

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 11993 OF 2016

New Shree Swami Samartha Borivade
and another.

... Petitioners.

V/s.

State of Maharashtra and others.

... Respondents.

V.A.Thorat, Senior Advocate with Mr.Nikhil Sakhardande, Mr.Vaibhav Sugdare, Mr.Saurabh Pakale and Mr.Ooril Panchal i/b. Mahimtura & Co. for the petitioners.

Mr.A.B.Vagyani, GP with Mr.P.G.Sawant, AGP for the respondents.

CORAM : A.S.OKA AND M.S.SONAK, JJ.

DATE : 25th October 2018.

ORAL JUDGMENT : (Per A.S.Oka, J.)

Heard the learned senior counsel appearing for the petitioners and the learned Government Pleader (GP) appearing for the respondents. The parties were put to notice that an endeavour shall be made to decide the petition finally at the stage of admission.

2. The petitioners are relying upon the order dated 8th March 1999 passed by the Deputy Collector, Private Forests (Acquisition), Thane in exercise of powers under section 6 of the Maharashtra Private Forests (Acquisitions) Act, 1975 (for short “the Private Forests Act”). The operative part of the said judgment and order reads thus:

“In view of the above findings and discussions, I am inclined to order as follows:-

The lands of S.Nos.79 & 80 pt. (area mentioned in the notice u/s 35(3) of village-Borivade, Taluka Thane shall stand vested and acquired in the State Government and Forest Department shall take the possession of these suit lands. The Forest Department shall pay the necessary compensation as per the provisions of the said Act.

The lands S.Nos.2/5. 66/3, 67 pt., 68, 69, 70, 71, 75, 46 and 48 (area mentioned in the notice u/s 35(3)) of village Borivade, Taluka Thane shall stand revested to the owners of the suit lands, and hence the said lands shall be deleted from the acquisition. The Forest Department shall make necessary arrangement to hand over the possession of these suit lands to the owners, if at all already taken.

In respect of the lands of S. Nos. 53, 53/1, 53/2 and 93/1 (area mentioned in the notice u/s 35(3)) do not belong to the said trust and hence this area should be excluded from the total area which was notified under the Forest Act in respect of this proceedings.

Parties too be informed accordingly.”

3. The present petition relates to the land described in the second paragraph of the operative part of the order of the Deputy Collector i.e. the lands bearing Survey Nos.2/5, 69/3, 67-part, 68, 69, 70, 71, 75, 46 and 48 of village Borivade, Taluka Thane. It is not in dispute that the order dated 8th March 1999 passed in exercise of powers under section 6 has not been modified or set aside in any proceedings. The

affidavit of Shri Prashant Ramakant Masurkar, Divisional Forest Officer (Wildlife-2), Sanjay Gandhi National Park, Borivli dated 23rd March 2018 filed on behalf of the respondents accepts that the Deputy Collector was empowered to pass an order under section 6 of the Private Forests Act. Reliance is placed on the notification dated 17th July 2018 issued under clause (c) of section 2 of the Private Forests Act by which the Deputy Collectors in the Thane District have been empowered to exercise the powers of the Collector under the Private Forests Act.

4. The grievance of the petitioner is about the Mutation Entry No.356 made in respect of the subject lands. By the Mutation Entry No.356, an entry of "Maharashtra Government Reserved Forest" was ordered to be made in respect of the subject lands. The prayer is for setting aside the said mutation entry as well as for deleting the name of the Maharashtra Government Forest Department from other rights column.

5. The learned senior counsel appearing for the petitioner submitted that the order dated 8th March 1999 has attained finality and, therefore, the clear findings recorded in the said order about non-applicability of the Private Forests Act holds the field. He pointed out that a categorical finding has been recorded that the subject lands are not private forest and the same do not vest to the State Government. He submitted that the circular dated 16th December 2004 issued by the State Government on the basis of the order dated 10th October 2001 passed in Writ Petition No.2980/2001 is no longer applicable inasmuch as by the

subsequent order dated 18th September 2006, the said writ petition has been disposed of. He submitted that there is no basis for the mutation entry which describes the status of the subject lands as reserved forest.

6. The learned Government Pleader relied upon the circular dated 16th December 2004 which provides that no certificate under section 6 and section 22A of the Private Forests Act shall be issued by the Collector without seeking prior approval of the Central Government under section 2 of the Forest (Conservation) Act, 1980 (for short “the said Act of 1980”). He submitted that in any event, the decision of the Apex Court in the case *T.N.Godavarman Thirumalapad v. Union of India* will apply. He submitted that under the said circular, a direction was issued to recall/cancel the certificate issued under section 6 and section 22A of the Private Forests Act without seeking prior permission of the Central Government under section 2 of the said Act of 1980. He relied upon paragraph-5 of the affidavit of Shri Prashant Masurkar dated 24th February 2018 and submitted that the subject lands are deemed forest. On a query made by this Court, he did not dispute that the order dated 8th March 1999 passed by the Deputy Collector continues to operate even as of today. He submitted that non-forest use of the subject lands is not permissible.

