
(2002) 07 KL CK 0061
In the High Court Of Kerala
Case No : M.F.A. No. 805 of 1990

Thankappan

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 18-07-2002

Acts Referred:

Kerala Private Forests (Vesting and Assignment) Amendment Act, 1986 — Section 8B, 8B(1)

Citation : (2002) 07 KL CK 0061

Hon'ble Judges : K.S. Radhakrishnan, J;K.A. Mohamed Shafi, J

Bench : Division Bench

Advocate : P.N.K. Achan and T. Sethumadhavan, for the Appellant; T. Ramaprasad Unni, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Radhakrishnan, J.—This appeal has been preferred by the Applicants in O.A. 173/77, 176/77, 177/77 and 180/77 of Forest Tribunal, Palghat, against the common order dated 14.6.1988 by which all the above mentioned applications were dismissed by the Tribunal holding that the application scheduled properties were private forest coming under the Vesting Act and that the applicants were not entitled to get the benefit of exemption u/s 3(2) or 3(3), of the Act. The order was passed after entertaining the review petitions filed by the Custodian of the Forest and the State of Kerala.

2. The State of Kerala and Custodian of Vested Forests filed I.A. 263/87, 282/87, 253/87 and 285/87 respectively u/s 8B of the Vesting Act so as to review the earlier decision rendered by the Tribunal on 31st May, 1978. Review petitions were entertained by the Tribunal. The Custodian had sought for the issuance of a commission since there was failure on the part of the State to produce some relevant data and particulars earlier. The commission was taken out. Commissioner submitted his report dated 16-10.1987. On the side of the applicants Ext. A3 document was produced. Maintainability of the review

petitions was raised by the applicants before the Tribunal. Tribunal held that the petitions for review were maintainable and the matter was examined on merits. Placing reliance on the documents produced earlier and after entertaining the review petitions including the commission report Tribunal came to the conclusion that it had earlier wrongly cast the burden on the State to prove that the properties were not under cultivation prior to the appointed day. Tribunal held after having found that the application schedule properties formed part of Urulankunnu Malavaram governed by the MPPF Act it was the duty of the applicants to prove that the schedule properties were cultivated prior to the appointed day in order to claim exemption from Vesting Act. Placing reliance on the commission report and other evidence Tribunal took the view that the properties were not under cultivation prior to the appointed day. On the basis of the oral and documentary evidence Tribunal also concluded that the applicants could not establish that they had title to the application schedule properties. Tribunal therefore concluded that they were not entitled to get relief either u/s 3(2) or 3(3) of the Act. Evidently applicants were not claiming relief u/s 3(3) of the Act since the claim was not based on any registered document. The Applicants are aggrieved by the order of the Tribunal have preferred this appeal.

3. Senior counsel appearing for the appellants Sri. P.N.K. Achan submitted Tribunal has committed a grave error in entertaining the review petitions u/s 8B of the Act. Counsel submitted grounds available u/s 8B of the Act were not urged or established by the Custodian and State so as to maintain the review petitions. Counsel submitted reliance placed on the Commission report so as to hold that the properties were not under cultivation prior to the appointed day cannot be sustained. Counsel submitted the Tribunal has no jurisdiction in placing reliance on the commission report obtained subsequent to the entertaining of the review petitions. Counsel placed reliance on the decision of the Division Bench of this Court in Ibrahim and Ors. v. Custodian of Vested Forests, 2000 (2) KLJ 794. Reliance was also placed on the decision of the Apex Court in Bagwathi Tea Estates Ltd. v. Government of India (1995) 1 KLT 612.

4. Counsel appearing for the custodian Sri. Ramaprasad Unni submitted Tribunal was justified in the facts and circumstances of the case in entertaining the review petitions and to decide the matter on merits. Counsel submitted that the Tribunal in its earlier order dated 31.5.1978 had committed an error by wrongly placing the burden on the State to prove the negative. Counsel also submitted earlier all the applications were allowed by the Tribunal placing reliance on Ext. A1 unregistered agreement dated 5.6.1970 as well as revenue receipt of 1974. Reliance was also placed on the interested testimony of one of the applicants. Counsel submitted it was on the basis of the interested testimony and on the basis of the unregistered agreement Tribunal had earlier allowed the application on 31.5.1978. Counsel submitted there was failure on the part of the State in producing certain relevant data and particulars before the Tribunal which would prove the situation of the properties before the appointed date. Counsel submitted that the Tribunal has rightly entertained the review petitions and gave

an opportunity to the State to take out a commission.

5. Before we examine the rival contentions we may examine the scope of Section 8B of the Vesting Act which is extracted below for easy reference.

