

(2016) 04 KL CK 0040

In the High Court Of Kerala

Case No : M.F.A. No. 665 of 1989 (E). (Against the Order in OA 170 of 1976 of Forest Tribunal, Kozhikode Dated 31-03-1989)

Ammukunhi Amma

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 08-04-2016

Acts Referred:

Kerala Private Forests (Vesting and Assignment) Act, 1971 — Section 2(f)(1)(i)(B)

Citation : (2016) 2 KerLJ 666 : (2016) 3 KHC 52 : (2016) 2 KLT 111

Hon'ble Judges : P.R. Ramachandra Menon and Anil K. Narendran, JJ.

Bench : Division Bench

Advocate : Sri. T. Krishnan Unni (Sr. Advocate) And Sri. K. Jayesh Mohankumar, Advocate, for the Appellant; Sri. M.P. Madhavankutty, Special Government Pleader (Forests), for the Respondent

Final Decision : Dismissed

Judgement

Ramachandra Menon, J.—The main question involved in this appeal is whether the property involved herein was a "cardamom plantation" as on 10.05.1971 - the appointed day, to be excluded from being vested with the Government under Section 3 (1) of the Kerala Private Forests (Vesting & Assignment) Act, 1971 (in short "the Vesting Act 1971"), in terms of Section 2 (f) (1) (i) (B) of the said Act. The case has travelled a long way after its inception before the Tribunal, even up to the Apex Court and after remand, to be reconsidered with reference to all the documents produced and the evidence let in.

2. The sequence of events reveals that the original applicant by name, Karimbil Kunhi Koman approached the Forest Tribunal, Kozhikkode by filing O.A. No. 170 of 1976 under Section 8 of the Act for a declaration that the property described in the application was "cardamom plantation" and hence was not liable to be vested with the Government as forest. Later, the original applicant Mr. Kunhi Koman bid farewell to this world, pursuant to which, his widow and children

came to be impleaded as the additional applicants 2 to 9, being the legal heirs.

3. The original extent shown in the application filed before the Tribunal was 910.54 acres, which was stated as a cardamom plantation, with coffee planted in some area. Subsequently, an I.A. was filed seeking to amend the extent as 1048.21 acres. The Tribunal, as per order dated 08.08.1971, found that the disputed area was cultivated prior to 10.05.1971 with cardamom and hence was not a forest liable to be vested with the Government. The O.A. was accordingly allowed, but the I.A. filed for amendment of the extent of land was dismissed. Being aggrieved of the verdict passed by the Tribunal in the O.A., the State preferred an appeal as MFA No. 454 of 1979. At the same time, the appellants being aggrieved of the order passed in I.A. dismissing the petition for amendment as to the actual extent of land preferred an appeal as MFA No. 466 of 1979.

4. During the course of hearing, it was brought to the notice of this Court from the part of the appellants that, in the counter affidavit filed by the State and by the Custodian of Vested Forests, Kozhikkode before the Tribunal, it was conceded that, out of 910.54 acres claimed by the applicants, about ? portion was seen planted with crops and about ? portion was left out without any cultivation prior to 10.05.1971. This by itself was an admission, and that the Tribunal was justified in allowing the O.A. and that the entire extent (as sought to be amended) was to be reckoned in connection with the finding that it was not a vested forest. Reference was also made to the fact that in all the relevant documents, the disputed property was shown as "elamala". This was vehemently opposed from the part of the State referring to the facts and figures. After hearing both the sides, this Court passed a common verdict on 22.01.1985, whereby the impugned order passed by the Tribunal was set aside and the matter was remanded for further enquiry and for taking a decision afresh, also directing the Tribunal to deal with the amendment application preferred before the Tribunal. Based on the remand, the matter was reconsidered and the I.A. was allowed correcting the extent as 1048.21 acres as against the original extent shown as 910.54 acres. The original applicant expired by that time, and the appellants came to be impleaded as the legal heirs. After considering the pleadings and evidence, the Tribunal passed a fresh order on 31.03.1989 holding that there was no evidence to show that the disputed area was a "plantation" as on 10.05.1971 and hence it was vested forest. Thus the O.A. preferred by the appellants was dismissed, which made the appellants to approach this Court by way of this appeal, raising many a ground on the factual and legal aspects.

5. Both the sides were heard meticulously on the subject. After referring to the materials on record including the deposition of witnesses examined as PW1 to PW5 and Ext. P1 to P39 on the side of the applicants and the evidence tendered by the respondents witnesses as RW1 to RW5 and perusing the court exhibits marked as Exts. C1 to C6, this Court held that the appellants/claimants had failed to establish that the disputed property was a "plantation" as on

10.05.1971, the appointed day and accordingly, interference was declined and the appeal was dismissed as per judgment dated 09.08.2002

6. The matter was taken up in appeal by the appellants before the Supreme Court by way of Special Leave Petition (SLP Civil No. 23588/2002). An I.A. was also filed as I.A. No. 2 of 2002 for accepting two additional documents in additional evidence. On 07.11.2003, leave was granted by the Apex Court and held that the interlocutory application would be considered at the time of hearing. The appeal was accordingly numbered as Civil Appeal No. 8726 of 2003. The Apex Court observed that, it appeared that certain material piece of evidence had not been looked into by the High Court and that the learned Judges were of the opinion that the entire matter required re-examination by the High Court after considering all the relevant materials and after hearing the parties concerned. In the said circumstances, the verdict dated 09.08.2002 passed by this Court was set aside and the matter was remanded for fresh consideration and decision in accordance with law, at the same time observing in the last sentence that there will be no orders on the application for direction. It is accordingly, that the above appeal has come to be re-listed before this Court.

