

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

MONDAY, THE 5TH DAY OF JANUARY 2015/15TH POUSHA, 1936

WA.No.1230 of 2009 IN OP.6769/2003

AGAINST THE JUDGMENT IN OP 6769/2003 of HIGH COURT OF KERALA
DATED 20-02-2009

APPELLANTS/ADDITIONAL PETITIONERS 2 TO 5 IN O.P:

1. ANNAMMA KURIAN, W/O.LATE JOSEPH KURIAN,
KANNAMPUZHA HOUSE, MALAYATTOOR.

2. JOSEPH KURIAN, S/O.DO. IN DO. DO.

3. SEBASTIAN KURIAN, S/O.DO. IN DO. DO.

4. ALEX KURIAN, S/O.DO. IN DO. DO.

BY SRI.S.V.BALAKRISHNA IYER, SENIOR ADVOCATE.
ADVS. SRI.K.JAYAKUMAR
SRI.P.B.KRISHNAN

RESPONDENTS/RESPONDENTS IN O.P:

1. UNION OF INDIA,
REPRESENTED BY ITS SECRETARY TO GOVERNMENT
MINISTRY OF ENVIRONMENT AND FOREST, NEW DELHI.

2. STATE OF KERALA, REPRESENTED BY
THE SECRETARY TO GOVERNMENT, FOREST
WILD LIFE DEPARTMENT, SECRETARIAT, TRIVANDRUM.

3. DEPUTY CONSERVATOR OF FOREST (C),
MINISTRY OF ENVIRONMENT & FOREST
GOVERNMENT OF INDIA, REGIONAL OFFICE, KENDRIYA SADAN
4TH FLOOR, E & T WINGS, 17 MAIN ROAD
2ND BLOCK, KARAMANGOLA, BANGALORE.

4. PRINCIPAL CHIEF CONSERVATOR OF FORESTS,
FOREST HEADQUARTERS, VAZHUTHACAUD, TRIVANDRUM.

5. ASST.CONSERVATOR OF FOREST,
NATURE STUDY CENTRE, KALADY, MALAYATTOOR.

R1 & R3 BY SRI.P.PARAMESWARAN NAIR,ASST.SOLICITOR GENERAL
R2, R4 & R5 BY SRI.M.P.MADHAVANKUTTY,SPL.GP FOR FOREST
R1& R3 BY SRI.N.NAGARESH, ASSISTANT SOLICITOR GENERAL

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 05-01-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ANTONY DOMINIC & ALEXANDER THOMAS, JJ.
=====

Writ Appeal No. 1230 of 2009
=====

Dated this the 5th day of January, 2015

J U D G M E N T

Antony Dominic, J.

This appeal is filed by the petitioners in OP No.6769/2003 which was filed by them challenging Exts.P6 and P7, the communications issued by respondents 5 and 3 respectively. The learned single Judge dismissed the OP and therefore, this appeal.

2. We heard the learned senior counsel for the appellants and the learned Government Pleader appearing for respondents 2, 4 and 5.

3. Briefly stated, the facts of the case are that the appellants are the legal heirs of one Joseph Kurian, who owned about 70 acres of land in Sy.Nos.426/1-2, 407/1, 407/2, 429 and 430 (Re.sy.Nos.104/4, 103/3, 114/7, 97/4, 97/7, 112/8 and Block No.23) of Malayattoor Village. The property lies along the northern side of the Periyar river and is separated from the river by a strip of forest land of about 150 meters width, which is a teak plantation known as Arattukadavu Teak Plantation Reserve. The 70 acres of land

mentioned above is an agricultural property, where, according to the appellants, various agricultural crops are grown.

4. It is stated that the only source of water to this land is from Periyar river. Based on an application made by the deceased Joseph Kurian, the Travancore Cochin Government issued order No.E Dis.88/54.Fd.D dated 17th of February, 1954, permitting him to erect a pump house and to construct two channels of about 15 chains, one in old Sy.No.411 and the other in old Sy.No.427 of Malayattoor Village. Accordingly, Ext.P1 agreement dated 9th of July, 1954 was entered into between late Sri.Joseph Kurian and the Divisional Forest Officer, Malayattoor, acting for and on behalf of the Government of Travancore-Cochin. The agreement contains various terms and conditions as per which the deceased was permitted to erect the pump house and to construct two channels through the survey numbers mentioned above.

5. It is also to be mentioned that condition No.5 of the agreement provided that the permission to erect a pump and to construct channels shall never be deemed to create an easement right in favour of the grantee nor can any such claim be made by others through him. Condition 9 of the agreement provides that

the right granted thereunder shall be subject to renewal of sanction every year on the 1st day of April and that the grantee shall make appropriate application in writing on or before the first day of March of every year for renewal. It is stated that the lease was being renewed periodically.

