
(1990) 02 KL CK 0032

In the High Court Of Kerala

Case No : O.P. No"s. 8793 of 1983-R and 10551 of 1985-R

Geetha Timbers, Chalakudy

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 02-02-1990

Acts Referred:

Constitution of India, 1950 — Article 226

Kerala Forest Code — Section 2(36)

Kerala Forest Produce (Fixation of Selling Price) Act, 1978 — Section 2, 5

Citation : AIR 1991 Ker 350 : (1990) 2 ILR (Ker) 548

Hon'ble Judges : V.S. Malimath, C.J;T.L. Viswanatha Iyer, J;K.A. Nayar, J

Bench : Full Bench

Advocate : T.R. Raman Pillai, for the Appellant; A.G., A. Antony and Kallada Sukumaran and T.K. Ajayakumar, Commissioner, for the Respondent

Judgement

K.A. Nayar, J.—The questions of law to be decided in these cases are snowed under an avalanche of exhibits and pleadings, but on a subjection of judicial thawing of these exhibits and pleadings, it will be seen that the matter falls in a narrow compass. Both the cases are connected and we will take up O. P. 10551 of 1985 for consideration first,

2. The petitioner is an A class contractor who has undertaken major contract works of the forest as well as Public Works Department of the State. He challenges the proceedings of the Government in permitting the 5th respondent to remove the timber stocked on the bank of the Kakki reservoir on the ground that the proceedings permitting the 5th respondent to collect and remove the timber spells in the realm of favouritism shown to the 5th respondent by the Government. The prayers in the Original Petition (O.P. 10551 of 1985) are:

"1. A writ of certiorari, or other appropriate writ, direction or order quashing Ext. 89 Government order No. 312/84/Agri. dated 27-10-1984 issued by the fust respondent, permitting the 5th respondent to remove timber (3898.952 cum) stacked on the banks of the Kakki reservoir;

2. to issue appropriate writ, direction or order, declaring that the quantity of timeber found at Anathode and Kakki stacking/ collection points in Kakki reservoir coupe are (3898.952 cum) stand reverted to Government as their property by virtue of clauses (5) and (12) of Ext. P19 agreement dated 13-6-1977;

3. to declare that the petitioner is entitled to purchase the entire timbers piled/ stacked on the banks of the Kakki reservoir (3898.952 cum) at Kakki and Anathodu collection/ stacking/collection site and the balance timber found in the Kakki reservoir at an average price of Rs. 1000/- per cum of utilisable timber by virtue and in consequence of Ext. P11 offer of the petitioner as revived by Ext. P14 dated 23-4-1983, subject to terms and conditions prevailing in respect of similar forest contracts, as to contract period, security deposit, penalty, etc."

The 3rd prayer in the Original Petition has not been pressed before us at the time of hearing and the petitioner's prayer in this Court at the time of hearing was to treat the Original Petition (O.P. 10551 of 1985) as a public interest litigation. The 5th respondent in the O.P. is the petitioner in O.P. 8793 of 1983.

3. The surviving points to be considered in the Original Petition, therefore, are whether Ext. P89 Government Order dated 27-10-1984 issued by the first respondent permitting the 5th respondent to remove the timber stacked on the bank of Kakki reservoir is in any way illegal and whether the timber found in the reservoir coupe are both collection and stacked as well as remaining submerged vested in the Government.

4. Before addressing to the legal questions involved, a narration of facts leading to Ext. P89 and thereafter will be required for appreciating the controversy. The timber remaining in 82 hydal coupes in Kakki dam area were sold to various parties in 1963, 1964, 1965 and 1967 before the Kakki dam reservoir was inundated and commissioned in 1967. The Executive Engineer, Civil Maintenance Division, Moozhiyar pointed out that timber lying between F.R.L. (3220") and minimum draw down level (2960") is a major cause for the hydrogen sulphide pollution and if those timber are allowed to be collected and removed, or allowed to be burnt to charcoal and removed, it will be possible to clear the area without any cost either to K.S.E. Board or Forest Department. The possibility of collection of revenue by the Department is also pointed out. This recommendation was approved by the Conservator, Chief Conservator and the Government and it was decided to go ahead with the proposal for salvaging the timber from the reservoir. It is, thereafter the Divisional Forest Officer published the necessary notification inviting tenders for the right of collection and removal of timeber and firewood and charcoal (except teak and rose wood) lying embedded in the Kakki reservoir between F.R.L. 3220" and minimum draw down level 2960". The notification inviting tenders was published in the Gazette on 24-5-1977 and Malayalam dailies Keralabhooshanam and Janayugam on 23-5-1977. The timber lying embedded in Kakki dam were left out by the contractors as they found not profitable due to their inferior quality. The quantity of timber that would be

available for collection also could not be ascertained as they were lying immersed in water and mud in the reservoir.

