
(2011) 01 KL CK 0024

In the High Court Of Kerala

Case No : Writ Petition (C) No. 1207 of 2005

M/s. Joseph And Company

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 17-01-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2011) 1 KLJ 681

Hon'ble Judges : Thottathil B. Radhakrishnan, J

Bench : Single Bench

Advocate : M.C. Sen SR., John Joseph Vettikad, C. Joseph Johny and G Shrikumar, for the Appellant; C.P. Sudhakara Prasad (AG), T.G Sunil (GP), K.V. Manoj kumar, P.J. Joseph Panikkassery and T.R. Ravi, for the Respondent

Judgement

Thottathil B. Radhakrishnan J.

1. This writ petition is filed seeking to quash Ext. P39 order of the Government confirming its decision to terminate the lease of 246.26 acres reserve forest land (Beatrice Estate) at Nelliampathy in Palakkad district on grounds of violation of conditions of the lease agreement dated 15.12.1979 and the provisions of the Forest (Conservation) Act, 1980, hereinafter referred to as the "FC Act". Ext. P41 proceedings of the Divisional Forest Officer, Nemmara holding that Smt. Meera Scaria, the Managing Partner of the writ petitioner firm, is not entitled to the amount in deposit in terms of earlier proceedings is also under challenge. In terms of a notification of January, 1953, certain abandoned portions of Beatrice Estate was auctioned out by the erstwhile Travancore-Cochin Government. One P.I. Joseph bid and took possession of an extent, including 246.26 acres out of the south block on 10. 5. 1955. He, however, did not execute any lease agreement with the Government and later, that area was assigned by him under Ext. P6 sale deed to K.K. Joseph. That document dated 28. 2. 1974 was registered on 15. 3. 1974 in the jurisdictional Sub Registrar's Office. A partnership with K.K. Joseph as the Managing Partner was also constituted. The

lease agreement between K.K. Joseph and the Government through the DFO was entered into on 15.2.1979. On 16.12.1983, the writ petitioner firm registered a transfer deed for 50 acres in favour of one Raghavan and his family from out of the leased area. After that, K.K. Joseph retired from the firm. It appears that though such assignment deed was executed in favour of Raghavan and others, the firm of which K.K. Joseph was a partner, continued to be in possession and was also paying lease rent for the entire area. On the premise that the transfer in favour of Raghavan and others was made without obtaining prior sanction and that the said fact was noticed by the writ petitioner firm only after K.K. Joseph retired from the firm, an application was filed for permission to have the said property re-conveyed from the heirs of Ragahvan. An application for NOC in that regard was filed as Ext. P25 before the DFO.

2. While the aforesaid application was pending, Ext. P14 notice was issued to Smt. Meera Scaria, the Managing Partner of the writ petitioner firm, to vacate the estate.

3. It also appears that in the meanwhile, the Government decided to regularise all transfers of leases in Nelliampathy, however that, the said decision was later revoked, which ultimately stand confirmed by the Government after that issue was remitted by the Apex Court in a different litigation.

4. In so far as the case in hand is concerned, the petitioner firm was evicted as per Ext. P29 termination order. That led to a writ petition which resulted in Ext. P34 judgment quashing the proceedings and remitting the matter to the Government. That writ petition gave rise to two writ appeals; by the State and by the writ petitioner. They were ultimately dismissed as per Ext. P35 judgment, which contains certain observations touching the facts of the case, however, clarifying that the issues are being left for the decision of the Government. On further appeal to the Apex Court, certain clarifications were issued and the Government were directed to pass final orders.

5. Following that, Ext. P37 notice was issued on 29.7.2004 on different grounds.

(i) M/s. Joseph & Co., the writ petitioner herein, is an encroacher and squatter of forest land.

(ii) K.K. Joseph sold 50 acres to Raghavan and others and the balance area was transferred to the writ petitioner firm, which transfers are in violation of clauses 12 and 14 of the lease deed. This ground was raised by the Government on the premise that K.K. Joseph was a lessee in his personal capacity and he violated clause 14 of the lease agreement by assigning 50 acres to Raghavan and others.