7. When the matter was taken up for hearing earlier, Mr. T. Krishnanunni - the learned senior counsel appearing for the appellants made reference to some additional documents produced before the Apex Court, when it was observed that the said documents were not forming part of the record. The appellants sought for time to take steps to get back the documents produced before the Apex Court. The said documents have been produced along with I.A. No. 3899 of 2015 filed before this Court under Order 41, Rule 27 of CPC; seeking to receive them in additional evidence. The second respondent has filed counter affidavit objecting the relief sought for in the I.A. raising several grounds, including that they are only certified copies of the original documents, and that the basic documents (which are proceedings of the concerned Revenue Divisional Officer and a mortgage deed between the appellants and a Bank), which hence cannot substantiate the existence of any "plantation" as on 10.05.1971. It is stated that the basic documents which are to be maintained by the registered owners of plantations have not been produced and even as per the proceedings of the RDO, the cultivation was seen in existence only to a very meagre extent (about 50 acres each). It was also added that, mere existence of stray cardamom plants will not make it cardamom plantation. The difference in survey Nos. in the O.A. Schedule property (situated in 193, 200 and 201/2) and those mentioned in Annexure B mortgage deed was also pointed out, adding that the power to be exercised under Order 41, Rule 27 CPC is very limited and that the requirement under the said provision has not been satisfied in the instant case. It was pointed out by the learned Special Government Pleader that the scope of remand ordered by the Apex Court is very limited being not an "open remand", enabling the parties to raise additional pleadings or by letting in additional evidence and that the remand was ordered when some vital aspects were stated as omitted to be looked into by the High Court; which hence was directed to be reconsidered after

hearing both the sides. The scope of remand is not liable to be varied or widened; and that if the additional documents are to be accepted in evidence, it will deny an opportunity to the respondent State to dispute the authenticity of the said documents by adducing evidence including by cross examination of the concerned authority who issued the same (Annexure A - issued by the RDO).

8. Heard Mr. T. Krishnanunni, the learned senior counsel appearing for the appellants as well as Sri. M.P. Madhavankutty, the learned Special Government Pleader (Forests), at length, both on the question of facts as well as law.

9. Before dealing with the merits of the case, this Court finds it fit and proper to consider the contention raised from both the sides in respect of additional documents produced along with I.A. 3899 of 2015, in the light of remand order passed by the Apex Court. The remand order reads as follows :

"Heard the learned counsel for the parties.

This appeal, by special leave, has been filed against the impugned judgment and hence we are not repeating them here again.

After carefully perusing the impugned judgment of the High Court, it seems that certain material pieces of evidence have not been looked into by the High Court. We are of the opinion that entire matter should be re-examined by the High Court after considering all the relevant material and after hearing the parties concerned.

In the circumstances, the appeal is allowed and the impugned judgment of the High Court is set aside. The matter is remanded to the High Court for a fresh decision expeditiously in accordance with law after considering all the relevant material and after hearing the parties concerned. No costs.

No orders on application for directions."

10. In response to the question raised by the Court as to which were the documents omitted to be looked into by the Court when the appeal was dismissed at the earlier instance, the learned senior counsel submitted that, it was with reference to the additional documents produced as Annexures A & B along with I.A. No. 3899 of 2015, as these documents could not be produced earlier and were produced before the Apex Court immediately after filing S.L.P. along with I.A. No. 2 of 2002. After the remand ordered by the Apex Court, on a finding that these documents were not forming part of the records returned to this Court, they were subsequently procured back and produced along with I.A. No. 3899 of 2015. The learned counsel submits that Annexure A is a copy of the proceedings of the concerned RDO issued way back in the year 1969, registering a portion of the disputed property as cardamom plantation, giving the split up figures as "yielding" and "not yielding" in the name of the predecessor-in-interest of the appellants. Annexure B is a mortgage deed executed between the predecessor-in-interest on one side and the State Bank of Travancore on the other side in the year 1971, in connection with granting of financial assistance by

way of a loan of Rs. 6 lakhs, availed for setting up of an ice-factory. Particulars of the property offered as security, over which mortgage was created, reveals the inclusion of the disputed property herein. The said property was offered as security and was accepted so, being a "plantation" and it was not a private forest under any circumstances.

11. The learned Special Government submitted that the additional documents can be accepted in terms of Order 41, Rule 27 CPC (aa) only if due diligence is established, despite which the party could not produce the same in the first round. No explanation is forthcoming from the appellants as to the "due diligence". They did not produce anything initially before the Tribunal, when the O.A. was filed in the year 1976 or before this Court in MFA No. 466 of 1979. Even thereafter, it was not produced before the Tribunal, despite the remand, or even in the present MFA till it was finalised earlier, as per judgment dated 09.08.2002, which came to be set aside and remanded by the Apex Court. These documents were virtually suppressed by the appellants, apprehending that the production will be detrimental to them, as the extent claimed and the meagre extent where plants were located by the RDO did not tally with each other and that the discrepancies pointed out by the RDO would have been brought to light.

12. It is true that the I.A. filed before the Apex Court was never allowed, although as per order dated 07.11.2003 while granting leave, it was observed that the interlocutory application will be considered at the time of hearing. It was held that on 07.09.2010, the date of pronouncement of the final verdict, that there will be no orders in the application for direction. Even though, the order of remand passed by the Apex Court only directs this Court to take fresh decision, in accordance with law after considering all the relevant materials and after hearing the parties concerned and even though there is no order/permission to raise any additional pleadings or evidence, since the additional documents were produced before the Apex Court along with the I.A. No. 2 of 2002 and since the Apex Court did not dismiss the I.A. as such, but for holding that no order was being passed in the application for direction; this Court finds it appropriate to look into these documents as well to ascertain whether it would prima facie enable the appellants to establish their case, and if so, whether the matter should be caused to be remanded for fresh consideration by the Tribunal with liberty to the State to rebut the evidence, including by cross examining the concerned officer, who has issued Annexure A or the party to Annexure B mortgage deed. Merit is being thus examined accordingly, with reference to all the facts and figures revealed by the materials on record, honouring the verdict passed by the Apex Court while ordering remand, in its right spirit and perspective.