5. Pursuant to the notification calling for tenders, four tenders were received. The highest rate of Rs. 15/- per cubic metre was offered by the 5th respondent. The other three offers were Rs. 14/- per cum., Rs. 13.50 per cum and Rs. 12/- per cum. In view of the fact that the timber embedded in the reservoir are those lying abandoned years back by the contractors of Hydal coupe in Kottayam the value of which was once realised by the Forest Department and Departmental collection of these timber was not feasible as it would entail heavy expenditure to drag those timber from the bottom of the reservoir, it was thought advantageous for the Department to accept the highest tender and accordingly the tender of the 5th respondent was accepted and agreement Ext. P19 was executed on 13-6-1977. Under the said agreement executed between the 5th respondent and the Divisional Forest Officer Ranni Division, acting on behalf of the State, the right of collection and removal of timber and firewood embedded in the Kakki reservoir in Gopdrical Range in between FRL 3220" and minimum draw down level 2960" was given to the 5th respondent up to the end of June, 1978. The rate fixed for all species of timber was Rs. 15/- per cum. except teak and rosewood. 20 bags of charcoal or 1.5 cum. of firewood will be treated as equivalent to 1 cubic metre of timber for calculation of value. If the timber salvaged is teak or rosewood the same should be surrendered to the Department and the contractor will have no claim over such logs including the cost of salvaging the logs. The contractor has to get all the timber pieces collected by them registered and duly hammer-marked at both ends of the logs by the Range Officer or any other Officer authorised for the purpose. Check measurement will have to be done after collection. After check measurement the Range Officer will issue to the contractor a chalan together with a bill in Form No. 10 for remittance into the Treasury of the value of the produce together with sales tax at 4%. The contractor has to pay the amount within 15 days from the date of receipt of the chalan and bill. If he fails to remit the amount he will be allowed a further period of 15 days subject to payment of interest for the overdue amount at the rate of 12 per cent. If he still fails to remit the amount even within the extended period a further extension of 15 days will be granted by the Divisional Forest Officer and another one month by the Conservator of Forests subject to payment of interest at 24 per cent, in both cases. If he still fails to pay the amount even within the extended time the contract will be cancelled and the security deposit made by him will be forfeited to the Government. The contractor shall also forfeit his claim to all the timber collected and paid for by him but left unremoved in the contract area. The contractor will also be responsible for the loss if any which the Government may sustain by the resale of the right of collection and purchase of the produce. But he will have no claim for the profit, if any, the Government may realise by such resale. It is specifically mentioned in clause 12 that no extension of the period of the contract shall ordinarily be granted, but if, however, the delay in completing the work in the contract area within the period specified in the

schedule attached is due to circumstances beyond the control of the contractor, extension of time can be granted by the Divisional Forest Officer/Conservator of Forests Quilon/Chief Conservator of Forests for one/three/six months respectively, but not exceeding six months on the whole subject to payment of penalty as mentioned in the clause. It is also stipulated that in the event of contractor's failure to remove the materials collected and stacked outside the waterspread area by the expiry of this extended period such stock shall be forfeited and shall become the absolute property of the Government and the contractor shall not, by reason of such forfeiture, be entitled to any refund or abatement of the amount payable under the contract. The Divisional Forest Officer was authorised to grant permission to store the timber and other produce collected from the contract area within the reserve forest but outside the contract area at the contractor's risk on payment of rental for the area at Rs. 100/- per acre per month.

6. The petitioner has not submitted any tender and the agreement was executed accepting the highest tender. At the expiry of the term of one year on 13-6-1978 it was found that there were still more wood stuff remaining in the reservoir between FRL 3220" and minimum draw down level 2960" which could be salvaged and removed at the option of the Government and also in whatever manner the Government wanted to salvage them. The contractor on 19-7-1978 applied to the Government for extension of the contract period. Extension was applied to the Government on the ground that the labour trouble, unfavourable climatic conditions and other problems crippled the progress of their work. It was also pointed out that the working season was short and the water level goes very low. The Chief Conservator of Forests recommended extension for one year. In the meantime the Divisional Forest Officer, Ranni and Conservator of Forests Quilon granted extension for one month from 1-7-1978 and two months from 1-8-1978 respectively. The government after examining the request of the contractor granted extension by Ext. P34 dated 6-9-1978. Extension was for six months from 1-7-1978 subject to realisation of penalties as per the agreement provision. It is during the period of first extension the petitioner submitted his letter dated 10-5-1978 offering Rs, 1000/- per cubic metre for the right of collection, The department thought that the offer was not genuine and it was detrimental to accept the petitioner's offer as he may make a selection of quality timber leaving the other, timber in the reservoir which will not serve the purpose contemplated in the agreement. On the expiry of the first extension period on 31-12-1978 there were still woodstuff remaining in the reservoir between FRL 3220" and minimum draw down level 2960" which had to be salvaged at the option of the government. Therefore when the contractor sought second extension on the same ground he mentioned for the first extension the Government granted further extension subject to realisation of penalty. This was done by Ext. P35. A further extension was also given by Ext. P36 for one year from 1-7-1979 and the last extension was given by Ext. P37 on 29-9-1980 up to 30-6-1981. Even after the expiry of the extended period the 5th respondent