"8B. Power of Custodian to apply for review of decisions of Tribunal. -(1) Notwithstanding anything contained in this Act or in the Limitation Act, 1963 (Central Act 36 of 1963) or in any other law for the time being in force, or in any judgment, decree or order of any court or other authority the Custodian may, if he is satisfied that any decision of the Tribunal u/s 8 requires to be reviewed on the ground that such decision has been made on the basis of concessions made before the Tribunal without the authority in writing of the Custodian or the Government or due to the failure to produce relevant data or other particulars before the Tribunal or that an appeal against such decision could not be filed by reason of the delay in applying for and obtaining a certified copy of such decision make an application to the Tribunal during the period beginning with the commencement of the Kerala Private Forest (Vesting and Assignment) Amendment Act, 1986 and ending on the 31st day of March, 1987 for review of such decision.

(2) An application under Sub-section (1) shall be in the prescribed form and shall be verified in the prescribed manner.

(3) On receipt of an application under Sub-section (1) the Tribunal shall, notwithstanding anything contained in this Act or in the Limitation Act, 1963 (Central Act 36 of 1963) or in any law for the time being in force, or in any judgment decree or order of any court or other authority, review decision and pass, such orders as it may think fit".

(Underline supplied)

S. 8B has employed a non-obstante clause. Non-obstante clause is usually used in a provision to indicate that, that provision should prevail despite anything to the contrary in the provision mentioned in any such non-obstante clause. Therefore notwithstanding anything contained in the earlier order of the Tribunal power has been conferred on the Custodian to prefer application for review if he is satisfied that any decision of the Tribunal u/s 8 requires to be reviewed on the ground that such decision has been made on the basis of concessions made before the Tribunal without the authority in writing of the Custodian or the Government or due to the failure to produce relevant data or other particulars before the Tribunal or that an appeal against such decision could not be filed by reason of the delay in applying for and obtaining a certified copy of such decision. Therefore, u/s 8B of the Custodian has to get himself satisfied that the order passed by the Tribunal u/s 8 requires to be reviewed on certain grounds enumerated therein. The Custodian then could file a petition for review u/s 8B before the Tribunal during the period beginning with the commencement of the Kerala Private Forest (Vesting and Assignment) Amendment Act, 1986 and ending on the 31st day of March, 1987 in the prescribed form and verified in the

prescribed manner.

6. The Tribunal on receipt of the application under Sub-section (1) of Section 8B shall review its earlier decision and pass such orders as it may think fit. The expression "as it may think fit" confers very wide jurisdiction enabling the Tribunal to take an entirely different view on the same set of facts or on facts which were omitted to be produced earlier though available. Reference may be made to the decision of the Apex Court in *Raja Ram Mahadev Paranjype and Others Vs. Aba Maruti Mali and Others*, *Babulal Nagar and Others Vs. Shree Synthetics Ltd. and Others*, *Ghulam Qadir Vs. Special Tribunal and Others*. Tribunal is not circumscribed by any restrictions of Section 8B(1) in reviewing its earlier order. Tribunal if it finds earlier order was passed erroneously can pass appropriate orders as it thinks fit.

7. We may indicate the scope of above mentioned provision came up for consideration before a Full Bench of this Court in *Pankajakshy Amma v. Custodian of Vested Forest* 1995 (1) KLT 358. Wherein identical contention was raised by the counsel appearing for the applicants stating that the Tribunal can review its judgment only if three conditions are satisfied and the Tribunal cannot go beyond these conditions and find out any other defect in the order for the purpose of reviewing its own judgment. Counsel submitted before the Full Bench that the Tribunal was wrong in taking note of the data collected long after the date of the disposal of the original application and the same would amount to supplying the data filed to be produced before the Custodian. Before the Full Bench learned Government Pleader submitted that the original order was passed without the relevant and vital data which goes into the root of the matter and therefore after going through the documentary evidence the Tribunal had rightly allowed the review petition and negated the claim of the applicants. The argument raised by the counsel for the applicant was considered by the Full Bench and held as follows:

"On a plain reading of the Section the satisfaction of any one of the three grounds has to be established as a condition precedent for the Custodian to make an application for review. But the provision does not say that the same or similar grounds must be in existence for the purpose of the Tribunal to satisfy itself before reviewing the order. To restrict the power of the review only to such of those three grounds for which the Custodian has to be satisfied will be restricting the scope of the review of the Tribunal. Similarly it would be a further restriction of the power to review u/s 8B of the Act if the power is treated as analogous to the power of review under Order XL VII Rule 1 CPC. Section 8B of the Act has been brought into existence by Amendment Act 36 of 1986 for a definite purpose. The background of such an amendment has been set out in the decision in *V.M. Abraham v. State of Kerala and Ors.* (1987 (1) KLT 57). Public interest was put in jeopardy by the conduct of certain officers in charge of litigation before the Forest Tribunals and before this Court as well as the conduct of some counsel who appeared for the State and Custodian in some of the cases.

The Legislature thought it fit to incorporate these provisions enabling the Custodian or the Government, as the case may be, to seek review of the decisions or prefer appeal before the High Court notwithstanding the fact that the period of limitation prescribed has expired, if the Government or the Custodian are satisfied about the existence of any one of three grounds set out in Section 8B(1) of the Act."

