IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

THURSDAY, THE 6TH DAY OF OCTOBER 2022 / 14TH ASWINA, 1944

MFA (FOREST) NO. 16 OF 2005

AGAINST THE ORDER IN O.A.NO.25/2001 OF FOREST TRIBUNAL, KOZHIKODE

APPELLANTS/RESPONDENTS:

1 STATE OF KERALA, REPRESENTED BY CHIEF SECRETARY, THIRUVANANTHAPURAM.

2 CUSTODIAN OF VESTED FORESTS, OLAVAKKODE, PALAKKAD DISTRICT.

SRI.NAGARAJ NARAYANAN, SPL. G.P. FOR FOREST

RESPONDENTS/APPELLANTS:

1 VELUSWAMY, S/O.MARUTHA BOYAN, AGALI OOR, AGALI AMSOM DESOM, MANNARKKAD TALUK.

ADDL R2 RAJAMMA, W/O. LATE VELUSWAMY, NELLIPATHI, AGALI VILLAGE, MANNARKKAD TALUK.

ADDL R3 CHINNAMMA, MOTHER OF LATER VELUSWAMI, -DO-

ADDL R4 MARUTHAN, 2ND WIFE SON OF DECEASED VELUSWAMI, -DO-

ADDL R5 RAJAN, -DO-

(ADDL. R2 TO R5 IMPLEADED VIDE ORDER DATED 27.09.2022 IN I.A.NO.1394 OF 2006)

BY ADVS. SRI.P.C.THOMAS
K.MOHANAKANNAN
SRI.T.G.RAJENDRAN

SRI.ROJO J.THURUTHIPARA

THIS MFA (FOREST) HAVING BEEN FINALLY HEARD ON 27.09.2022, THE COURT ON 06.10.2022 DELIVERED THE FOLLOWING:

'CR'

K.VINOD CHANDRAN & C.JAYACHANDRAN, JJ

M.F.A.(FOREST) No.16 of 2005

Dated this the 6th day of October, 2022

J U D G M E N T

Jayachandran, J.

1. The State, as well as, the Custodian of the vested forest, Palakkad are the appellants in this Miscellaneous First Appeal. The order under challenge is the one passed by the Forest Tribunal, Kozhikode dated 17.12.2003 in O.A.No.25 of 2001. The sole respondent herein preferred the Original Application under Section 8 of the Kerala Private Forest (Vesting and Assignments) Act, 1971 for a declaration that the property scheduled therein is not a private forest and not vested in the Government; and in the alternative, for exemption under Sections 3(2) and 3(3) of the Act. By the impugned order, the Tribunal found that the disputed property is a private forest, which vests with the Government. However, the Tribunal also found that

the applicant is entitled to exemption under Section 3(2) of the Act.

2. Heard Sri.Nagaraj Narayanan, learned Special Government Pleader (Forest) and Sri. Mohanakannan, learned counsel for the respondent. Perused the records.

3. Learned Special Government Pleader submitted that the order under challenge is a non speaking one. No reason other than a bald statement that the father of PW1 was cultivating the property – a self serving statement – is seen reckoned in the impugned order to find that the applicant is entitled to exemption under Section 3(2) of the Act. Learned Special Government Pleader submitted that, all what is available in the property is 7 tamarind trees and 3 Chadachikora trees, the former aged between 50 – 60 years and latter between 30-35 years. The Commissioner found that, there are no signs of any cultivation in the property. This has been taken judicial note of in paragraph no.10 of the impugned order. However, in disregard of the above

referred circumstances, the Tribunal, without stating any reason, found that the applicant is entitled for the exemption. It is also pointed out that, no record, whatsoever, to show the cultivation in the subject property was produced by the applicant, albeit his version in cross examination that, he is possessed of such records. Learned Special Government Pleader emphatically stressed on the burden of proof to pin point that the same unequivocally is on the applicant only, in support of which proposition, he relied upon the following decisions:

(i) **Unreported decision of the High Court in M.F.A.No.12 of 1980 dated 10.01.1986.**

(ii) **State of Kerala** v. **Thomas [1987(1) KLT 530]**

(iii) **State of Kerala** v. **Kunchiraman [1990(1) KLT 382]**

(iv) **State of Kerala** v. **Chandralekha [1995(2) KLT 152(F.B.)]**

(v) **State of Kerala and Another** v. **Popular Estate and Another [(2004)12 SCC 434].**

4. Per contra, learned counsel for the respondent argued to sustain the impugned order. It was pointed out that, there was specific pleading in the original application as regards cultivation made by the applicant's father, Marutha Boyan, after purchasing the property in the year 1961, wherein, there is specific averment with respect to the cultivation of tamarind trees. The existence of tamarind trees, though 7 in number, has been found by the Advocate Commissioner. It was also pleaded that, due to the obstruction on the part of the forest officials, the property could not be cultivated for two years prior to the death of Marutha Boyan. Therefore, according to the learned counsel, the order impugned is fully justified in finding that the applicant's father was cultivating the property at the relevant time, wherefore, the applicant is entitled to the exemption under Section 3(2) of the Act. That apart, learned counsel took us through the evidence tendered by PW1 to highlight that the factum of cultivation was very much spoken of by PW1 before the

court, which version remained unchallenged in the cross examination. As regards the claim of Section 3(3) of the Act, learned counsel submitted the requirements of a valid registered deed coupled with the intention to cultivate is amply demonstrated by the facts and evidence. On such premise, learned counsel seeks dismissal of the instant appeal.