(iii) The land in question is Reserve Forest and the petitioner's possession of the Government leased Forest land is illegal and no new right can be permitted to accrue over reserve forest, having regard to Section 22 of the Kerala Forest Act. The further premise was that large scale destruction of trees is reported from Beatrice Estate. The grounds in that notice were objected to and the

representative of the estate of Raghavan also expressed willingness to re-convey 50 acres to the writ petitioner firm. Ultimately, the impugned Ext. P39 and following that, Ext. P41 are issued. They are under challenge.

6. In support of the writ petition, it was argued that it was not K.K. Joseph, but the petitioner firm Joseph & Co., which was the lessee and K.K. Joseph was only representing the firm which was in its infancy and it was therefore, that the lease was executed by K.K. Joseph and a conjoint reading of the transfer by P.I. Joseph in the name of K.K. Joseph and the consequential lease by the DFO in favour of K.K. Joseph would show that the lease was essentially in favour of the writ petitioner firm. It is also argued in that regard that the materials on record unequivocally point out that for all intents and purposes, the Government and its officials had treated the writ petitioner partnership firm as the lessee in terms of the lease executed between the DFO and K.K. Joseph. The next contention is that clauses 12 and 14 of the lease deed are not violated by the petitioner warranting termination of the lease and hence, the termination is void in law. Thirdly, it is contended that there is no violation of the FC Act or the Kerala Forest Act. The impugned Ext P39 order is issued in violation of the directions of the Apex Court, it is contended. On the basis of these submissions, it is sought that Ext. P39 be quashed and as a consequence, compensation be awarded for illegal termination and forceful dispossession on 31.5.2002.

7. A counter affidavit is placed on record on behalf of the respondents reiterating the stand discernible from Exts. P29, P37 and P39 and further challenging the maintainability of the writ petition and pointing out that Beatrice Estate is part of area notified as reserve forest and on facts, it cannot be held that the lease was in favour of the firm since the firm was registered only on 15.3.1974 while the advance of the purchase price was paid on 15.1.1974 and the balance was paid at the time of execution of the sale on 28.2.1974 by K.K. Joseph in his personal capacity. It is contended that, at any rate, there is clear violation of clause 14 of the lease deed, having regard to the transfer in favour of Raghavan and others and the impugned action is in order. It is also pointed out that bifurcation into small plantation will destroy the forests of Nelliampathy and in view of the deed, the Government are within jurisdiction to terminate the lease.

8. The first issue is as to the identity of the lessee. Was it K.K. Joseph or Joseph & Co., the writ petitioner? It was P.I. Joseph who bid Beatrice Estate in auction. In 1974, he assigned the portion involved in this writ petition in favour of K.K. Joseph. Following the assignment by P.I. Joseph in favour of K.K. Joseph, a lease agreement was executed between the Government and K.K. Joseph. In the document of 1979, by which, K.K. Joseph purchased the leasehold right from P.I. Joseph, it is clearly mentioned that K.K. Joseph had purchased the property in his capacity as Managing Partner. While it may be true that this fact is not reiterated in the lease deed executed between the Government and K.K. Joseph, the fact of the matter remains that the Government cannot feign ignorance of the fact that the transfer taken by K.K. Joseph from P.I. Joseph was in his

capacity as the Managing Partner of Joseph & Co. It cannot be taken that the Government entered into the lease deed oblivious of the contents of the transfer by P.I. Joseph to K.K. Joseph. The different materials on record, including Exts. P10, P11, P12, P13 and P16 to P20, categorically evidence that the Government had, for all intents and purposes, treated the writ petitioner Joseph & Co. as the lessee under Ext. P7 lease deed. In such circumstances, the Government and its officials, at this distant point of time, cannot contend that it was not the writ petitioner firm which was the lessee, but it was K.K. Joseph who was the lessee, in his individual capacity. They are also not entitled to plead that the lease was in favour of K.K. Joseph and any transfer by him to the writ petitioner would be in violation of clauses 12 and 14 of the lease deed. The finding in the impugned order (Ext. P39) that the lease was in favour of K.K. Joseph in his personal capacity and did not inure to the benefit of the writ petitioner is hence unsustainable.