13. It is worthwhile to note the Scheme of the Statute ("the Vesting Act") to appreciate the nature of contentions and the challenge raised. The Vesting Act was enacted by the State as a measure of "agrarian reform", so as to give effect to the Governmental policy of "grow more food". The properties in the hands of citizens which were beyond the ceiling area under Kerala Land Reforms Act and

which were left uncultivated, were intended to be taken over by the Government, in terms of Section 3 (1) of the Vesting Act, to be redistributed/allocated to the deserving persons for effecting cultivation. By virtue of Section 3 (1) of the Vesting Act, the vesting was to be automatic, as held by the Full Bench of this Court in Bhargavi Amma v. State of Kerala [1997 (2) KLT 513 (F.B.)]. The notification to be issued, specifying the particulars of the property so vested, is only a procedural formality to be completed.

14. The Vesting Act contemplates two situations, where a party can aspire to have his properties outside the purview of Act, the first one by virtue of the "exclusion" of the properties in terms of the definition of the term "private forest" under Section 2 (f) of the Vesting Act and other one is by way of "exemptions" under Section 3 (2) or 3 (3) of the Act. The burden of proof to show that the property is not a vested forest, is upon the claimant, by virtue of the law declared by a Full Bench of this Court in State of Kerala v. Chandralekha [1995 (2) KLT 152]. If the property is one which is being "personally cultivated" by the litigant as on the appointed day i.e. on 10.05.1971, it is liable for exemption under Section 3 (2) of the Vesting Act, subject to the parameters specified therein. Similarly, if the property was retained with the "intention to cultivate" as on 10.05.1971, it will still be eligible for exemption under Section 3 (3) of the Vesting Act, subject to the specified requirements. The learned senior counsel fairly concedes during the course of hearing, that there is no claim or prayer for "exemption" in terms of Section either 3 (2) or 3 (3) of the Act, but for the claim for "exclusion", it being a "plantation" in terms of Section 2 (f) (1) (i) (B) of the Vesting Act.

15. Section 2 (f)(1) (i) (B) of the Vesting Act reads as follows:

"2(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) xxxxxxxx

(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 for the preparation of the same for the market.

From the above provision, it is quite evident that, so as to get "exclusion" under Section 2 (f) (1) (i) (B), it has to be specifically pleaded and established that the property was principally cultivated as on 10.05.1971, to be treated as a plantation. This is a distinction from the wording in Section 3 (2) of the Vesting Act where the word "principally" is conspicuously absent. In so far there is no case for the appellants either in respect to Section 3 (2) or 3 (3) of the Vesting

Act and since it is confined to the claim for "exclusion", with reference to the nature of land, as defined under Section 2 (f) of the Act, scope of Section 3 (2)/3(3) need not be considered as it may have application only with reference to the ceiling limit and that is all.

16. Mr. Madhavankutty, the learned Special Government Pleader makes a reference to Sections 81 (1) and 82 of the Kerala Land Reforms Act ("KLR Act" in short) dealing with "exemptions" and "ceiling area" respectively, the relevant portions of which are extracted below :

"81. Exemptions - (1) The provisions of this Chapter shall not apply to -

(a) lands owned or held by the Government of Kerala or the Government of any other State in India or the Government of India or a local authority [or the Cochin Port Trust] or any other authority which the Government may, in public interest, exempt, by notification in the Gazette from the provisions of this Chapter.

Provided that the exemption under this clause shall not apply to lands owned by the Government of Kerala and held by any person under lease whether current or time expired or otherwise.

Explanation I - "Lands owned by the Government of Kerala" shall, for the purposes of this clause, have the same meaning as "Government lands" under sub-section (1) of Section 2 of the Kerala Government Land Assignment Act, 1960 [but lands escheated to the Government and held by tenants entitled to fixity of tenure under Section 13 shall not be deemed to be lands owned by the Government of Kerala.

Explanation II - lands, the right, title and interest in respect of which have vested in the Government under sub-section (9) of Section 66 or Section 72, shall not be deemed to be "lands owned by the Government of Kerala" for the purposes of this clause.

Explanation III - For the purposes of this clause, "other authority" shall include a corporation owned or controlled by the Government of Kerala or the Government of any other State in India or the Government of India.

(b) lands taken under the management of the Court of wards.

Provided that the exemption under this clause shall cease to apply at the end of three years from the commencement of this Act;

(c) lands comprised in mills, factories or workshops and which are necessary for the use of such mills, factories or workshops;

(d) private forests;

(e) plantations;

(f) cashew estate

Explanation - For the purpose this clause "cashew estate" shall mean any land principally cultivated with not less than 150 cashew trees per hectare

(g) xxxxx

(h) lands mortgaged to the Government, or to a co-operative society (including a co-operative land mortgage bank) registered or deemed to be registered under the Co-operative Societies Act for the time being in force, or to the Kerala Financial Corporation, or to the Kerala Industrial Developments Corporation, or to the State Small Industries Corporation, as security for any loan advanced by the Government or by such society or Corporation, so long as the mortgage subsists:

Provided that the exemption under this clause shall cease to apply at the end of three years from the commencement of this Act;

(i) lands purchased by the Kerala Co-operative Central Land Mortgage Bank or a Primary Mortgage Bank under Section 18 of the Kerala Co-operative Land Mortgage Banks Act, 1960 [or by the Kerala State Cooperative Bank Ltd., or by a primary agricultural credit co-operative society or by a scheduled bank as defined in the Reserve Bank of India Act, 1934], so long as such lands continue in the possession of the bank;

(j) lands purchased by the Kerala Financial Corporation or lands the management of which has been taken over by that Corporation, under Section 32 of the State Financial Corporations Act, 1951, so long as such lands remain in the ownership, or continue under the management, as the case may be, of the said Corporation:

provided that the exemption under this clause shall not apply in the case of lands the management of which has been taken over by the Corporation on or after the 1st day of April, 1964.

(k) lands belonging to or held by an industrial or commercial undertaking at the commencement of this Act, and set apart for use for the industrial or commercial purpose of the undertaking:

Provided that the exemption under this clause shall cease to apply if such land is not actually used for the purpose for which it has been set apart, within such time as the District Collector may, by notice to the undertaking, specify in that behalf.