wanted further extension and by letter dated 25-5-1981 he sought further extension up to 31-1-1982. When the 5th respondent knew that the same will not be granted he filed O.P. 5023 of 1981 in September 1981 to declare that he acquired a right to collect and remove the timber. He also filed C.M.P. 17751 of 1981 for an interim direction not to object or prevent the collection or removal of timber, firewood or charcoal from Kakki reservoir and the interim direction as prayed for was granted by this Court subject to payment of price and penalty according to the agreement. This was on 5-10-1981. In the meantime the application of the 5th respondent dated 25-5-1981 for extension up to 31-1-1982 was rejected by the Government by Ext. P49. Thereafter O.P. No. 5023 of 1981 filed by the 5th respondent came up for hearing and this Court by judgment dated 24-6-1982 produced as Ext. P66 recorded the submission made on behalf of the Government to the effect that notwithstanding the expiry of the period of agreement as extended from time to time up to 30-6-1981 the Government would recognise the rights and obligations of the 5th respondent under the contract for a further period expiring on 30-8-1982 except in regard to the rates of payment which the Government would fix for the timber removed and stacked by the 5th respondent after 30-6-1981. The Advocate General also submitted that it would be open to the 5th respondent to make an application to the Government for further extension of time and such application would be considered on merits. Acting upon such submission this Court extended the time for performance of the terms of contract till 30-8-1982 subject to the right of the Government to fix the new rates of payment (and penalty if any) in respect of the timber removed and stacked subsequent to 30-6-1981. This Court also held that it will be open to the 5th respondent to make the application to the Government for the right to continue the work which they have been doing in terms of the contract and hoped that the Government would consider the same on merit without delay bearing in mind the fact that the 5th respondent has been performing the contract after considerable investment of capital and in the hope that the 5th respondent would be allowed to complete the work as contemplated in the contract. O.P. No. 5023 of 1981 was disposed of with the above directions. This decision has become final. The clear effect of the decision is that Ext. P 19 contract will stand extended up to 30-8-1982 except with respect to the rates of payment in respect of timber removed and stacked by the 5th respondent subsequent to 30-6-1981. In other words, the Government has to fix the rate for timber removed and stacked between 30-6-1981 and 30-8-1982. Immediately after the judgment, the 5th respondent made another representation dated 21-7-1982 requesting the Government to grant permission to remove all timbers collected by them after payment of value and penalties as on 30-6-1981 and further to grant extension up to 31-8-1982 on the same terms and conditions as it stood on 30-6-1981 enabling the 5th respondent to complete the work contemplated in the contract. The Government rightly took the view that in accordance with the judgment the petitioner was permitted to continue the performance of the terms of the contract till 30-8-1982 only subject to the right of the Government to fix the new rates of payment (and penalty if any) in

respect of the timber removed and stacked subsequently to 30-6-1981. The removal and stacking means removal of timber to stacking site from the site of collection and stacking for check measurement at sites decided by the Divisional Forest Officer. For release of the timber collected before 30-6-1981 the 5th respondent has to satisfy the conditions of the agreement. Therefore, the request of the 5th respondent to permit removal of the timber collected was rejected by the Government by communication dated 30-8-1982 produced by the petitioner as Ext. P 76. The 5th respondent thereafter filed Ext. P 77 application dated 1-9-1983 to permit the removal of the timber collected by them till 30-8-1982 and also requesting the Government not to fix any other contract till removal of the timber collected by them till 30-8-1982 is effected. In the meantime the petitioner also made a representation dated 20-2-1983 produced as Ext.P 11 offering at the rate of Rs. 1000/-per cubic metre for the timber collected by the 5th respondent and kept in the area. The 5th respondent also filed O.P. No. 8793 of 1983 on 10-10-1983 for permission to remove the timber collected by them and also for extension of the contract up to 31-8-1984. There was also a prayer to quash the order of the Government rejecting the 5th respondent's request for removal evidenced by Ext. P 76. This is the other writ petition heard along with this case, O.P. 8793 of 1983.

7. When the 5th respondent filed O.P. 8793 of 1983 on 10-10-1983 the petitioner herein renewed his offer by Ext. P 14 dated 21-11-1983 for the timber collected by the 5th respondent at the rate of Rs. 1000/- and therefore the petitioner got himself impleaded in O.P. 8793 of 1983 as the 7th respondent on 5-1-1984. The petitioner who was impleaded as 7th respondent filed C. M.P. 4698 of 1985 in that Original Petition for the issue of a Commission to inspect and report to this Court the general condition of timber collected and stacked on the banks of the Kakki reservoir and some other incidental matters. This Court ordered that no timber should be removed by any person. It is thereafter on 25-2-1985 the 5th respondent has filed C.M.P. 5585 of 1985 to allow them to withdraw the Original Petition. This was opposed by the petitioner herein. But on 12-3-1985 counsel for the 5th respondent endorsed on C.M.P. 5585 of 1985 that the petition for withdrawal of the Original Petition is not pressed since he is instructed not to press the Original Petition. It was at that time on 11-3-1985 the petitioner herein filed C.M.P. 7264 of 1985 for transposing him as petitioner in that Original Petition. It is in the above circumstances the said O.P. 8793 of 1983 was referred to the Full Bench on 15-3-1985.