9. The terms and conditions of the lease deed indisputably provide that the lessor shall be at liberty to terminate the lease if the lessee makes default in the observance of any of the covenants contained therein. Clause 12 of the lease states that in the event of the lessee making default in the observance or fulfillment of any of the covenants contained in that lease deed, the lessor shall be at liberty at any time, thereafter, after giving notice to the lessee and hearing him, in person or through his agent or vakil duly appointed, about the failure of the lessee to remedy such default that may be reported to the lessor from time to time by the Chief Conservator of Forests, to terminate the lease and lessee shall forthwith vacate the leased land. Clause 14 thereof provides that the lessee shall not be entitled to sublet or assign his interest in the said lease except with the previous permission, in writing, of the lessor.

10. The argument on behalf of the Government is that by making the transfer in favour of Raghavan and others, the lessee had violated clause 14 of the lease deed, by assigning the interest of the lessee without the previous permission, in writing, of the lessor and as a consequence, in terms of clause 12, the lessor is entitled to terminate the lease and the lease having been terminated, the lessee is bound to vacate the land. For one thing, clause 14 which prohibits the lessee from subletting or assigning his interest in the leased land, except with the previous permission of the lessor, is such a term that would nullify any such transfer or assignment, be it by way of subletting or other modes of assignment of interest in the lease. The effect of clause 14 would be that any purported transfer of interest of the lessee to a third person without the previous permission of the lessor, in writing, would ipso facto result in such transfer being void ab initio. The question then would be as to whether the making of such a transfer would be a vitiating factor which would attract liability under clause 12 of the lease. In the context in which it is placed, the provision in clause 14 that the lessee shall not be entitled to sublet or assign his interest in the lease except with the previous permission in writing of the lessor, is a mandatory term. It could be canvassed as one intended to nullify the effect of any transfer and not

one that would kindle the jurisdiction to terminate the lease by invoking clause 12, except in cases where, by the conduct referable to clause 14, the lessee has parted with the possession or enjoyment of the whole or any part of the leased land. It is essentially in support of such an approach that the writ petitioner says that though K.K. Joseph had made a transfer of 50 acres in favour of Raghavan, that was noticed by the firm only after his retirement and the firm continues to be in possession and was paying lease rent for the entire area as discernible even from the counter affidavit, in particular, paragraphs 90 and 92 thereof. They also referred to Ext. P35 judgment making reference to this situation. The regularisation of that transfer was delayed and the transferor and transferee were advised to have re-conveyance of the 50 acres to the lessee firm to remedy the defect, it is contended. While the writ petitioner attempts to demonstrate bonafides in this matter by saying that a request for NOC for registration of such re-conveyance was also applied for and was pending consideration, the impugned Ext. P39 proceeds on the firm premise that even with reference to clause 12 of the lease agreement, the writ petitioner, is not entitled to opportunity for remedying the defaults. The impugned order is issued by the Government specifically concluding that it cannot accept that the fault was committed innocuously by K.K. Joseph. The Government took the view that K.K. Joseph was well aware of the condition of obtaining prior approval of the Government, the lessor, in terms of clause 14 of the agreement since that was the mode in which he himself had got the transfer of the leasehold right from P.I. Joseph in the year 1979. The Government says in the impugned order that K.K. Joseph cannot commit such a mistake when he is required to take approval of the Government. It concluded that in the instant case, K.K. Joseph deliberately avoided obtaining prior approval of the Government as it would have resulted in enquiries into treating the coffee estate as uncultivated area and as to the pricing the valuable property, which would have cost not less than Rs. 2 lakhs per acre. The Government also took the view that the property has been sold to multiple owners with the intention of breaking it into smaller units. These findings in the impugned Ext. P39 leading to the Government's conclusion that the transfer by K.K. Joseph to Raghavan and others was without the prior permission in writing of the Government and such transfer without such previous permission is in violation of the lease agreement and therefore, as per clause 12 of the agreement, the lessor can terminate the lease, is a finding rendered by the Government on a question of fact as to the premise on which K.K. Joseph transferred the property to Raghavan and others. It is a finding rendered by the authority vested with the absolute power to deal with forest lands in accordance with law and also non-forest government land, including granting and termination of leases. The finding of fact contained in Ext. P39 in that regard, including the conclusion as to the bonafides of K.K. Joseph in having executing a document in favour of Raghavan and others, is one which would not be disturbed by the writ court on grounds of jurisdiction. This is simply because the jurisdiction of the Government to decide on that issue is not under challenge. Equally, the power of the Government in clause 12 read with clause 14 of the