(l) xxxxxx

(m) house sites, that is to say, sites occupied by dwelling houses and lands, wells, tanks and other structures necessary for the convenient enjoyment of the dwelling houses.

Explanation - For the avoidance of doubt, it is hereby declared that a compound wall shall not be deemed to be a structure necessary for the convenient enjoyment of a dwelling house, if the land on which the dwelling house is situated and enclosed by the compound wall is more than the land necessary for

the convenient enjoyment of the dwelling house.

(n) xxxxxx

(o) sites of temples, churches, mosques and cemeteries and burial and burning grounds;

(p) sites of buildings including warehouses;

(q) commercial sites;

(r) land occupies by educational institutions including the necessary for the convenient use of the institutions and playgrounds attached to such institutions;

(s) lands vested in the Bhoodan Yagna Committee

(t) lands owned or held by -

(i) a University established by law; or

(ii) a religious, charitable or educational institution of a public nature; or

(iii) a public trust (which expression shall include a wakf)

Provided that -

(i) the entire income of such lands is appropriated for the University, institution or trust concerned: and

(ii) where the University, institutions or trust comes to hold the said lands after the commencement of this Act, the Government have certified previously that such lands are bona fide required for the purposes of the University institution or trust, as the case may be; and

(u) lands granted to defence personnel for gallantry

(2) xxxxxx

(3) The Government may, if they are satisfied that it is necessary to do so in the public interest -

(a) on account of any special used to which any land is put; or

(b) of account of any land being bona fide required for the purpose of conversion into plantation or for the extension of preservation of an existing plantation or for any commercial, industrial, educational or charitable purpose, by notification in the Gazette, exempt such land from the provisions of this Chapter, subject to such restrictions and conditions as they may deem fit to impose:

Provided that the land referred to in clause (b) shall be used for the purpose for which it is intended withing such time as the Government may specify in that behalf; and, where the land is not so used within the time specified, the exemption shall cease to be in force.

(4) Notwithstanding anything contained in this Act or in any other law for the time being in force or in any contract or other documents or in any judgment, decree or order of any Court or Tribunal or Taluk Land Board or Land Board or other authority, a person holding plantation and lands ancillary thereto or interspersed within such plantation, may use not exceeding five per cent of the extent of such holding for floriculture or for the cultivation of Vanilla or medicinal plants or other agricultural crops or for establishing hotels or resorts or other tourism projects and for purposes ancillary or connected therewith."

82. Ceiling area - (1) The ceiling area of land shall be -

(a) in the case of an adult unmarried person or a family consisting of a sole surviving member, five standard acres, so however that the ceiling area shall not be less than six and more than seven and a half acres in extent;

(b) in the case of a family consisting of two or more, but not more than five members, ten standard acres, so however that the ceiling area shall not be less than twelve and more than fifteen acres in extent.

(c) in the case of a family consisting of more than five members, ten standard acres increased by one standard acre for each member in excess of five, so however that the ceiling area shall not be less than twelve and more than twenty acres in extent; and

(d) in the case of any other person, other than a joint family, ten standard acres, so however that the ceiling area shall not be less than twelve and more than fifteen acres in extent.

(2) For the purposes of this Chapter, all the lands owned or held individually by the members of a family or jointly by some or all of the members of such family shall be deemed to be owned or held by the family.

(3) In calculating the extent of land owned or held by a family or any adult unmarried person, the shares of the members of the family or the adult unmarried person, as the case may be, in the lands owned or held -

(a) by one or more so such members jointly with any person or persons other than an member or members of such family or by such adult unmarried person jointly with any other person or persons; or

(b) by a co-operative society or a joint family, shall be taken into account.

Explanation : For the purposes of this subsection, the share of a member of a family or an adult unmarried person in the lands owned or held jointly or by a co-operative society or joint family shall be deemed to be the extent of land which would be allotted to such member or person had such lands been divided or partitioned, as the case may be, on the date notified under Section 83.

(4) Where, after the commencement of this Act, any class of land specified in Schedule II has been converted into any other class of land specified in that

Schedule or into a plantation, the extent of land liable to be surrendered by a person owning or holding such land shall be determined without taking consideration such conversion.

Provided that nothing contained in this section shall apply to the conversion of any land into cashew estate.

(5). The lands owned or held by a private trust or a private institution shall be deemed to be lands owned or held by the person creating the trust or establishing the institution, of if he is not alive, by his successors-in-interest.

(6) In computing the ceiling area, lands exempted under Section 81 shall be excluded.

Explanation I - For the purposes of this section, where a person has two or more legally wedded wives living, the husband, one of the wives named by him for the purpose any their unmarried minor children shall be deemed to be one family; and the other wife or reach of the other wives and her unmarried minor children shall be deemed to be a separate family.

17. The term "plantation" is referred to in Clause (e) of Section 81(1) of the KLR Act. Under the KLR act, the maximum area stipulated is 15 acres. But if it is a plantation, there is no ceiling limit. As such, what is "plantation" has necessarily to be identified and it stands defined under Section 2 (44) of the KLR Act which is extracted below:

(44) "plantation" means any land used by a person principally for the cultivation of tea, coffee, cocoa, rubber, cardamom or cinnamon (hereinafter in this clause referred to as "plantation crops") and includes -

(a) land used by the said person for any purpose ancillary to the cultivation of plantation crops or for the preparation of the same for the market;

(b) xxxx

(c) agricultural lands interspersed within the boundaries of the area cultivated by the said person with plantation crops, not exceeding such extent as may be determined by the Land Board (or the Taluk Land Board, as the case may be] as necessary for the protection and efficient management of such cultivation.

Explanation : - Lands used for the construction of office buildings, god owns, factories, quarters for workmen, hospitals, schools and play grounds shall be deemed to be lands used for the purposes of sub-clause (a);

Quite evidently, the word "principally" is used in the definition clause of "plantation" and unless the property satisfies the definition of the term plantation, the benefit of unlimited exclusion, i.e. without any regard to the maximum of 15 acres provided under Section 82 of KLR Act will not be available. So, the fundamental question to be considered is whether the disputed property which is claimed to be a "plantation" as on the appointed day 10.05.1971, was

"principally" being cultivated as on that date.