8. In the meantime, the Government by order dated 13-8-1982, to implement the judgment of this Court, directed the Agricultural Production Commissioner, the Special Secretary Finance, Chief Conservator of Forests and the Chief Technical Examiner, Finance Department, to jointly survey the salvaged timber at the site and report the quality of the timber and the price etc. with a view to fix the rate for timber. The Committee also constituted a technical Committee to conduct a detailed survey. The Committee conducted a detailed inspection of the logs collected, their volume, their category and their value based on

proportionate seigniorage with reference to the rate that prevailed in 1982-83. Thereafter the committee submitted its report to the Government and the Government issued order dated 27-10-1984 produced by the petitioner as Ext. P 89. The Government order states that as per the report of the Committee the measurement of various species of logs was 2399.983 cum and the total amount to be realised is Rupees 3,61,174.06. Therefore the Government issued orders fixing the average price as Rs. 150.50 per cum. The timber was to be removed only after realising in advance the total price of timber without any reduction in the amount as calculated by the Committee. Since the petitioner thought that getting a relief for him or contesting the case as a respondent in O.P. No. 8793 of 1983 is a debatable one the petitioner filed this Original Petition, O.P. 10551 of 1985 which has also come up for hearing along with O.P. 8793 of 1983 before the Full Bench. As stated already the surviving prayer in this Original Petition relates only to the validity of Ext. P 89 and also the right if any of the 5th respondent to remove the timber in terms of Ext. P 19 agreement.

9. The prayer in O.P. No. 8793 of 1983 is to quash the order of the Government dated 30-8-1982 rejecting the prayer of the petitioner for extension of the contractual period up to 30-8-1984 produced as Ext. P75 by the petitioner in O.P. No. 10551 of 1985 and also the order of the Government dated 13-6-1983 informing the 5th respondent that he is bound to pay penalty according to the standard conditions. There is also a prayer for a direction to implement the judgment of this Court in O.P. 5023 of 1981 and to check measure and issue chalan in respect of the timber collected by the 5th respondent till 30-6-1981. It is in this background both the Original Petitions were heard together by the Full Bench.

10. From what has been stated above it is clear that by virtue of the decision of this Court in O.P. 5023 of 1981 dated 24-6-1982 (Ext. P66) which has become final the rights and obligations of the 5th respondent under the contract namely, Ext. P 19 dated 13-6-1977, will continue for a period expiring on 30-8-1982 with the modification regarding the rates of payment for the timber removed and stacked by the 5th respondent subsequent to 30-6-1981 up to 30-8-1982. The Government has to fix new rates of payment including penalty if any in respect of the timber removed and stacked subsequent to 30-6-1981. This the Government has fixed by Ext. P 89 at Rs. 150.50 per cum. In short Rs. 15/- per cum. agreed in Ext. P19 contract dated 13-6-1977 will have to be read as Rs. 150.50 per cum. in respect of the timber removed and stacked by the 5th respondent subsequent to 30-6-1981 till 30-8-1982. Subject to this all the other terms and conditions of the contract will govern the rights and obligations of the parties. Therefore the rights and obligations with respect to the timber collected between 30-6-1981 and 30-8-1982 will have to be worked out in accordance with the contract in the light of Ext. P 19 modified by the judgment Ext. P66 and the Government order Ext. P 89 fixing the price for the timber removed and stacked by the 5th respondent after 30-6-1981.

11. The rest of the wood whether collected or remaining in the reservoir can only be the property of the Government and the Government is free to deal with the same in whatever manner most advantageous to the Government. In view of the fact that the petitioner himself has offered Rs. 1000/- per cubic metre it will be advantageous for the Government to call for fresh tender for getting more competitive price for the timber and other forest produce vested in the Government.

