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IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO. 420 OF 2015**

Shri Shashikant Kantilal Pokharna

... Petitioner

Vs.

The State of Maharashtra & Ors.

... Respondents

.....

Mr.Suresh M. Sabrad for the Petitioner.

Mr. A. B. Vagyani, GP a/w. Mr. Manish Pabale, AGP for Respondent
nos. 1 to 6.

.....

CORAM : A.S. OKA & A.K. MENON, JJ.**RESERVED ON : 12th APRIL, 2017****PRONOUNCED ON : 26th APRIL, 2017**

JUDGMENT (Per: A.K.Menon J.)

1. By this Writ Petition the petitioner seeks an order setting aside Mutation Entry no. 4280 in the records of rights (Village Map No.6) pertaining to Taluka-Mulshi, District Pune in respect of land bearing Survey no. 38 admeasuring 11 Hs 69Rs cultivable land and 3 Hs 54Rs of barren land total land admeasuring 15Hs 3Rs situated at Devghar, Jambhulne, Taluka Mulshi, District Pune (herein after referred to as “the said land”). By the impugned Mutation Entry the land was to be treated as forest land. The petitioner also seeks restoration of the earlier Mutation Entry No.1062 and a direction setting aside the impugned communication dated 14th March, 2012 issued by the Conservator of Forest, Taluka Maval, Pune – Respondent no. 2

2. By the said letter dated 14th March, 2012 the petitioner was informed that in view of the Forest (Conservation) Act, 1980, the aforesaid mutation entry came to be made. By the impugned letter respondent no. 2 justified mutation entry and informed the petitioner that, should the petitioner be desirous of carrying on non forest activity, the petitioner would require to obtain permission from the Central Government. Apparently, the said letter came to be addressed to the petitioner without him being given a hearing. It transpires that although impugned mutation entry was made on or about 30th May, 2006, the petitioners were unaware of it since he had no notice of the change in the mutation entry.

3. According to the petitioner, the said land was owned by members of Katkari family and respondent no. 1, considering the holding of family members, had declared the land as forest without any notice or notification. It is the petitioner's case that the mandatory notification under Section 35(3) of the Maharashtra Private Forests (Acquisition) Act, 1975 (for short "the Private Forest Act, 1975") was not issued. According to the petitioner, on 16th May, 1979, the respondent no. 4 being the Assistant Collector, Haveli Division, Pune had passed an order under Section 22 of the Private Forest Act, 1975 excluding the said lands, since the individual holdings of the Katkari family members was below 12 Hectares.

4. On 24th December, 1979 the members of the Katkari family made application for sale of the said land. This application was made to the respondent no. 6 - The Divisional Commissioner, Pune Division, Pune who after making inquiries passed an order dated 22nd May, 1995 granting permission for dividing the said land into plots and its disposal.

5. On 2nd December, 1985, the sale deed in respect of the said land was executed for an amount of Rs.17,250/- described as Nazrana was deposited in the Government treasury. Thereafter the petitioner applied to the respondent no. 5 – Tahsildar, Tal. Mulshi, Dist. Pune for permission to use land for non agricultural purpose. Permission for non agricultural use was granted on 13th January, 1986 while permitting the petitioner to use the same for residential purposes. The petitioner thereafter got layout plans sanctioned. After dividing the land into plots, original Mutation Entry No. 1062 was made on 28th May, 1987. It is only much later on 4th February, 2001, the respondent no. 2 issued a letter to the respondent no. 5, calling upon respondent no. 5, to restore the said land to its original position by virtue of provision under the Forest (Conservation) Act, 1980. All this transpired according to the petitioner without any notice to the parties concerned. There was no notice to the petitioner.

6. The petitioner thus approached respondent no. 2 for deletion of the said entry pointing out the aforesaid facts and urged his case that the said land was excluded from the purview of Private Forest Act, 1975. However, the impugned letter of 14th March, 2012 came to be issued once again without any notice. The petitioner thereafter learnt of the order passed by the Hon'ble Supreme Court in the case of ***Godrej & Boyce Manufacturing Co. Ltd. vs State of Maharashtra and Ors.*** [2014 3 SCC 430] inter alia holding that notice under section 35(3) of the The Indian Forest Act, 1927, must be issued and served upon the concerned parties.

7. Mr.Sabrad the learned counsel for the petitioner submitted that the said land was excluded from purview of Private Forest Act, 1975 with effect from 16th May, 1979. Mr.Sabrad further submitted that in the present case no notice under section 35(3) of the Indian Forest Act, 1927 was issued and in the absence of such notice the declaration of the land as forest was untenable and liable to be set aside. It would be appropriate to refer to the relevant paragraphs of the Indian Forest Act, 1927 which reads thus: -

Sec 35. Protection of forests for special purposes.—

(1) *The State Government may, by notification in the Official Gazette, regulate or prohibit in any forest or waste-land—*

- a. the breaking up or clearing of land for cultivation;*
- b. the pasturing of cattle; or*

c. the firing or clearing of the vegetation; when such regulation or prohibition appears necessary for any of the following purposes:—

(i) for protection against storms, winds, rolling stones, floods and avalanches;

(ii) for the preservation of the soil on the ridges and slopes and in the valleys of hilly tracts, the prevention of landslips or of the formation of ravines, and torrents, or the protection of land against erosion, or the deposit thereon of sand, stones or gravel;

(iii) for the maintenance of a water-supply in springs, rivers and tanks;

(iv) for the protection of roads, bridges, railways and other lines of communication;

(v) for the preservation of the public health.

(2) The State Government may, for any such purpose, construct at its own expense, in or upon any forest or waste-land, such work as it thinks fit.