18. Now comes the question as to what is the meaning of the term "principally cultivated". Going by the very terminology, the intention of the Statute appears to be that the cultivation has necessarily to be to a substantial extent so as to make the property principally cultivated. In other words, occurrence of the cultivation here and there in a large extent of the property is not sufficient to hold that it was principally being cultivated. The factual position available in the present case will be dealt with later, and before that, what exactly is the meaning of the term and what extent of cultivation has to be there to ascertain whether it was being principally cultivated or not, are to be considered.

19. The learned Special Government Pleader seeks to place reliance on the observations and findings made by another Division Bench of this Court in the common judgment dated 11.03.1988 in MFA 78 of 1983. Paragraphs 32 and 33 of the said verdict are relevant, which hence are extracted below :

"32. The Tribunal relied on the report of the Commissioner to find that there were coffee plants which were 15

- 20 years old in the disputed property. The Commissioner had seen a maximum of 50 - 75 coffee plants per acre in the age group of 8 - 12 years at the time of inspection. It is hardly possible to hold that number is sufficient to treat the disputed area as "principally planted with coffee". Significantly, the Commissioner did not find any cardamom plants in the disputed area. Ext. C1 to C3 will therefore, indicate only that there were stray coffee plants in some portions of the disputed area. We had occasion to consider whether an area where there are only a few coffee or cardamom plants or where there are remnants of abandoned plantations could be treated as principally cultivated with such plantation crops. In our judgment in M.F.A. No. 214 of 1981 we had refused to accept almost the same contention as is sought to be advanced by counsel for the respondents. We based our decision on the judgment in M.F.A. No. 426 of 1982, which in turn, drew largely upon in Chacko Jose v. State of Kerala and another, 1975 KLT 825 and Kunhahamed Koya v. Gopala Menon, AIR 1943 Madras 1891. On of use (Sivaraman Niar, J.) had occasion to consider the question whether an area with sparse growth of coffee or cardamom could be considered as "principally planted" with those crops. With reference tot he evidence of a plantation expert, it was held in M.F.A. No. 48 & 291 of 1981 that unless there were at least half the usual number of plants per acre of the respective species, the area could not be considered as "principally planted" with those corps.

33. We are therefore constrained to hold that the Tribunal was wrong in coming to the conclusion that the dispute disputed area was either a coffee or cardamom plantation or that it was even cultivated prior to the appointed date. The existence of a few cardamom or coffee plants in the property, even prior to the appointed date, cannot induce an invariable inference that the areas in question were cardamom or coffee plantation prior to that date. That evidence is hardly

sufficient to sustain a finding that the disputed area was principally planted with cardamom or coffee. The vague and general assertions found here and there in the evidence let in by the applicants were not sufficient to hold that the lands in dispute were held under the personal cultivation of the applicants entitling them for exemption under Section 3 (2) of the Act 26 of 1971"

From the above, it is seen that the finding rendered by the learned Judges in the above case was, with reference to the inference arrived at in similar situation, based on the evidence of a "plantation expert", that unless there were at least "half" usual number plants per Acre of the respective specie, the area could not be considered as principally planted with those crops. We are in full agreement with the above finding and reasoning and unless the pleading and evidence in the instant case establish that the above requirement is satisfied, the property cannot be held as a "plantation", to be excluded from the purview of the Vesting Act.

20. Coming to the factual position involved in the present case, with reference to the pleadings and evidence adduced, the disputed property, according to the appellants, is comprised in Resurvey Nos. 193, 200 and 201 in Meloth Village of Hosdrug Taluk. The property originally belonged to Kodoth tharavadu. Pursuant to the final decree passed by the Sub Court, South Canara for partition of the tharavadu property in O.S. 114 of 1936, the property came to be allotted as the share of some of the members of the tharavadu from whom it was purchased by Karimbil Kunhi Koman (the original applicant) and Cherippadi Kunhikannan Nair (C.K. Nair), jointly as per different deeds of conveyances executed between 1947 and 1955. Subsequently, Karimbil Kunhi Koman and Kinjukannan Nair effected division of the properties as per Ext.P3 partition deed executed in between, wherein the property was described as "Elathottam". By virtue of Ext. P1 patta karar (lease agreement) dated 16.07.1964, the share of Kunhikannan Nair was taken on lease by Kunhi Koman, which was subsequently renewed as per Ext.P2 dated 28.08.1967. The property has been described as "Elamala" in the other records such as Ext. P25 to P27 and Ext. P32 to P36 referred to in O.S. 114 of 1936. It is contended by the appellants, with reference to these documents (here the property has been described as Elathottam/Elamala) and also with reference to the counter affidavit filed by the respondent in O.A. 170 of 1976 (wherein it was stated that out of 910.54 acres claimed by the petitioners, about ? portion was planted with crops and about ? portion was left without any cultivation prior to 10.05.1971), that in view of the admission that ? portion was already cultivated prior to 10.05.1971, the property was to be held as a "plantation". According to the appellants, in view of the said admission, there could not be any dispute with regard to ? portion of the property and what was left to be considered by the Tribunal was only with regard to the position in respect of the remaining extent and that is all. It was accordingly, that the O.A. was allowed. But according to the respondent State, the said contention was repelled by this Court earlier and the order passed by the Tribunal had already been set aside, and hence there was no finding that ? portion of the property was not vested

forest; by virtue of which it was necessary for the Tribunal to have a fullfledged enquiry into the question as to whether the land was private forest or not. Applying the same logic to the instant case, since the judgment passed by this Court at the earlier instance on 09.08.2002 has been set aside by the Apex Court ordering remand for fresh consideration (as per the verdict passed in Civil Appeal on 07.09.2010), we have gone through the entire pleadings and evidence afresh, to ascertain whether the property was "principally cultivated" as on 10.05.1971 and to hold whether it was liable to be excluded from the purview of the vesting Act.