12. The petitioner has challenged Ext. P89 Government order. That fixation was necessitated by the judgment of this Court in O.P. 5023 of 1981. This Court directed the Government to fix the rates for payment for the timber removed and stacked by the 5th respondent subsequent to 30-6-1981. Government constituted a committee consisting of top officers of different Departments, namely, Agricultural Production Commissioner, Special Secretary to Government, Finance, Chief Conservator of Forests and Chief Technical Examiner, Finance Department. That Committee also appointed a team of technical hands consisting of Divisional Forest Officer, Trivandrum, Divisional Forest Officer, Timber Sales Division and Working Plan Officer Punaloor. That Committee was subsequently replaced by another Committee consisting of Silvi Culture Research Officer, Divisional Forest Officer, Timber Sales Division Trivandrum and Divisional Forest Officer, Timber Sales Division, Punaloor, and they conducted a detailed inspection of the logs collected by the 5th respondent. They also listed the logs classifying them according to quality and indicated the probable average cut-turn of the logs falling under different categories. A detailed inventory of the logs also was prepared by them. Thereafter the Chief Conservator of Forests submitted a note to the Committee regarding fixation of price for the logs based on the observation of the team of Officers. The logs were categorised into B and C categories there being no A category logs. B category logs were those capable of giving an average yield of 75 percent of utilisable timber. C category logs were those capable of yielding 50 percent utilisable timber. The inventory of the logs consisted of 18 species. Of this only three species, namely, Paly, Chandana Vembu and Vellapine would come under the Price Fixation Act. The Committee felt that the Price Fixation Act would apply only to sound logs and the timber extracted from Kakki reservoir not being sound logs it will not be proper to apply the scheduled rates as those rates were fixed based on market rates of the concerned species. The seigniorage rate also was not considered applicable as those rates are applicable to timber in fresh conditions without much defects. The practice of the Department to charge lesser rate than the seigniorage rate in respect of defective and deteriorated timber was also adverted to. Considering the Departmental practice in the case of lump sum sale at the rate of half the seigniorage rate, proportionate rate was recommended in the case of B and C category logs at 75% and 50% respectively of the seigniorage rate. In making the recommendation the Committee accepted the position that the price should be related to quantum of utilisable timber indicated by the Technical team. The Committee also felt that the seigniorage rate prevailing in 1982-83 should be

taken into consideration as the judgment in O.P. 5023 of 1981 was issued in June, 1982. The Committee took note of the flat rate fixed in the open tender in view of the impossibility of ascertaining the species, quantity, quality and location of the wood material lying embedded in the mud and silt under water and of impossibility of ascertaining a realistic working charges to collect all the wood stuff left in the lake. The fact that collection and removal of the timber is done by the contractor at his own risk, arrangement and cost and the requirement to remove not only the utilisable portion of the timber but all the timber the idea being to get the reservoir cleared of all woodstuff were also adverted to by the Committee. The characteristic of the contract mainly of a work contract with an element of mel-labham sale in it and the likelihood of deterioration of the wood because of its submerged condition ever since 1967 etc. were also borne in mind by the Committee. The fact that none of the species salvaged from the lake will be of merchant able quality for the normal end use is one of the factors which deterred the committee from applying the seigniorage rate. The flat rate was fixed because of the deteriorated condition and poor quality and the higher cost involved in salvaging the timber from the reservoir. We are satisfied that the Committee has taken into consideration all the relevant aspects and no irrelevant consideration has been taken into account. It is in the light of the above finding after due consideration of the entire aspects the Government issued Ext. P89 order accepting the Committee's recommendations and fixed the price at Rs. 150-50 per cum. The objection of the petitioner against Ext. P89 is that the price fixation is against the Kerala Forest Produce (Fixation of Selling Price) Act 1978 which came into force on 12-3-1979 and the price fixation is also below the seigniorage rate.

13. "Seigniorage rate" is defined in the Kerala Forest Code, Volume I Chapter II in the definition Section 2(36) to mean in the Forest Department the rate fixed as the minimum amount that must be assured to Government by the sale of trees and other forest produce collected from within the forests. This rate is fixed for the State as a whole from time to time by Government for each produce and does not cover any portion of the working charges. Further the Kerala Forest Produce (Fixation of Selling Price) Act, 1978 was brought into force with effect from 12-3-1979 and u/S.3 the Government was required before the end of each financial year by a notification published in the Kerala Gazette to fix the selling price of every forest produce for the following financial year. u/s 5(2) the sale of any forest produce in contravention of Sub-section (i) shall be null and void and shall not be enforceable in a court of law. The forest produce has been defined u/s 2(c) to include Pali, Chandana vembu, and Vellapine and so far as these types of timber were also included in Ext. P 89 the price fixation is violative of the provision in Kerala Forest Produce (Fixation of Selling Price) Act, 1978 as well as the seigniorage rate prescribed by the Government, according to the petitioner. But we feel that there is no merit in this contention. The price was originally fixed by agreement dated 13-6-1977 at Rs. 15/- per cum. The agreement was for salvaging the timber lying at the bottom of the reservoir submerged in water.

