
(1990) 01 KL CK 0052
In the High Court Of Kerala
Case No : M.F.A. No. 699 of 1984

State of Kerala and another	Vs	APPELLANT
Kunhiraman (died) and others		RESPONDENT

Date of Decision : 29-01-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 18, Order 26 Rule 10
Kerala Private Forests (Vesting and Assignment) Act, 1971 — Section 12, 2(f), 3, 3(1), 3(2)

Citation : (1990) 1 KLJ 325

Hon'ble Judges : L. Mangharan, J; K.T. Thomas, J

Bench : Division Bench

Advocate : M.C. John Government Pleader, for the Appellant; P. Santhalingam and P. V. Narayanan Nambiar, for the Respondent

Final Decision : Allowed

Judgement

Thomas J.

1. A Forest Tribunal declared, by the impugned order, that the disputed land (10 acres in extent) is not private forest which vested in Government as per Section 3 (1) of the Kerala Private Forests (Vesting and Assignment) Act, 1971 (for short "Vesting Act"). The order is challenged in this appeal by the State and Custodian of Vested Forests. In the Original Application, the claimant has stated, inter alia, that the disputed land forms part of a larger extent of land which once belonged to Poralam Devaswom and that in the year 1941, the said Devaswom J granted a lease of 400 acres of land to one Joseph who, in turn, leased 40 acres therefrom (which includes the disputed land) to one Ayamootty in the year 1942. It is further averred in the application that Ayamootty cultivated the land with pepper, tapioca and ginger and in 1957 the disputed land was leased by the said Ayamootty in favour of the claimant who continued cultivation therein, and that the improvements effected in the property got destroyed in a forest fire during 1975-76 and thereafter he could not cultivate the land due to other

imponderables. As the forest officials obstructed him from enjoying the land, he filed the Original Application u/s 8 of the Vesting Act.

2. The application was resisted by the Custodian of Vested Forests. In the counter affidavit filed on his behalf, it is claimed that the disputed land is portion of a large area of forest land in North Wynad Taluk, to which the provisions of Madras Preservation of Private Forests Act, 1949 (for short "M. P. P. F. Act.") applied immediately before the appointed date under the Vesting Act. It is further contended that the disputed land was never under cultivation of any person and it remained as forest area right through.

3. u/s 3(1) of the Vesting Act, the ownership and possession of all private forests stood transferred and vested in the Government on and from the appointed day (10-5-1971). "Private Forests" as defined in Section 2 (f) of the Vesting Act includes any land to which M. P. P. F. Act applied immediately before the appointed day. In this case, RW 1 who was the Forester of the Range concerned from the appointed day and RW 2 who was the Forest Range Officer have deposed that the disputed land was portion of a larger tract of private forest falling within the purview of M. P. P. F. Act. The said assertion of the two witnesses has not been challenged in cross examination.

4. Learned counsel for the respondents contended that mere statement of the forest officials is not enough to prove that a particular land fell within the ambit of M. P. P. F. Act or that it was private forest on the appointed day. According to the counsel, the burden is on the appellants who assert that the land is private forest to prove the same. Support to the said contention was sought to be obtained from an observation contained in the judgment in M. F. A. No. 271/77 dated 12-12-1979 to the effect that "if once it was denied that it was forest land, the burden of proving that these were forest lands, was in the State". We may observe, with great respect, that the aforesaid judgment cannot be treated as laying down the law on the point that burden of proof in such proceedings is on the Custodian as against a person who claims that the land was not private forest on the appointed day. The question of burden of proof on this point has to be looked at from a practical angle. When the dispute is in respect of a land situated in the high ranges, the court will be justified in presuming that it originally was a forest area. The geographical specialities of the lands in Kerala would support such presumption. Position may be different if the land is situated in the plains or in lower regions such as Kuttanadu areas. It requires no effort to assume that areas which now form Wynadu District were by and large forest regions at least till the commencement of the latter half of this century. Hence it would be pedantic to insist that when there is dispute concerning a land in the said area, the burden is on the person who says that it was forest land to establish the same by leading evidence. That apart, the observation in the judgment of the division bench referred to above was not made after discussing or even dealing with the legal principles involved on the point.