21. With regard to the "so called admission" stated as made by the second respondent in paragraph 2 of the counter affidavit filed before the Tribunal, that about ? portion of the property was seen planted with crops and about ? portion was left without any cultivation prior to 10.05.1971, it cannot be read in isolation and has to be appreciated with reference to the remaining portion in paragraph 5. Both the paragraphs 2 and 5 are reproduced below for convenience of reference.

"2. Out of 910.54 acres claimed by the Petitioner about half portion was seen planted with crops and about half portion left without any cultivation prior to 10.05.1971. The petitioner was granted a no objection permit by District Collector, Connore for 170 acres in R.S. 195 as per Collector's K.Dis. 6671/164 dated 11.5.65.

3.

4.

5. There is no surveyed boundary or any sort of demarcated boundary on this ground to differentiate this 910.54 acres of land in R.S. 193 and 200 Malom Village. The land forms extensively part of other vested forest lands which were also under his possession prior to 10.05.71 and in the absence of definite boundary on the ground for this 910.54 acres, he claim vested forests as well as his part of estate. There are many patches of ever green forests ranging from 2 to 20 acres in extent amidst this estate and the petitioner claim these patches in the guise of fire belt, which has been demarcated and included in the vested fores. There patches of Vested Forests contain constly tree growth of different age gradation of ever green species like, Pali, Punna, Vellapine, Cheru with thick undergrowth of canes and tree growth of 1 to 80 years old which testifies that these area has not been brought under any sort of cultivation in the forest. There patches of Vested Forests contain costly tree growth of different age gradation of ever green species like, Pali, Punna, Vellapine, Cheru with thick undergrowth of canes and tree growth of 1 to 80 years old which testifies that these area has not been brought under any sort of cultivation in the forest. The exact area thus demarcated as vested forest can be ascertained only after survey which is in progress."

In view of the assertion made in paragraph 5, it cannot be held that there was

any admission on the part of the respondent as to the disputed fact. That apart, the second respondent has never stated in the said counter affidavit that the property was "principally cultivated" as on 10.05.1971. But for stating that ? portion was seen planted with crops, even what type of crop was it, also is not mentioned. This being the position, what is not specifically spoken to by the second respondent cannot be simply put into his mouth, to extract unlawful gains by the appellants. Even though Section 58 of the Evidence Act very much stipulates that admitted fact does not require to be proved, it also enables by virtue of the proviso thereunder, that nothing prevents the Court from requiring the party to adduce evidence and substantiate the facts and figures. This is more so relevant in a case like this, where the very vesting under section 3 (1) of the Act is automatic, which is brought into effect by virtue of enactment in public interest as an "agrarian reform". In the said circumstances, the so called admission sought to be relied on by the appellants is not liable to be treated as an admission of the actual requirement that the property was "principally cultivated" as on 10.05.1971.

22. Considering the question whether the appellants have proved the factual position that the property was "principally cultivated" as on 10.05.1971, it is to be noted that no material or reliable piece of evidence has been brought to the notice of this Court, but for Exts. C1 to C4 commission report/plan, the deeds/conveyances where the property was described as "elathottam/elamala". The report of the earlier commissioner and plan attached therewith (Exts. C1 to C4) stand already set aside by the Tribunal and another commissioner was deputed to ascertain the actual facts and figures. The O.A. itself was filed by the original applicant in the year 1976 i.e. nearly five years" after the vesting, which took place on 10.05.1971. Exts. C1 to C4 were of the years 1977-1978, which have been set aside by the Tribunal and the subsequent commission report of the year 1979 was produced and marked as Ext.C5. In Ext. C5, the commissioner has given the facts and figures in crystal-clear terms, particularly in paragraphs 13 to 19 as extracted below :

"13. The following lands in the Sub Divisions to which the respondent laid claims as cardamom plantation were examined by me.

I. Sub Division 237/3 in R.S. 201/2: The area was claimed by me and the same was found to be nothing but thick forest. However, the jeepable road runs through this vested area and I am told by the Forest Range Officer that all path ways are being exempted from vested forest areas so as to enable others to use the pathway for their ingress and egress to their properties.

II. Sub Division 200/6 in R.S. 200: The area demarcated is circular in shape and along the fringes of this circuit, I was able to find altogether 15 plants which from their size and growth appeared to be 15 years old. The plants were amidst thick forest and the entire circuit in Sub Division No. 200/6 was full of jungle trees and it is hard to believe that these plants were there due to due to conscious human endeavour. The rational inference that could be drawn is that

the plants have grown by natural causes especially because on the northern side of this circuit we have the cardamom plantation of the respondent. The area under this circuit sub-division No. 237/3 is 0.7934 hectares.

III. Sub Division 232/1 in R.S.213: Altogether the respondent was able to point out 6 plants about 15 years old. This circuit is contiguous to sub Division 219 in R.S. 213. The area of this circuit is 0.7504 hectares which may be exempted as being cultivated with cardamom.

IV. Sub Division 220/2 in R.S. 193: About 143 cardamom plants were found in this area which to all intents and purposes does not look like a cardamom plantation what with the closely situated trees and heavy shades. The forest Department say that the plants found in this area were planted by the respondent under the cover of the interim injunction order he has secured. The respondent says that the plants are 15 to 25 years old. On examining these plants I found them to be aged 15 to 20 years old but that strangely none of these plants have more than 2 or 3 shoots. Plants aged 15 to 20 situated in the exempted area reveal the robust growth of the plants that grown in freely the jungle manure and they have innumerable shoots. One such plant occupies large area with its bushy growth whereas the plants I observed were almost dying and their leaves getting dried up in spite of the thick shades they were having. The Commissioner submits that the opinion of the foresters that the plants in question were planted after 1977 cannot be ruled out as altogether baseless. The area of this circuit is 2.5109 hectares.

14. Regarding other areas taken by Government as vested forest, Sri. Kunhambu on behalf of his brother submitted that the entire area was planted with cardamom that because of lack of shade many cardamom plants were destroyed.