6. Subsequently, on 31/5/1989, Ext.P2 lease deed was executed between the Governor of Kerala on the one part and the deceased on the other part. By this agreement, lease was granted for a further period of ten years and the rate thereof is also specified in the agreement. Clause 11 of Ext.P2 clearly reiterates that the Government shall have full control over the land on which the pump house is erected and through which the channels are opened. It is also made clear that the lessee shall surrender the area covered by the pump house and channel as and when required by the Government without claiming any compensation.

7. When the period of the renewed lease was about to expire on the lapse of 10 year period specified in Ext.P2, the deceased grantee submitted Ext.P4 application dated 10/7/1998 for renewal of the lease. In the meanwhile, Forest (Conservation)

Act, 1980 came into force w.e.f. 25/10/1980 and under Section 2 thereof, restriction was imposed on the de-reservation of forests or use of forest land for non-forest purposes. In view of the provisions contained in Section 2 of the Forest (Conservation) Act, the State Government by their letter No.10768/C2/2002 F&WLD dated 30/10/2002 sought prior approval of the Central Government. Referring to the said proposal made by the State Government, the Government of India issued Ext.P7 communication dated 30/12/2002, which reads thus;

“Sub:-Diversion of 0.172 ha. of forest land to Shri Joseph Kurian to erect a pump house and construction of Irrigational Canal in Ernakulam District.

Sir,

Kindly refer to State Govt.'s letter No.10768/C2/2002/F&WLD dated 30/10/2002 seeking prior approval of the Central Govt. in accordance with Section '2' of the F(C) Act, 1980 for the above project. After careful consideration of the proposal of the State Government, I am directed to convey Central Government's inability to approve the proposal in the interest of Conservation of Forests. I am also directed to bring to your kind notice that F(C) Act does not facilitate diversion of forest land to cater to

individuals' interests. Any proposed diversion of forest land must involve larger interests of community and the nation. Therefore, I am directed to request you to kindly not forward proposals catering to individuals' interests for approval under Section '2' of the F(C) Act in future."

8. On receipt of Ext.P7, the 5th respondent issued Ext.P6 informing the deceased grantee that the Government of India has rejected "the proposal for the diversion of the forest land for non forestry purpose" and he was directed to make alternate arrangements for irrigation of his land. He was also asked to surrender the land under lease back to the Government. It was in these circumstances, seeking to quash Exts.P6 and P7, the deceased had filed the OP. He also sought a direction requiring the 4th respondent to consider and pass orders on Ext.P8, a subsequent representation made by him seeking renewal of the lease. During the pendency of the OP, the grantee of lease expired and thereupon, the appellants, being his legal heirs, got impleaded in the petition and prosecuted the case.

9. In the counter filed by the 5th respondent, in para 9, it is stated thus;

“Exhibit P7 order was issued not because, the extension of lease would prejudicially affect the interests of the forests. But it was issued only because, the Forest Conservation Act did not facilitate diversion of forest land to cater to individual interests.”

10. In the counter affidavit filed on behalf of respondents 1 and 3, the reason stated for the issue of Ext.P6 is stated thus;

“Any grant of lease of forest land for non-forestry purposes must cater the larger interest of the community and Nation. In the present case no such interest is involved. The mere fact that the petitioner has been using forest land for his personal gains for the last so many years and incurred some expenses thereof does not automatically entitle him to grant of a lease of forest land for non-forestry purposes under the Forest (Conservation) Act, 1980.”

11. Further, in para 7, respondents 1 and 3 also state thus;

“He had no right to cultivate in the forest land in question. The petitioner cannot be permitted to continue his illegal possession of forest land for the sole reason that he is cultivating some seasonal crops in the land in question. The

petitioner who has been continuing the illegal possession of forest land must face the legal consequences thereof."

12. The OP was heard by the learned single Judge and the same was dismissed mainly holding that the appellants or the deceased grantee did not have any legal right whatsoever in the matter. Learned single Judge has also held that in the absence of any legal right, the appellants or the deceased could not have maintained the Original Petition itself. It is aggrieved by this judgment, this appeal is filed.