5. Having heard the learned counsel appearing on both sides, we find considerable force in the submissions made by the learned Special Government Pleader. It is shocking to note that, no reason, whatsoever, is stated in the impugned order to find that the applicant is entitled to the exemption under Section 3(2) of the Act. The Tribunal, in the impugned order, raised point No.4 specifically dealing with the applicant's entitlement for exemption under Sections 3(2) or 3(3) of the Act and considered the said point in paragraph no.11 of the order. The relevant finding in paragraph no.11 is extracted herebelow:

> "The case of PW1 is that his father has been cultivating the property with Kora, Chama, groundnut etc. I therefore hold that the applicant is entitled to get exemption under Section 3(2) of the Act. Point found accordingly."

6. We find that the grant of exemption under Section 3(2) of the Act taking stock of the applicant's case/claim only, without referring to any evidence in support thereof, is perverse and unsustainable in law.

7. In ascertaining whether applicant's father, Marutha Boyan was in cultivation of the property, it is necessary to trace his title and possession over the schedule property. Going by the averments in the original application, the scheduled property, along with the other items, originally belonged to the Jenmy, Mannarkkad Moopilsthanam, as per document No.3084/1920. One Chellan obtained leasehold rights over the schedule property from the Jenmy and upon his death, Chellan's rights devolved upon his children. As per document no.2475/61, applicant's father Marutha Boyan got

assignment of 6 acres of land (schedule property) and it is the applicant's case that his father was in cultivation of the property. Simultaneous with the same, the applicant also avers that the property was purchased and possessed with the intention to cultivate and there are fruit bearing trees like tamarind planted in the property. Now, the Advocate Commissioner found in his report that, there are 7 tamarind trees standing in the property, which are aged 50-60 years and 3 Chadachikoora trees, which are aged 30-35 years. Reckoning the age of tamarind trees, the same should have been planted sometime during 1950s, the Commissioner's visit to the property being on 19.12.2002. It is noteworthy that in 1950s, the applicant's father has not obtained title or possession of the property, which he obtained only in the year 1961. We, therefore, arrive at two conclusions, (i) the existence of 7 tamarind trees would not indicate any cultivation in the property, and (ii) the Advocate Commissioner's report would not vouch that the

so called cultivation was made by applicant's father, Marutha Boyan.

8. We take note of the contention of the learned Special Government Pleader that the burden of proof invariably lies on the applicant. In *Thomas (supra), Kunhiraman (supra) and in the unreported decision*, it has been held unequivocally by 3 different Division Benches that the burden of proof regarding the exemption under Section 3(2) of the Act lies upon the applicant only. The legal position was reiterated by the Full Bench in *Chandralekha (supra)* with the following findings:

> "Section 8 makes the position clear that, it is for the person who claims that the land is not a private forest or that the private forest has not vested in the Government to apply before the Tribunal for decision of the dispute. From a reading of the Section, it is apparent that the person who prefers a claim before the Tribunal that the property is not private forest or that it has not vested under the Vesting Act has the

> burden to establish his case. As he alone can produce necessary evidence in support of his case it can never be held that the onus of proof is on the State to prove that the land in question is a private forest. As the owner of the land has to prefer his claim before the Tribunal that the land is not private forest or that the private forest has not vested in the Government, he has necessarily to establish that claim as he alone is in possession of data and materials to prove his case. The burden is squarely upon him to substantiate his claim. In State of Kerala v. Kunhiraman [1990(1) KLT 382] a Division Bench of this Court held that the burden is on the claimants to prove that the land in question was not private forest on the appointed law."

9. The seal of approval from the Honourable Supreme Court lies in the judgment in *Popular Estate (supra).* In paragraph no.15 of the judgment, the Supreme Court upheld the proposition laid down by the Tribunal that it was for the claimant to prove that the properties in respect of which relief is sought for were not private forest as defined under the Act.