Another Division Bench of this court has considered the legal position relating to

burden of proof in similar cases in greater detail in the judgment dated 10-1-1986 in M.F.A No. 12/80 (the dictum thereof was reported in *State of Kerala v Balagopal*, 1986 K.L.T.S N. 17). One of us (Thomas, J) is a party to the said decision. The Division Bench held as follows:

At first blush it may appear that the authority which contends that the land is private forest or that it has vested in the Government has to establish it before the Tribunal. But the clear provision in S. 3 of the Vesting Act would indicate the contrary. An owner of land can become aware of alleged vesting only when the land is measured or boundaries put up as contemplated in S. 6. Ordinarily it is only then that he gets an opportunity to approach the Tribunal. The person who approaches the Tribunal must have a claim that the land is not a private forest or that the private forest has not vested in the Government. He has to put forward such a claim before the Tribunal. Naturally if the claim is denied by the Government or the Custodian, he has to establish that claim. This conclusion is supported by the provisions in sub-section (3) of S. 8 of the Act.

We follow the ratio laid down in the said decision, and hence we hold that the burden is on the claimant to prove that the land in question was not private forest on the appointed date.

5. The claimant made some efforts to get the protection envisaged in sub-section (2) of Section 3 of the Vesting Act. The sub-section reads thus:

Nothing contained in sub-section (I) shall apply in respect of so much extent of land comprised in private forests held by an owner under his personal cultivation as is within the ceiling limit applicable to him under the Kerala Land Reforms Act, 1963 (1 of 1964) or any building or structure standing thereon or appurtenant thereto.

The person who claims protection under the said sub-section has to prove mainly three points. (1) That he held the land comprised in private forest as an owner. (2) That the said land was under his personal cultivation. (3) That the total extent of land under his cultivation is within the ceiling limit applicable to him under the Kerala Land Reforms Act.

6. Ownership contemplated in the sub-section is legal ownership. In other words if the person cannot trace his right to a valid title, he is disabled at the first instance itself from claiming exemption u/s 3 (2) of the Vesting Act. Ext. P1 is a registered assignment deed executed by Ayamootty in the year 1972. The recitals therein show that the land was orally leased by Ayamootty in favour of the claimant in the year 1957. There is no case for the claimant that the aforesaid lease was with the prior permission of the District Collector. Section 3 (1) of the M. P. P. F. Act prohibits alienations of any forest land either by way of sale or mortgage or lease or otherwise without the previous sanction of the District Collector. The sub-section also declares that any alienation made in contravention of the said prohibition shall be null and void. The claimant has, therefore, failed to establish that he has a valid title."

7. Even if it is assumed that the claimant has a valid title we have no difficulty in saying that the claimant failed to prove the second postulate that the disputed land was under his personal cultivation. The claimant was not examined as a witness. No doubt, there is justification for his non-examination as he was suffering from old age disabilities But the relative of him, who was examined as PW. 1 could not satisfy that the land was cultivated by the claimant before the appointed day. During examination, PW. 1 asserted that the area in question is replete with pepper vines. Challenging the said stand, a question was put to him in cross - examination whether a commission would be taken out to substantiate the said assertion. He declined to do so on the ground that he cannot afford to meet the expenses. Still the Forest Tribunal accepted the evidence of PW. 1 in preference to the evidence of the forest officials on the strength of some of his own observations in local inspections The Forest Tribunal has made copious references to the notes prepared by himself during the local inspections conducted by him. It appears that the Tribunal has regarded the notes of his observations as evidence and used them to come to his findings. When he made the second visit, he appears to have collected statement from persons who came before him. Such statements were also used by the Tribunal in reaching his conclusions. Learned Government Pleader raised criticism over the aforesaid procedure adopted by the Forest Tribunal.