7. We have carefully considered the submissions. We have perused the impugned mutation entry. The impugned Mutation Entry No.356 has been made on the basis of the provisions of the Private Forests Act. In fact, in paragraph-5 of the affidavit of Shri Prashant Masurkar, Divisional Forest Officer (Wildlife-2), Sanjay Gandhi National Park dated

24th February 2018 filed on behalf of the State Government, it is contended thus:

“5) I say that by way of the operation of the provision of the Maharashtra Private Forest (Acquisition) Act, 1975 the said land stood vested with Government under section 3(1) and it has a legal status of “Deemed Reserved Forest”. On account of the basic definition of “private forests” in section 2(f) along with definition of “forests” in section 2(c-i) and sub-clause (iii) of Section 2(c-i), being linked to adjoining Reserved Forest of Kavesar Survey no.292, it is sufficient to consider this area as acquired and deemed Reserved forests with effect from 30.08.1975 as per the provisions of MPF (A) Act, 1975 and its status “Deemed Reserved Forest”. There is no need of any possession by Forest Department for vesting of such lands in Government.”

Thus, the contention of the respondents is that the mutation entry has been made by virtue of the vesting of the said lands in the State Government under sub-section (1) of section 3 of the Private Forests Act. It is not the case made out by the respondents that the subject lands were declared as reserved forest after following the procedure under Chapter-II of the Indian Forest Act, 1927 (for short “the said Act of 1927).

8. Now, we come to the order dated 8th March 1999. As stated earlier, it is not disputed that the Deputy Collector has jurisdiction to make an adjudication under section 6 of the Private Forest Act. The following issues were framed in the said order:

1. Whether the suit land was the large tract of land covered with trees under growth and sometimes intermingled with grass?

2. Whether the suit lands is a part of forest or lies within it on the appointed day (30/8/1975)?
3. Whether the suit lands are only such forest lands which is not the property of Government?
4. Whether the suit lands were Forest lands in respect of which any notification issued u/s 35(1) of the Forest Act, 1927 and the same was in force immediately before the appointed day?
5. Whether the suit lands in respect of which the notice u/s 35(3) of the Forest Act had been issued?
6. Whether or not private lands (suit lands) was he private forest:
7. Whether or not private forest or portions thereof vested in the State Government?
8. What order?

As far as the lands bearing Survey No.79 and 80-Part are concerned, it was held that the same vest in the State Government. As regards the subject lands, a clear finding has been recorded by the Deputy Collector that the subject lands are not covered by the definition of forest under clause (c-i) of section 2 of the Private Forest Act. In paragraph-7, a categorical finding has been recorded which reads thus:

“7.....
However, lands comprising of S. Nos. 2/5, 66/3, 67 pt., 68, 69, 70, 71, 75, 46 and 48 are not private forest and hence they are not liable to be vested in an acquired by the State Government.
”
 (Underline supplied)

This is the finding which is the basis of operative part of the order which we have already reproduced.

9. There are mainly two contentions raised by the respondents. The first one is regarding the applicability of sub-section (1) of section 3 of the Private Forests Act. The said contention has been negated by the order dated 8th March 1999. The second contention is that the said order is inoperative inasmuch as an approval of the Central Government under section 2 of the said Act of 1980 was not obtained. Firstly, assuming that the circular dated 16th December 2014 is lawful and is in operation, the same will apply prospectively and at least will not apply to the order dated 8th March 1999. At highest, on the basis of the said circular, either a review of the said order could have been undertaken or the said order could have been challenged by way of appeal. The only conclusion which can be drawn as of today is that the order dated 8th March 1999 continues to operate and is binding on the respondents. Therefore, the Mutation Entry No.356 cannot be justified at all.

10. As the Mutation Entry No.356 has been made only on the basis of the provisions of the Private Forests Act, it is not necessary for us to decide the wider issue whether the subject lands or any of them are covered by the definition of “forest” under the said Act of 1989 or the expanded definition of “forest” in the decision of the Apex Court in the case of Godawarman (*supra*) or whether the subject lands can be declared as reserved forest under the said Act of 1927. All the said issues are left open. Suffice it to say that the provisions of the Private Forests Act are not applicable to the subject lands and, hence, there is no vesting of the same under sub-section (1) of section 3 of the Private Forests Act. Subject

to what is observed above, the petition must succeed and we pass the following order:

- (i) Rule is made absolute in terms of prayer clauses (a) and (b);
- (ii) Necessary entries shall be carried out in the revenue record on the basis of this judgment within a maximum period of two months from the date on which this order is uploaded on the server;
- (iii) As observed in the earlier paragraphs, we make it clear that we have made no adjudication on the issue whether the subject lands constitute a forest under any enactment as well as within the meaning of “forest” in the decision of the Apex Court in the case of Godavarman (supra). All the said issues are left open;
- (iv) All the concerned parties to act on an authenticated copy of this order.

(M.S.SONAK, J.)

(A.S.OKA, J.)