10. Having taken note of the legal position referred as above, we will now examine the evidence tendered by PW1, the applicant. After referring to the title obtained by his father, PW1 would state in page No.3 (towards the end) that tamarind trees are standing in the disputed property and that, his father was cultivating "groundnut", "kora", "chama" etc., in the disputed property. He would therefore state that, his father purchased the property with the intention to cultivate and that, he was doing cultivation ever since its purchase. The above version of PW1 is seen challenged in the cross examination. It was specifically put to him that the tamarind trees were naturally/spontaneously grown in the property, which, PW1 however denied. To a specific question, PW1 answered that, he had records to show cultivation in the subject property. It was also suggested that the lie of the property is very steep, to which, PW1 would answer that it is steep. It is important to note that, apart from the applicant, who was examined as PW1, none else

was examined in proof of the applicant's case of having cultivation in the subject property. We find that the records produced are not of any help to the applicant in this regard. Ext.A1 is the assignment deed and Ext.A2 is the photocopy of the purchase certificate. Ext.A3 is the power of attorney executed in favour of the petitioner. Exts.A4 to A10 are building tax receipts, which would not lend any support to the applicant's claim that he was cultivating the property and Ext.A11 is an electricity bill. We are of the opinion that the self-serving, interested testimony of the applicant alone is wholly insufficient to establish that the applicant was doing cultivation in the subject property at the relevant time. Adequate evidence could have been adduced by examining a labourer, who had performed some work in the subject property, in connection with the cultivation claimed. Evidence could also have been led in the form of any agricultural income tax paid or such other records indicating cultivation, which according to PW1 was in his possession, but not produced. The above

factual scenario, coupled with the findings in the Commissioner's report, would certainly persuade us to negate the applicant's claim of cultivation over the property. The Commissioner found only 7 tamarind trees and 3 Chadachikora trees. He specifically reported that, there is no indication, whatsoever, of any cultivation in the schedule property. Relevant findings are extracted here below:

> 'മറ്റു ഫലവൃക്ഷങ്ങൾ ഒന്നും തന്നെയില്ല. വേറെ യാതൊരു തരത്തിലുള്ള പ്ലാൻറ്റേഷനോ, മറ്റു മരങ്ങളോ കാണപ്പെട്ടില്ല. എന്തെങ്കിലും കൃഷി ചെയ്തതിൻറെ ലക്ഷണങ്ങൾ ഒന്നും ടി സ്ഥലത്തു കണ്ടില്ല. വളരെ ചരിഞ്ഞു കിടക്കുന്ന ഒഴിഞ്ഞ പറമ്പുസ്ഥലമായി വഹകൾ കിടക്കുന്നു.'

These facts noted by the Advocate Commissioner would cut at the root of the applicant's claim. We are grossly unhappy with the Tribunal's finding in this regard, *dehors* the fact that the Tribunal took note of the above aspect pointed out by the Commissioner as regards absence of any cultivation in the subject property.

11. Before parting with the judgment, we will also address the scope and ambit of the expression 'cultivation' as employed in Section 3(2) of the Act. The language employed is "held by an owner under his personal cultivation". It is clear that the land in question should be held by the applicant as its owner and secondly, the same should have been used for his personal cultivation. Here, it is necessary to take note of the characteristic features of "cultivation", as distinguished from a spontaneous/natural growth. The term 'cultivation' implies a systematic agricultural or farming activity, including tilling of the soil, sowing seeds of the particular crop, nurturing the same by supplying water, fertilizers, if any, required etc., until the crops are grown to such extent, so as to reap the produce. In the context of evidence, materials in individual support of the above facets of cultivation may not be possible/feasible. However, the state of affairs as on the cut off date, as culled out from the over all evidence, facts and circumstances, should indicate, by the yardstick of preponderance of probability, that the land in question

was in the cultivation of the applicant. In the given facts, we find that the spontaneous/natural growth of 6 to 7 tamarind trees or 3 Chadachikora trees will not answer the requirements of the section, that is to say, the land in question was held by the applicant as the owner, under his personal cultivation.

12. As regards the claim under Section 3(3) of the Act, we notice that the intention for cultivation is relevant with respect to the time of purchase/transfer of the property by virtue of a registered deed. Such intention to cultivate harbored by the purchaser/assignee/lessee should be translated into action within a reasonable time from the date of execution of the registered deed and some acts in furtherance of cultivation should have been done. We have already found while considering the claim under Section 3(2) that the applicant failed to establish any cultivation in the subject property. In such circumstances, the intention, if any, of the applicant's father in the year 1961 to cultivate the property would

pale into insignificance, *de hors* and independent of the fact that no act in furtherance of such intention is established in evidence. We further note that going by Section 3(1) of the MPPF Act, alienation of a private forest by way of sale, mortgage, lease or otherwise without the previous sanction of the District Collector is null and void. The applicant has no case that the subject property was purchased with sanction of the District Collector; nor is any document produced indicating the same. Therefore, the requirement of holding the property under a 'valid' registered document is also not satisfied.

In the result, this appeal is allowed and the impugned order of the Tribunal is set aside. The OA will stand dismissed.

Sd/-

K.VINOD CHANDRAN
JUDGE

Sd/-
C.JAYACHANDRAN
JUDGE

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