These are logs abandoned by the coupe contractors to whom the Hydal coupes were sold during the years 1963, 1964, 1965 and 1967. The Government also obtained full price for the same. At that time the Kerala Forest Produce (Fixation of Selling Price) Act was not in force. The contract period was extended up to 30-6-1981. The agreement in favour of the 5th respondent evidenced by Ext. P 19 entered on 13-6-1977 was extended up to 30-6-1981 by the Government and thereafter by judgment of this Court evidenced by Ext. P 66 the same was extended up to 31-8-1982 subject to fixation of price for the timber removed and stacked by the 5th respondent subsequent to 30-6-1981. What this Court has directed was to fix the price in place of Rs. 15/- at a flat rate irrespective of the nature and quality of timber. Even charcoal and firewood were converted under this fiat rate formula. We shall examine whether the Kerala Forest Produce (Fixation of Selling Price) Act 1978 will apply to this sort of contract. The contract we are concerned is relating to a salvaging operation. This is more like a works contract. The intention of the Government was only to clear the wood both usable and unusable from the reservoir. If, in the course of clearing the timbers, teak and rosewood trees are found, the same had to be surrendered to the Government without any cost for the work done. On a reading of the Act and the Rule and the judgment of this Court, we are of the opinion that the Kerala Forest Produce (Fixation of Selling Price) Act is not intended to cover the sale of forest produce which are submerged in the reservoir for over 20 years. The intention of the Government in getting a contract like Ext, P 19 was to clear the reservoir of all wood materials with no cost to the Government and if possible to get the maximum revenue out of the transaction. Such a contract cannot be characterised as a contract for sale of forest produce and therefore the Act will not apply. Regarding the provision relating to seigniorage rate the Government adverted to all these facts while passing Ext. P. 89 as stated already.

14. On a reading of Ext. P 91 it will be clear that the Committee has taken relevant factors into consideration and it has not considered irrelevant materials. The petitioner has referred to Exts. P39, P71, P92, P93, P96 and P 107 to show that relevant consideration has not been taken into account in the sense the price that could be obtained for the timber collected has not been adverted to. But this Court is not concerned whether better price would have been got for the timber salvaged. The question is whether in passing Ext. P 89 relevant consideration has been omitted to be taken into account and whether irrelevant consideration has been taken into account.

15. In *CCSU v. Minister for the Civil Service* (1984) 3 All ER 935 at page 950 Lord Diplock observed:

"Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call "illegality" the second "irrationality" and the third "procedural impropriety". That

is not to say that further development on a case by case basis may not in course of time and further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice."

The above passage has been approved and adopted by the Supreme Court in *Ranjit Thakur Vs. Union of India (UOI) and Others*, wherein the Supreme Court added that the judicial review generally speaking, is not directed against a decision, but is directed against the "decision making process". In *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, the Supreme Court, after referring to the decision in *Chief Constable of the North Wales Police v. Evans (1982) 3 All ER 141*, held (at p. 1650 of AIR);

"In our opinion, it is necessary to remember that judicial review, in the words of Lord Brightman in that case, is not concerned with the decision, but with the decision making process. As observed by Prof. Dias in *Jurisprudence* (5th edn. at p. 91) unless the restriction on the power of the court is observed, the court would under the guise of preventing the abuse of power, be itself guilty of usurping power which does not belong to it. It is, therefore, necessary to bear in mind the ways and means by which the court can control or supervise the judicial action of any authority which is subject to judicial control. In this connection, it is necessary to refer to the observations of Lord Justice Templeman in *Re Preston v. I.R.C.* (1985 (2) WLR 836) and the observations of Lord Justice May in *Regina v. Chief Constable of the Merseyside Police* 1986 (2) WLR 144. It is not within the purview of a court to substitute a decision taken by a constituted authority simply because the decision sought to be substituted is a better one. Learned Additional Solicitor General, in our opinion, is, therefore, right in contending that the appellant should not be allowed to contend that the decision of the Bombay Port Trust to allot the plot to the major holder is not one of the feasible means of achieving the objectives of the development. It was not open to the appellant to contend that the Bombay Port Trust could have framed a better policy in a way in which both the goals, development and non-eviction of existing tenants, could have been achieved."

Further in *R.B. Shreeram Durga Prasad and Fatechand Nursing Das Vs. Settlement Commission (It and Wt) and Another*, at p. 1042) : (1989) 1 JT 234 at p. 238 the Supreme Court observed:

"In exercise of our power of judicial review of the decision of the Settlement Commission we are concerned with the legality of procedure followed and not with the validity of the order. See the observations of Lord Hailsham in *Chief Constable of the North Wales Police v. Evans (1982) 1 WLR 1155*. Judicial review is concerned not with the decision but with the decision making process."

Therefore, on a consideration of the above decisions we hold that Ext. P89

cannot be considered infirm in any manner. The fact that some of the timber recovered was actually sold for a higher price is not a vitiating circumstance. The question is whether the authority acted illegally or mala fide or omitted to take into account relevant factors or irrelevant factors are taken into account. We hold that Ext. P 89 cannot be held to be infirm on any of these considerations.

16. If Ext. P89 is not infirm then the rights of the parties have to be worked out in the light of Ext. P 19 as modified by Ext. P 66 judgment of this Court and Ext. P 89 price fixation. We make it clear that Ext. P 89 price fixation will apply only to timber removed and stacked by the 5th respondent subsequent to 30-6-1981 till 30-8-1982. Subject to this, the rights of the parties will have to be worked out according to the contract.