15. On examining the rest of the areas the Commissioner finds that they are thick jungles described as even green forests-full of trees of species like Vella Urippu, Tholaranji Vatta, Vella Payan, Cheeni. Most of these areas are impenetrable forests full of wild briars bushes and thick undergrowth and could never have been cardamom plantations or area, where cardamom planting was attempted. Further, the petitioner also did not require me to inspect these areas since they were verily thick forests. The Commissioner submits that the Government was right in having taken these areas as vested forest.

16. The Coolie lines cardamom plantations, arecaut garden, Devi Temple demarcated in the pan Exhibits C2 and C4 are almost correct but these areas are already excluded by the Government and classified as developed areas.

17. The Commissioner had the opportunity to inspect the southern most boundary which touches the Coorg boundary. Close to this area lies some revenue lands.

18. On inspecting rest of the areas in R.S. No. 201/2, 200 and R.S. 193 part the commissioner submits that the State has been fair enough in excluding all

developed areas and that no manifestly developed area was taken by it as vested.

19. However, it is submitted that the Commissioner not able to agree to in any measure the opinion expressed by the previous commissioner that the entire area is a planted with cardamom of aged 15 to 30 years. The respondent also had no such case before the Commissioner.

From the above, it clear that the commissioner had even taken the number and types of the plants available at the time of inspection which only denotes that some cardamom plants were situated here and there in the property, which cannot be a foundation to hold that the property was "principally cultivated" on the appointed day i.e. on 10.05.1971.

23. Of course, there is a contention for the appellants that the documents produced revealed cultivation in the property at least till 1967 and by virtue of the law declared by the Supreme Court in *Ambika Prasad Thakur and Ors. v. Ram Ekbal Rai* [AIR 1966 SC 605] if a thing or a state of thing is shown to exist, inference of its continuity within a reasonable proximate time, both forwards and backwards, may sometimes be drawn. Reliance is sought to be placed on Section 114 of the Evidence Act as well; as to the presumption to be drawn. The factual circumstance in the above case, stands entirely on a different pedestal, as the Scheme of Vesting Act is entirely different and the Vesting being automatic on 10.05.1971, burden is heavy upon the litigant to prove that it is not a vested forest, in view of law declared Full Bench of this Court in *State of Kerala v. Chandralekha* [1995 (2) KLT 152]. Whether this burden has been satisfied by the appellants is the question. In other words, what is the material produced by the appellants, to hold that the property was being "principally cultivated" as on 10.05.1971, is the fact that requires to be ascertained.

24. Even in the earlier round of litigation, the above aspect was considered by the Bench while passing judgment on 09.08.2002, holding that even if the property was continuing as a plantation upto 1967, it was not enough to hold that it was principally being cultivated as on 10.05.1971. We fully agree with the said proposition. The documents already produced before the Tribunal and which were forming part of the records till filing I.A. No. 3899/2015, do not prove or give any indication that the property was being principally cultivated as on 10.05.1971. Then the question is whether the additional documents produced along with I.A. No. 3899/2015 as Annexures A & B would support the case of the appellants in any manner. Annexure A forms the proceedings dated 08.02.1969 of the Revenue Divisional Officer, Kasargode in respect of the files bearing No. R.Dis. 6140/67 & 6141/67, issued in favour of the persons by name C. Kunhikannan Nair and C. Kunhi Koman respectively. The said proceedings refer to the application dated "24.05.1967" preferred by the parties for registration under the Kerala Cardamom Estate Owners Registration Rules 1966. The Registration of the owner of the cardamom plantation is envisaged under Section 11 of the Cardamom Act (Central Act) 1965. Section 12 deals with the Rule making power of the State, while Section 13 deals with the returns to be filed

and under Section 14, cess at the prescribed rate is payable on the cardamom exported. It is in exercise of the power under section 12, that the Kerala Cardamom Estate Owners Registration Rules, 1986 were framed by the State, in turn leading to the application preferred in the year 1967 and the registration given, to the extent as made clear vide Annexure A. Now, let us examine the evidential value of Annexure A proceedings of the RDO.

25. It has been categorically observed by the RDO in paragraph 2 of Annexure A that the extent of cardamom plantation furnished in the application form does not reconcile with the extent of cardamom plantation found on verification; also adding that the extent under each resurvey No. has not been furnished in the application. On verification, the RDO found that the applicant C. Kunhikannan Nair has got cardamom plantation in Re. Survey 193, 200, 201/2 of Maloth village as given below :

R.S. No.

Total Acre

Area with cardamom plantation

Yielding

Non-yielding

193

223.00 acres

26.00 acres

15.00 acres

200

107.45 "

4.00 "

5.00 "

201/2

137.65 "

20.00 "

5.00 "

Similar particulars in respect of the property which belonged to Kunhi Koman have given in the proceedings as given below :

R.S. No.

Total Acre

Area with cardamom plantation

Yielding

Non-yielding

193

223.00

46.00

20.00

200

107.45

10.00

5.00

201/2

31.00

20.00

2.00

In both the above proceedings, it has been stipulated in paragraph 4, that the registered owners should submit annual return to the office of the RDO in "From F" for every year ending the 31st July; before 15th August of that year. From the above particulars referred to by the RDO, it is clearly discernible that, even in the year 1969 as against the claimed extent of 1048 acres involved in the present appeal, the total area where cardamom plants were available (yielding plus non-yielding) constituted only about 152 acres. When the appellants projected the claim before the Tribunal in the O.A. filed in the year 1976 that the plantation having a total extent of 1048 acres was liable to be excluded, not being a private forest, their own applications preferred before the concerned authority under the Cardamom Act/Rules for registration in the year 1967 and as disclosed from the Annexure A order issued by the RDO, only an extent of about 152 acres was shown as the registrable extent of cardamom plantation (yielding/non yielding). As such, the very document produced as "Annexure A" by the appellants themselves cuts the root of the case that the disputed property having an area of 1048 acres was principally cultivated with cardamom. Annexure A does not support the case of the appellants in any manner; nor does it require the matter to be remanded to bring out any factual particulars.