8. Section 12 of the Vesting Act enables a Forest Tribunal to exercise all the powers of a civil court while trying a suit under the CPC (for short "the Code") in respect of the matters enumerated therein. Clause (e) relates to "inspecting any property or thing concerning which any decision has to be taken" In Rule 5 of the Kerala Private Forests (Tribunal) Rules, 1972, the tribunal is given the power to inspect "any land adjoining the land in respect of which a dispute has arisen for decision". If a Forest Tribunal proceeds to conduct local inspection, his powers can be drawn from Order XVIII Rule 18 of Code. Under the said Rule the court may inspect any property at any stage and where such inspection is made, the court shall make a memorandum of any relevant facts observed at such inspection, and such memorandum shall form part of the record of the suit. The purpose of local inspection is to enable the court to understand the evidence in the case. It is never meant to create or collect evidence. Nor can the observations made during local inspection be used as evidence for any purpose. It is well settled that local inspection is not intended for substituting the enquiry envisaged in law. The presiding officer who makes the local inspection cannot substitute his own view of the matter for the evidence in the case. If a party has to collect evidence through inspections he may avail himself of the opportunities provided in Order XXVI Rule 10 of the Code by taking out a commission. The correctness of any observation made by the Commissioner can be checked or verified by the parties. The commissioner can be examined as a witness and the party who disputes the observations and findings of the commissioner can cross-examine him. Such an opportunity is not available to the party when the court makes the local inspection and records its own impressions and views. It is

precisely for this reason that the courts have consistently struck the note of caution that the views and impressions gathered by a judge in local inspection shall not be used as evidence.

Patna High Court said so in *Guju v Jogendra* (AIR 1935 Patna 457). "A judge should undertake local inspection for the purpose of understanding the evidence and not to create evidence nor to contradict the legally admitted evidence". A single Judge of the Mysore High Court in *T. Krishnaswami v. Dunduppa* (AIR 1962 Mysore 17) after making a detailed survey of the case law has held thus:

The observations of a judge at the time of inspection can be used only for the purpose of better following and understanding the evidence adduced in the case or to test its accuracy. But it is not the purpose of such inspection to be substituted as evidence in the case or to contradict the evidence placed before Court and make it the foundation of the judgment.

In this context, it is of use to refer to the observations made by Subramanian Poti, J. (as he then was) speaking for the Division Bench in *Cheekutty v. Land Tribunal, Alangad* (1975 KLT 628) that "the purpose of local inspection by a court is not to use any material gathered by it or the impression gained by such local inspection in deciding the case one way or the other That should depend upon the evidence in the case".

9. That apart, if the judge or presiding officer who conducts local inspection proceeds to collect statements of the passers-by or persons who go there or persons who remained there, it would scuttle the process of law for testing the evidence in court. Any such statement when recorded in the notes of local inspection and used for any purpose may contaminate the evidence lawfully recorded or solemnly affirmed. Courts have deprecated such practice. To quote one authority, Justice Wadsworth in *Achutharamayya v. Soorappayya* (AIR 1939 Madras 61) has stated thus :

When the Judge welcomes the presence of crowds of anonymous villagers and indulges in informal inquiries amongst the people in those crowds for the purpose of obtaining guidance in deciding the rights of the parties and treats the result of those inquiries as evidence in the case, there is an end of all judicial procedure. A judgment must be based on evidence which is admissible in law, There is no objection to a Judge viewing the place in dispute in order to enable him to visualize the locality and to appreciate the evidence before him. But there is absolutely no warrant for the procedure whereby the Judge converts himself into an unofficial investigator and inquires of all and sundry regarding their views of the rights of the parties with the object of founding a judgment on what he has heard.

We hold that the Forest Tribunal has traversed beyond the permissible limit by relying on his impressions, views and observations, particularly those which he culled out for the purpose of contradicting the recorded "evidence in the case.

10. The claimant has failed to prove that the disputed land was under his personal cultivation at any time either before or after the appointed day. We have also to observe that the claimant has not even attempted to prove the third limb of Section 3(2) namely that the extent of land under his personal cultivation is within the ceiling limit applicable to him under the Kerala Land Reforms Act. In the Original Application, he did not make an averment on that aspect. Learned counsel for the respondents contended that since this aspect is least contested before the Forest Tribunal, much importance to it may not be attached at the appellate stage. We cannot accept the said contention for the simple reason that when the claimant did not even make an averment in his application regarding the total extent of his land vis-a-vis the ceiling limit applicable to him under the Kerala Land Reforms Act, there is no scope for admitting or disputing it by the other side.

The conclusion is inescapable that the Forest Tribunal has gone wrong in granting the declaration prayed for in the application. We, therefore, allow this appeal and set aside the impugned order. Parties will bear their respective costs.