17. This Court has held time and again that in contractual matters writ petition will not normally be entertained. For enforcement of contractual rights parties should avail remedies by way of civil suit and should not invoke the extraordinary jurisdiction available under Article 226 of the Constitution of India. One recent decision of this Court is the judgment in W.A. No. 356 of 1989. SLP 10281 of 1989 filed against the said judgment was dismissed by the Supreme Court on 16-10-1989. In *Kulchinder Singh and Others Vs. Hardayal Singh Brar and Others*, (para 11) the Supreme Court held;

"Private law may involve a State, a statutory body, or a public body in contractual or tortious actions. But they cannot be siphoned off into the writ jurisdiction."

This was reiterated in *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, : *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*,). The Supreme Court said (at p. 1502, para 19 of AIR):

"We do not think that any of these cases could assist the appellants or is at all relevant. None of these cases lays down that, when the State or its officers purport to operate within the contractual field and the only grievance of the citizen could be that the contract between the parties is broken by the action complained of, the appropriate remedy is by way of a petition under Article 226 of the Constitution and not an ordinary suit. There is a formidable array of authority against any such a proposition. In *Lekhraj Satramdas, Lalvani Vs. Deputy Custodian-cum-managing Officer and Others*,) (supra) this Court said (at p. 337):

In our opinion any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant cannot be enforced by the machinery of a writ under Article 226 of the Constitution.

In *Banchhanidhi Rath Vs. The State of Orissa and Others*,) this Court declared (at p. 845). If a right is claimed in terms of a contract such a right cannot be enforced in a writ petition.

In *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and*

Others,), a Constitution Bench of this Court observed (at p. 1126 of AIR) : (SCC p. 747, para 21):

The appellants have displayed ingenuity in their search for invalidating circumstances but a writ petition is not an appropriate remedy for impeaching contractual obligations."

In Life Insurance Corporation of India Vs. Escorts Ltd. and Others, at p. 344 : (AIR 1986 SC 1370 at p. 1424) the Supreme Court held:

"If the action of the State is related to contractual obligations or obligations arising out of the tort, the court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances."

18. We are not unaware of the observation of the Supreme Court in Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay, at p. 1649) to the effect:

"If a Governmental policy or action even in contractual matters fails to satisfy the test of reasonableness, it would be unconstitutional. See the observations of this Court in Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another, and Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, (at pp. 505-506)."

In Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others, considering a similar question the Supreme Court once again, after referring to Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , observed (at p. 1083 of AIR):

"There is a line of decisions where the contract entered into between the State and the persons aggrieved is non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple. Radhakrishna Agarwal and Others Vs. State of Bihar and Others, ; Premji Bhai Parmar and Others Vs. Delhi Development Authority and Others,) and Divisional Forest Officer Vs. Bishwanath Tea Co. Ltd.,).

In view of the authoritative judicial pronouncements of this Court in the series of cases dealing with the scope of interference of a High Court while exercising its

writ jurisdiction under Article 226 of the Constitution of India in cases of non-statutory concluded contracts like the one in hand, we are constrained to hold that the High Court in the present case has gone wrong in its finding that there is arbitrariness and unreasonableness on the part of the appellants herein in increasing the cost of the houses/flats and the rate of monthly instalments and giving directions in the writ petitions as prayed for."

19. The relief sought for in O.P. 8793 of 1983 is purely contractual in nature. The 5th respondent in O.P. 10551 of 1985 who is the petitioner therein wanted extension of the contract up to 30-8-1984 and also to quash the order of the Government dated 13-6-1983, directing the 5th respondent to pay penalty for each month in accordance with the standard conditions stipulated in similar cases. In the light of the above decision of the Supreme Court we feel that the petitioner in O.P. 8793 of 1983 who is the 5th respondent in O.P. 10551 of 1985 must work out their rights according to the contract as modified by Ext. P.66 and p 89 and no relief could be given to the petitioner in O.P. 8793 of 1983 in the petition. :

20. The petitioner in O.P. 10551 of 1985 did not press prayer No. 3 in the Original Petition and opted to press the Original Petition as a public interest litigation.

21. In *People's Union for Democratic Rights and Others Vs. Union of India (UOI) and Others*, the Supreme Court observed regarding the scope of public interest litigation as under (para 2):

"We wish to point out with all the emphasis at our command that public interest litigation which is a strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and that other opposing such claim or resisting such relief. Public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of large number of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed. That would be destructive of the Rule of Law which forms one of the essential elements of public interest in any democratic form of Government. The Rule of Law does not mean that the protection of the law must be available only to a fortunate few or that the law should be allowed to be prostituted by the vested interests for protecting and upholding the status quo under the guise of enforcement of their civil and political rights. The poor have civil and political rights and the Rule of Law is meant for them also, though today it exists only on paper and not in reality."