lease deed to enter on such an issue is beyond dispute. Added to this, the Government and the writ petitioner stood governed by the directions of the Division Bench of this Court as also the directions of the Apex Court in the earlier round of litigation which obliges a decision on that point. The finding of fact and the inferences drawn regarding the conduct of K.K. Joseph, on the basis of the materials on record, cannot be treated as perverse, unreasonable or arbitrary, warranting interference by the writ court under Article 226 of the Constitution of India. Therefore, the finding of the Government in the impugned Ext. P39 that the interest of the lessee under the lease, to the extent of 50 acres out of Beatrice Estate was transferred to strangers without previous permission of the Government in writing is a finding which stands, even if the lessee is the writ petitioner Joseph & Co. The impugned Ext. P39 would also, therefore, stand. Having regard to the aforesaid, the question whether the FC Act or the Kerala Forest Act would have any application as regards the issues raised by the writ petitioner does not really arise for consideration. The applicability of the FC Act or the Kerala Forest Act may be germane for leases and renewal of leases. The plea of the petitioner was that there was no ground to terminate the lease granted to K.K. Joseph. If that contention were to be upheld, as a consequence, the subsequent events may have only such impact as would visit concluded contracts, including leases. It having already been found that the termination of lease with reference to clauses 12 and 14 of the lease deed sustains and needs no interference in this writ petition, this question, by itself, would not tilt the scales in favour of the writ petitioner. For the aforesaid reasons, this writ petition fails in so far the challenge to Ext. P39 is concerned. It is dismissed to that extent. However, the sequence of events up to Ext. P39 would categorically show that the lease in question inured to the benefit of the writ petitioner Joseph & Co. and such lease can be treated as terminated only by the order Ext. P39. A reading of the decision of the Apex Court in the earlier round and the directions therein clearly show that what was required was the issuance of a show cause for the proposed termination of lease. Whichever way the contents of the notice issued prior to Ext. P39 is construed, the fact of the matter remains that the termination of lease can be taken as having been effected only by the issuance and communication of Ext. P39. It having been issued to Smt. Meera Scaria, the Managing Partner of Joseph & Co., it does not lie with that firm to contend that the said notice or termination order was not issued to Joseph & Co. But, as the consequence of Ext. P39 attracts only from the date of its issuance, the writ petitioner company is entitled to release of amounts covered by the earlier judgments and also of usufructs or value equivalent thereto as regards the usufructs confiscated or collected by the Government on and till the date of issuance of Ext. P39. The Divisional Forest Officer, Nemmara is the authority which appears to have all materials to conclude on such amounts having regard to the contents of the materials released as Ext. P80, produced along with I. A. 4770/09. The said officer is, therefore, directed to calculate the amounts as may be due to the petitioner in terms of this judgment and the respondents are ordered to ensure its release through appropriate authority without fail within a

period of three months from now. A statemnt of account in this regard will be provided by the DFO to the writ petitioner within one month from now calling for objections and affording an opportunity of hearing in that regard. Ext. P41 is quashed and the DFO will issue revised orders including as regards matters mentioned of in Ext. P41, strictly in accordance with the terms of this judgment. The writ petition is ordered accordingly. No costs.