The Full Bench further held as follows:

"The Tribunal while dealing with the application for review is not restricted to the grounds mentioned u/s 8(1) of the Act. There may be grounds like discovery of a vital evidence which after due diligence was not within the knowledge, or omission to note the point of law or an error apparent on the face of record, or erroneous assumption as to material factor where the Tribunal has omitted to try a material issue or any other sufficient reason. Thus the grounds of review are not exhaustive and in the light of the amendment it can not be restricted to specified grounds."

The Full Bench further noted that the Tribunal on review placed reliance on Ext. C1 report obtained subsequently and found that the applicant was not entitled to the benefit of Section 3(3) of the Act since he had not proved his title and that he was not in personal cultivation of the property on the appointed day, just like the case on hand the Full Bench found no infirmity in the Tribunal placing reliance on commission report which was obtained subsequent to the entertainment of the review petition. We may hasten to add similar is the contention raised before the Full Bench and the situation was also identical. We have also gone through the Judge's papers in the Full Bench case.

8. We are of the view the decision of the Apex Court in Bagwathi Tea Estate's case (supra) has not in any way diluted the principle laid down by the Full Bench of this Court in Pankajakshy Amma's case (supra). While dealing with Section 8(3) of the Vesting Act the Apex Court held that the words "due to failure to produce relevant data or other particulars" mean what they say. It must be a failure to produce relevant data or particulars; it cannot mean a mere change of opinion on the same material or on the same evidence.

9. We are of the view the purpose of taking out a commission is to furnish relevant data or particulars before the Tribunal with regard to the situation which existed prior to 10.5.1971. There was failure on the part of the State to furnish those relevant data or particulars with regard to a situation existed prior to 10.5.1971. Question as to whether the applicants were in cultivation prior to 10.5.1971 is a mandatory condition to be satisfied for claiming exemption u/s 3(2) of the Act. As held by the Full Bench in State of Kerala v. Chandralekha, 1995 (2) KLT 152 that the burden is on the person who prefers a claim to establish that the property is not a private forest. In this case the burden was wrongly cast on the State and Custodian. Of course it is open to the Custodian as well as the applicant to produce relevant data or particulars to show that the

property was either not under cultivation or under cultivation prior to the appointed day. In other words, if there was failure on the part of the Custodian to produce relevant data and particulars with regard to the nature of the land, prior to the appointed date he can do so u/s 8B. When the Custodian is satisfied that there was a failure on the part of the State that the relevant data or particulars could not be made available to the Tribunal by taking out a commission it is always open to the Custodian to do so by filing a review petition u/s 8B, in the event of which, Tribunal shall entertain the same and pass appropriate orders as he thinks fit. We may reiterate that the situation that we get in this case is identical to the one dealt with by the Full Bench in Pankajakshy Amma's case. Contention was also identical. We therefore find it ourselves unable to accept the reasoning of the Division Bench of this Court in Ibrahim's case (supra) which in our view goes contrary to the reasoning of Full Bench in Pankajakshy Amma's case.

10. We may indicate on merits applicants have not successfully established that they are entitled to seek declaration that the properties are not private forest and therefore liable to be exempted from the provisions of the Act. The only evidence produced before the Tribunal earlier was Ext. A1 which is an unregistered document dt. 5.6.1970 executed by one Chacko and four others. A1 is unregistered agreement alleged to have been executed in favour of the applicant in a stamp paper purchased in the name of another person. No witness in the document was examined to prove the said document. Balakrishnan, applicant in O.A. 180/77 evidently was an interested party. Without any corroboration we are of the view Ext. A1 unregistered agreement cannot be relied upon so as to establish title or possession to the property. On entertaining the review A3 document was produced. No reliable evidence was adduced by the applicants to show that the application schedule properties form part of Ext. A3. We are of the view in the absence of any independent evidence either oral or documentary no reliance could be placed on A1 to A3. Relief was granted by the Tribunal earlier placing reliance on the interested testimony of one of the applicants. We are of the view as held by the Full Bench of this Court in Pankajakshy Amma 's case (supra) the burden is on the applicants to show that the property was under cultivation prior to the appointed day. This burden has not been discharged by adducing any independent evidence. No commission was taken out earlier at the instance of the applicants. No neighbour of the properties was examined. Commission taken out at the instance of the State would show that rubber trees, cashewnut trees etc. were not planted before the appointed day. No Rubber Board licence was produced by the party so as to establish that this property was under rubber cultivation prior to the appointed day. In O.A. 180/77 it is stated by the Commissioner that 30 coconut trees aged 18 years were found. Commissioner visited the property only in 1987 and the age stated is only approximate. We find applicants themselves have got the property only in the year 1970 as per the unregistered agreement. Therefore they could not have planted the property prior to A1. In the absence of any independent evidence we

are of the view that the Tribunal was justified in reviewing its earlier order and dismissing the original application's. We therefore confirm the order of the Tribunal.

11. Appeal lacks merits and the same is dismissed.