Public interest litigation was usually brought to vindicate the constitutional and legal right of large number of people who are ignorant or in a socially and economically disadvantageous position. In *Bandhua Mukti Morcha Vs. Union of India (UOI) and Others*, the Supreme Court held (at p. 811):

"We have on more occasions than one said that public interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the Government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the signature-tune of our Constitution. The Government and its officers must welcome public interest litigation, because it would provide them an occasion to examine whether the poor and the down trodden are getting their social and economic entitlements or whether they are continuing to remain victims of deception and exploitation at the hands of strong and powerful sections, of the community and whether social and economic justice has become a meaningful reality for them or it has remained merely a teasing illusion and a promise of unreality, so that in case the complaint in the public interest litigation is found to be true, they can in discharge of their constitutional obligation root out exploitation and injustice and ensure to the weaker sections their rights and entitlements. When the Court entertains public interest litigation, it does not do so in a cavilling spirit or in a confrontational mood or with a view to tilting at executive authority or seeking to usurp it, but its attempt is only to ensure observance of social and economic rescue programmes, legislative as well as executive, framed for the benefit of the have-nots and the handicapped and to protect them against violation of their basic human rights, which is also the constitutional obligation of the executive. The Court is thus merely assisting in the realisation of the constitutional objectives."

In *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, the Supreme Court had to consider the constitutional right of the pavement dwellers under Article 21 of the Constitution of India. In *M.C. Mehta and another Vs. Union of India and others*, the Supreme Court once again referred to the scope of public interest litigation and observed (Para 2 of AIR):

"These applications for compensation are for enforcement of the fundamental right to life enshrined in Article 21 of the Constitution and while dealing with such applications, we cannot adopt a hyper-technical approach which would defeat the ends of justice. This Court has on numerous occasions pointed out that where there is a violation of a fundamental or other legal right of a person or class of persons who by reason of poverty or disability or socially or economically disadvantaged position cannot approach a court of law for justice, it would be open to any public spirited individual or social action group to bring an action for vindication of the fundamental or other legal right of such individual or class of individuals and this can be done not only by filing a regular writ petition but also by addressing a letter to the court. If this Court is prepared to accept a letter complaining of violation of the fundamental right of an individual or a class of

individuals who cannot approach the court for justice, there is no reason why these applications for compensation which have been made for enforcement of the fundamental right of the person affected by the petroleum gas leak under Article 21 should not be entertained. The Court while dealing with an application for enforcement of a fundamental right must look at the substance and not the form. We cannot therefore sustain the preliminary objection raised by Mr. Divan."

22. What we find here is a petition to quash Ext. p 89 price fixation order by an equally powerful contractor as the 5th respondent. The petitioner's contention is that the price fixed is extremely low and therefore public revenue is lost to the Government. Even though the petition is not a public interest litigation or social action litigation in the sense aforementioned, the petition can be justified as one filed by a citizen interested in seeing that the public revenue is not eroded from the Government coffers. In that way it can be contended that public interest will suffer if the 5th respondent is allowed to remove the timber at the rate fixed by agreement or at the rate fixed in Ext. P 89 in respect of the timber collected and stacked from 30-6-1981 to 30-8-82. Even though petitioner has not submitted any tender at the time when the tender was accepted and agreement executed on 13-6-1977 he has the necessary locus standi to file the writ petition. But we cannot say that on the facts available the agreement was in any way unconscionable or against the public interest. That agreement was extended from time to time and ultimately the rights and obligations of the contractor continued by judgment of this Court dated 24-6-1982, Ext. p 66, except for the price to be fixed for timber collected and stacked after 30-6-1981 till 30-8-1982. The price has been fixed by the Government on 27-10-1984 by Ext. P 89. The fixation, we held, cannot be said to be arbitrary or illegal. Therefore, we are of the view that public interest will be safeguarded if we direct the parties to work out their rights under the agreement as modified by Exts. P 66 and P 89. Since we find that the petitioner himself offered for the timber at a rate of Rs. 1000/- per cubic metre, we feel that the Government should try to obtain most competitive price in respect of the timber vested in the Government by inviting tenders or by other means for the disposal of the balance timber vested in the Government.

23. In the light of the above discussion, we hold that with respect to timber collected and stacked after 30-6-1981 till 30-8-1982 the parties should work out their rights in the light of Ext. P 19 as modified by Ext. P 66 and Ext. P 89. Similarly, the parties are at liberty to work out their contractual rights in respect of the timber collected and stacked before 30-6-1981. We do not express any opinion in regard to the existence or otherwise of the rights of the parties under the contract. With respect to the rest of the timber remaining submerged in the reservoir as well as collected by the 5th respondent, we declare that the same is vested in the Government and the Government is free to deal with the same in the best manner advantageous to the Government.

24. Both the Original Petitions are disposed of as above. There will be no order

as to costs.