13. As we have already stated, the stand taken by the Government of Kerala in the counter affidavit is that Ext.P7 was issued by the Government of India not because the extension of lease would prejudicially affect the interests of forest but because the Forest (Conservation) Act did not facilitate diversion of forest land to cater to individual interests. Similarly, the extracted portion of paragraph 3 of the counter affidavit filed by respondents 1 and 3 also shows that the grant of lease of forest land for non forestry purposes must cater to the larger interest of the community and nation and that in the case of the appellants, no such interest is involved. This precisely is the reason stated in

Ext.P7 issued by the 3rd respondent also. It is the correctness of this reason which we are called upon to examine in this appeal.

14. Section 2 of the Forest (Conservation) Act reads thus;

"2. Restriction on the de-reservation of forests or use of forest land for non-forest

purpose:- *Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing-*

(i) that any reserved forest (within the meaning of the expression "reserved forest" in any law for the time being in force in that State) or any portion thereof, shall cease to be reserved;

(ii) that any forest land or any portion thereof may be used for any non-forest purpose;

(iii) that any forest land or any portion thereof may be assigned by way of lease or otherwise to any private person or to any authority, corporation, agency or any other organisation

not owned, managed or controlled by Government;

(iv) that any forest land or any portion thereof may be cleared of trees which have grown naturally in that land or portion, for the purpose of using it for reafforestation."

15. Reading of Section 2 therefore shows that notwithstanding anything contained in any other law for the time being in force in a State, no State or other authority shall make, except with the prior approval of the Central Government, any order directing any of the matters specified in clauses (i) to (iv) of the Section. In so far as this case is concerned, what is relevant is clause (iii), which provides that no such order can be passed by the State Government except with the prior approval of the Central Government, that any forest land or any portion thereof may be assigned by way of lease or otherwise to any private person or to any authority, corporation, agency or any other organization not owned, managed or controlled by the Government. In other words, as per clause (iii) of section 2 of the Forest (Conservation) Act, it is permissible to assign by way of lease or otherwise, any forest land or portion thereof, even to a

private person, provided prior approval of the Central Government is obtained. It is contrary to the above prescription contained in Section 2 of the Act that in Ext.P7, the 3rd respondent has stated that Forest (Conservation) Act does not facilitate diversion of forest land to cater to individuals' interests. The third respondent, being the authority under the Forest (Conservation) Act, 1980, cannot travel beyond the limits prescribed by the Act and should have confined himself to the letter of the law. Therefore, the conclusion in Ext.P7 is ultra vires the Forest (Conservation) Act, 1980. Therefore, the reason stated in Ext.P7 and the counter affidavits filed by the respondents justifying Ext.P7 is contrary to Section 2(iii). For that reason, Ext.P7 is untenable.

16. We also notice from Ext.P7 that the 3rd respondent seems to have considered the proposal made by the State Government under Section 2 of the Forest (Conservation Act) on the premise that it was for diversion of 0.172 hectares of forest land to the deceased to erect a pump house and construction of irrigational canal in Ernakulam district. It is so stated in the subject mentioned in Ext.P7, which we have extracted in the

earlier portion of this judgment. This being the basis on which the 3rd respondent has considered the proposal of the State Government, that is patently incorrect because pursuant to Ext.P1 lease deed of 9/7/1954, the pump house was erected and the channels were also constructed. Further, para 7 of the counter affidavit filed by respondents 1 and 3 shows that they are proceeding on the basis that the lessee was cultivating in the leased land. This is despite the fact that even the State Government does not have a case to that effect.

17. The 3rd respondent also seems to have forgotten that even according to the State Government, the retention of the pump house and the channel would not “prejudicially affect the interests of the forest” (vide paragraph 9 of the counter affidavit filed by the 5th respondent) and by seeking prior approval, the State was expressing their willingness to renew the lease. Therefore, Ext.P7 order has been passed by the 3rd respondent, contrary to the provisions of Section 2 of the Forest (Conservation Act) and also by misdirecting himself.

18. For these reasons, we are unable to sustain Ext.P7. Ext.P7 and Ext.P6 under which Ext.P7 was communicated are

therefore set aside and the 3rd respondent is directed to reconsider the proposal dated 30/10/2002 submitted by the 2nd respondent and pass fresh orders in the matter duly advertg to the provisions of the Forest (Conservation) Act and other relevant factual aspects. Such orders shall be passed, as expeditiously as possible, at any rate, within six months of receipt of a copy of this judgment. We also direct that until fresh orders are passed and communicated to the appellants, the interim order passed by this Court in IA No.537/09 will remain in force.

The judgment of the learned single Judge is set aside and the appeal is allowed as above.

Sd/-
**ANTONY DOMINIC
JUDGE**

Sd/-
**ALEXANDER THOMAS
JUDGE**

Rp

//True Copy//

PA to Judge