26. Coming to Annexure B (another additional document produced along with I.A. 3899/15), it is a certified copy of the mortgage deed dated 21.01.1971 i.e. prior to commencement of the Vesting Act, executed between the predecessor-in-

interest, in so far as the present appellants are concerned and the State Bank of Travancore, in connection with a loan of Rs. 6 lakhs availed for setting up an ice factory by the borrowers. The schedule of property given in the said document refers to various other survey numbers as well, which are not mentioned in "Annexure A" proceedings issued by the RDO. The Survey Nos., extent and other particulars do not completely tally with the particulars given in Annexure A and nowhere in Annexure B, has it been mentioned that the entire property was being "principally cultivated" even as on the execution of the said document, but for referring to the status of the mortgagers as owners of the arecanut/coconut/rubber and cardamom plantation (measuring about 1240 acres in Maloth and West Elary villages of Hosdrug taluk and about 2.30 acres in Kanjghad village of Hostrug taluk). The contention made by the learned senior counsel for the appellants that the property shown in Annexure B, if private forest, would not have been accepted by the Bank as security for the loan, does not impress us in any manner; obviously, for the reason that the said document is of the date "21.01.1971", whereas the Vesting Act came into existence only on 10.05.1971 stipulating the norms for identifying the vested forest. Since, both Annexures A and B do not reveal that the disputed property of 1048 acres was being "principally cultivated" as on 10.05.1971, the contention of the appellants that the said property stands excluded from the purview of the Act by virtue of Section 2 (f) (1) (i) (B) of the Vesting Act cannot but fail.

27. Another important aspect is that, if the entire property of 1048 acres were "principally being cultivated" as on 10.05.1971, it would have necessitated maintenance of various records as to deploying large extent of labourers, paying wages to them; purchase of manure/fertilizers/pesticides and other agriculture equipments; huge transportation costs; sale of Cardamom to the prospective customers for export, satisfaction of tax under different heads as per the relevant Statutes including payment of agricultural tax etc. The appellants have conceded in paragraph 3 of the affidavit dated 30.10.2015 filed in support of I.A. 3899 of 2015 that they have all along been satisfying the agricultural tax under the Kerala Plantation (Additional Tax) Act, 1960 till date in respect of the property concerned; but no reference is made to any such document forming part of the records and non-production of any materials in this regard can only lead to the inference that the version of the appellants that the property of "1048 acres" was being "principally cultivated" by them is nothing but a bald submission, which hence is not liable to be accepted. It is also relevant to note, as borne by Ext. C5 Commissioners Report, that the disputed property is having no demarcation of boundary and that the appellants were having cardamom plantation on the northern side of the disputed property which is not vested with the Government and further that all the lands where building/shed/temple/well were situated, were treated as developed properties and have already been taken outside the purview of the Act by the Government.

28. Lastly, there is a contention for the appellants that at least the property identified by the RDO as plantation while giving registration as per Annexure A

(50 acres yielding and 25 acres unyielding) might be ordered to be excluded from the purview of the Act. Apart from the fact that the said document dated 08.02.1969 does not stand as a proof to hold that the same situation was prevailing as on "10.05.1971" as well and that the property was being "principally cultivated" by the appellants. It is also to be noted that the actual factual position is something else, as reflected from Ext. C5 Commissioner's report (paragraphs 2 to 5 extracted hereinbefore). The learned senior counsel submits that Exts. C1 to C4 earlier Commissioners' report/plan stand in favour of the appellants and though the said reports/plan unfortunately came to be set aside by the Tribunal, they still form part of the record. It is stated that they were set aside by virtue of law declared by this Court in *Moidu v. Lakshmi Amma* [1968 KLT 699] that, it was necessary to have the earlier Commission report set aside, to have ordered issuance of another Commission. But the point to be considered herein is that, even as per the additional evidence now brought in by the appellants as per Annexure A proceedings of the RDO of the year 1969, only an extent of 152 acres were found as cardamom plantation (both yielding and unyielding). If this be the position, how the entire area of 1048 acres came to be reckoned/certified as "plantation" by the Commissioner appointed in the earlier instance as per Ext. C1 to C4 remains a matter of mystery. This Court finds that Exts. C1 to C4 were rightly set aside by the Tribunal and the factual particulars were got ascertained through the subsequent Commissioner vide Ext. C5. It is also to be noted that there is no much distance of time between Exts. C1 to C4 (which were set aside) and Ext. C5. We have already held that existence of plants here and there cannot constitute as a "plantation" and it can be treated as "principally cultivated", only if more than 50% of normal number per acre is identified. Total extent certified as per Annexure A proceedings of the RDO (about 152 acres) out of the total claimed extent of 1048 acres, is only a negligible extent (it being less than 15%) which cannot lead to any inference that the disputed property was being "principally cultivated" as on 10.05.1971.

29. With regard to the submission made by the learned senior counsel that the property identified as "plantation" in Annexure A document by the RDO might be excluded from the Vesting Act, this Court finds it difficult to agree. This is because of the particular scheme of the Statute. As discussed hereinbefore, the Statute grants the benefit of "exclusion" from the purview of the Vesting Act under section 2 (f) (i) (1) (B), only if the property was "principally cultivated" as on the date of commencement of the Vesting Act i.e. on 10.05.1971. The Statute does not say that the portion of the property where any planting is effected will stand excluded from the purview of Vesting. The facts and figures have to be taken as a whole. The purpose of the Statute is to confer vesting upon the State and the exclusion/exemption, as the case may be, can only be subject to satisfaction of the specific requirements mentioned in the provision. In so far as the Statute does not say that the portion of the total property where any existing crop/plantation is identified is to be excluded, leaving the remaining extent to be vested with the Government, the submission made by the appellants that "152

acres" identified by the RDO in the year 1969 as per Annexure A (out of the total claimed extent of 1048 acres) might be excluded from the purview of the Vesting Act is of no pith or substance.

30. In the light of the above discussions, this Court is of the view that the appellants have miserably failed in establishing their case, that the disputed property was "principally cultivated" as on the appointed day i.e 10.05.1971, not to be a "vested forest". The appeal fails and the same is dismissed accordingly.