the State in issuing a notification under Section 3(2) of the EFL Act. However, we notice that, the very same judgment has gone on to consider the effect of the order rendered by the Tribunal in such proceedings initiated earlier under the Vesting and Assignment Act. The above aspect has been discussed in paragraph 116 and 117 of the said judgment, which are reproduced hereunder :

“116. The second part of the issue is as to whether judgment/order of Forest Tribunal, High Court and Supreme Court in the context of 1971 Act declaring the properties of the petitioners as plantation are relevant or not. It is relevant to note that the scope of *non obstante* clause in a Statute has been examined by the Apex Court in several cases. In State of Tamil Nadu v. Arooran Sugars Ltd. (supra) the Supreme Court has laid down in paragraph 16 as quoted above. When Section 3(1) gives an overriding effect, overriding the judgment/decreed or order of Court or Tribunal, the determination of Forest Tribunal, High Court or Supreme Court in the context of 1971 Act can in no way affect the vesting of Ecologically Fragile Land within the meaning of 2003 Act with effect from 02.06.2000. The binding effect of judgment of any issue relevant for vesting of Ecologically Fragile Land has been taken away expressly by Section 3(1). Although the judgments rendered in the context of 1971 Act are not binding but whether such judgment can be held to be relevant for any purpose is also to be examined. The judgments rendered by Forest Tribunal, High Court or Supreme Court are relevant under Section 42 of Indian Evidence Act. Section 42 of the Evidence Act which is relevant for the purpose of this case is quoted as below:

“42. Relevancy and effect of judgments, orders or decrees, other than those mentioned in Section 41.--

Judgment, orders or decrees other than those mentioned in Section 41 are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.”

117. In view of the definition of Forest as contained in Section 2(c) and the Ecologically Fragile Land as contained in Section 2(b) of the 2003 Act which exclude the land which is principally covered with naturally grown trees and undergrowth and includes any forests statutorily recognised and declared as reserved forest, protected forest or otherwise, but does not include any land which is used principally for the cultivation of crops of long duration such as tea, coffee, rubber, pepper, cardamom, coconut, arecanut or cashew or any other sites of residential buildings and surroundings essential for the convenient use of such buildings. Thus the lands which are used principally for the cultivation shall not be Ecologically Fragile Land and the issue whether they are principally used for cultivation of crops is relevant and is to be enquired into. Thus the judgments which were rendered by Forest Tribunal, High Court and Supreme Court under the 1971 Act are clearly relevant judgments within the meaning of Section 42 of the Indian Evidence Act and can be looked into as a piece of evidence for determining the issue. We are thus of the view that any enquiry or decision under Section 19 or Section 9(3) and 10(b), the judgments delivered in the context of plantation for personal cultivation etc are relevant and can be relied for in appropriate cases.”

What emerges from the above is that, an order passed under the Vesting and Assignment Act would be relevant in terms of Section 42 of the Indian Evidence Act. Therefore, the previous order is not

to be eschewed in toto but is admissible to the extent permitted by Section 42 of the Evidence Act. Viewed in the above perspective, the findings in Ext.A1 regarding the nature of the land at the time of passing of the said order and the findings in relation thereof are relevant and admissible in deciding whether the land answers the definition of an Ecologically Fragile Land under the EFL Act. It is true that Section 3(1) opens with a *non obstante* clause and excludes anything contained in any judgment, decree, order of any Court or Tribunal or in any land contract or other documents transfer and vest in the Government, with effect from the date of commencement of the Act. Therefore, the effect of Section 3(1) is to extinguish all rights conferred on a private land by any law in force, judgment, decree or order of any court or Tribunal. Section 3 of EFL Act reads as follows :

“3. Ecologically fragile land to vest in Government.- (1) Notwithstanding 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 this Act, the ownership and possession of all ecologically fragile lands held by any person or any other form of right over them, shall stand transferred to and vested in the Government free from all encumbrances and the right, title and interest of the owner or any other person thereon shall stand extinguished from the said date.

(2) The lands vested in the Government under subsection (1) shall be notified in the Gazette and the owner shall be informed in writing by the custodian and the notification

shall be placed before the Advisory Committee constituted under Section 15 for perusal.”

The effect of the above provision is, therefore, only to extinguish the rights conferred on private parties by a law in force or by a judgment or order of a Court or Tribunal or by a custom. However, the findings arrived at in such judgments or orders would nevertheless be evidence in respect of the condition of the land, especially where a contention is raised, that the land does not come within the definition of an Ecologically Fragile Land under the Act. As already found above, the land in the present case is one that does not answer the definition contained in Section 2(b) of the EFL Act.

19. A further contention has been raised by the learned Government Pleader that, the burden of proving that the land is not an ecologically fragile land is on the person who challenges the notification issued under Section 3(2) and that, the appellants in the present case have not discharged the said burden. The learned Government Pleader has relied upon a Full Bench Decision of this Court in ***State of Kerala v. Chandralekha [1995 (2) KLT 152] (SC)*** to support the above contention. We have already found that, there is sufficient evidence available in the present case to support the conclusion that, the land involved in the present case is not one coming within the definition of an Ecologically Fragile Land contained in Section 2(b) of the Act. The appellants have in this

case, discharged their burden and proved that, the notification that is under challenge in this case has been issued without any justification. The Tribunal has seriously erred in not referring to, discussing or considering the evidence available in support of the claim put forward by the appellants. The Tribunal has proceeded to find that the land was an ecologically fragile land, placing implicit reliance on the oral testimony of RW1. The said finding, in view of the overriding evidence referred to by us, is unsustainable.

For the foregoing reasons, this appeal is allowed. The order of the Forest Tribunal dated 26.07.2008 in O.A.No.20/2008 is set aside. Ext.A8 notification and declaration dated 11.09.2006 issued by the 1st respondent under Section 3(2) of the Kerala Forest (Vesting and Management of Ecologically Frakgile Land) Act, 2003 is quashed.

Sd/-
K. SURENDRA MOHAN, JUDGE

Sd/-
MARY JOSEPH, JUDGE

AV

/True Copy/

P.A to Judge