(3) “No notification shall be made under sub-section (1) nor shall any work be begun under sub-section (2), until after the issue of a notice to the owner of such forest or land calling on him to show cause, within a reasonable period to be specified in such notice, why such notification should not be made or work constructed, as the case may be, and until his objections, if any, and any evidence he may produce in support of the same, have been heard by an officer duly appointed in that behalf and have been considered by the State Government.

8. While considering the effect of section 35(3), the Supreme Court held that service of notice was mandatory. The Court considered the expression “issue” and held that the word “issue” should be read in its wider perspective and would entail that mere issuance of notice under Section 35(3) of the Indian Forest Act, 1927 is not sufficient for any land to be declared as private forest within the meaning of Section 2(f) (iii) of the Maharashtra Private Forest (Acquisition) Act, 1975. The Supreme Court held that the broader meaning of the word “issue” has to be considered.

9. In an affidavit in reply in the present petition filed by the Assistant Conservator of Forests a peculiar stand has been taken. On one hand it contended that owner of the land was “earlier” issued notice under Section 35(3) of the Indian Forest Act, 1927 and therefore, the said land may also be “private forest” as per section 2(f) (iii) of the Private Act 1975. It is contended that being “private forest” as per inclusive definition of the phrase given in its basic definition read with meaning of the word “forests” as per section 2(c-i) of the Act which is sufficient for its acquisition.

10. It is also contended that the forest area was “Deemed Reserved Forests” as on the appointed day i.e. 30th March, 1975 which land stood vested in the Central Government. 11.72 Hs of land in question is stated to have been restored under section 22(A) of the Maharashtra Private Forests (Acquisition) Act, 1975 by three orders dated 16th May, 1979 the forest areas were restored back to the owners and / or their successors under the Forest (Conservation) Act, 1980 which came into force on 25th October, 1980. This Act required prior approval of the Government of India in case any order was to be issued permitting non Forest use. According to the deponent permission for non forest use was issued without prior approval of the Ministry of Environment and Forest and therefore not valid.

11. Mr. Vagyani, the Government pleader while opposing the petition relied upon the record maintained by the State and the Register kept for the purpose at the Office of the Pune Forest Division and referred to as “the Golden Register”. The original register was produced for our perusal. Mr. Vagyani relied upon page 12 of the said Golden Register referred to entry at Survey No.38 in the said register which identifies the said land. Mr. Vagyani submitted that the entry indicates that notice under Section 35(3) of the Indian Forest Act, 1927 had been issued to the holder of the land. The extract of the said register is placed on record and annexed as R-3.

12. The affidavit in reply also relies upon communications between Revenue and Forest Department of the State Government and the Chief Conservator of Forest which in our opinion are of no consequence in the facts of the case. The learned Government Pleader has not been able to show us the relevance of this correspondence.

13. The Affidavit of the Assistant Conservator of Forest records in paragraph 8 that acquisition of the areas is fully justified based on the definition “Forest” under Section 2(f) of the Maharashtra Private Forests (Acquisition) Act, 1975 and no other condition is required for treating these areas as “Deemed Reserved Forest”. Furthermore it is stated that the said areas fulfilled the criterion specified in Section 2(f)

(iii) because notice under Section 35(3) of the Indian Forest Act, 1927 was issued to the then owner. However, save and except, a bare statement in the affidavit in reply we do not find any evidence to establish issuance / service of notice. The contents of the Golden Register also do not in any manner establish that the notice had been issued or served.

14. In the circumstances, we are of the view that the petitioner's case that no notice has been issued under Section 35(3) must be upheld and relying upon decision in *Godrej Boyce (supra)*, we are of the view that service of notice under Section 35(3) was indeed necessary and there is no evidence on record to show that such notice has been issued.

15. The impugned letter in the present case has proceeded on the presumption that the lands which are private forests vest in the State Government under Section 3 of the said Maharashtra Private Forests (Acquisition) Act, 1975. In our view, having considered the contents of the affidavit in reply and the document relied upon there is nothing to establish that the land bearing survey no.38, situated at Devghar, Jambhulne, Taluka Mulshi Dist. Pune is a private forest as contemplated under Section 2(f)(iii) of the Maharashtra Private Forests

(Acquisition) Act, 1975 and the same does not vest in the State by virtue of Section 3. Having come to this conclusion, the impugned order requires to be set aside.

16. Before parting with this judgment we must also record that in (Sinhagad Technical Education Society vs. Dy. Conservator of Forest). WP/7235/2013, this Court has delivered judgment dated 3rd February, 2015 to which one of us A.S.Oka, J. was party, this Court considered the law on the controversy which arises in the present case as well and had applied the law as laid down in Godrej Boyce (supra).

17. For avoidance of doubt we clarify that while dealing with the present case we have only held that the said lands do not constitute “private forest” under the Maharashtra Private Forests (Acquisition) Act, 1975. We have not examined the applicability of provision of the Indian Forest Act, 1927 and of the Forest Conservation Act, 1980 or any other provision or whether or not the same constitutes private forest or form part of the private forest. We restrict this adjudication to the status of the land only to the extent as contemplated under Section 2(f)(iii). This aspect we have answered in the negative. In the circumstances we pass the following order :

- (a) Impugned order dated 14th March, 2012 is set aside.
- (b) The mutation entry no. 4280 in respect of land survey no.38 situated at Devghar, Jambhulne, Taluka Mulshi, District Pune is hereby set aside and mutation no. 1062 is restored.
- (c) Rule is made absolute in the above terms.
- (d) There will be no order as to costs.

(A.K. MENON, J)

(A.S. OKA, J)