

(1995) 09 KL CK 0027
In the High Court Of Kerala
Case No : O.P. No. 8653/88

V.R. Thirumalaiswamy Gounder and Others	APPELLANT
Vs	
Chief Conservator of Forests, Trivandrum and Others	RESPONDENT

Date of Decision : 13-09-1995

Acts Referred:

Forest (Conservation) Act, 1980 — Section 2

Citation : AIR 1996 Ker 213

Hon'ble Judges : M.M. Pareed Pillay, C.J;P.K. Balasubramanyan, J

Bench : Division Bench

Advocate : P.N.K. Achan, for the Appellant; N.S. Menon, Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Balasubramanyan, J.—The petitioner was a parter of a firm. He died subsequently and two of his sons came forward to get themselves impleaded. They submitted that in addition to being his sons they were also partners of the firm. They were impleaded. They seek to challenge the order Ext. P6 passed by the Secretary (Agriculture and Forest) Government of Kerala rejecting their claim for execution of a lease in their favour on the ground that the lease in question is one hit by the Forest (Conservation) Act, 1980, Act 69 of 1980 and since the conditions of that Act were not satisfied the Government Order Ext. P1 earlier passed, could not be complied with or implemented.

2. The firm had a lease in respect of certain lands. While in possession of those lands, the partners of the firm seem to have encroached upon adjacent forest lands. The extent encroached upon was 250.39 acres. The forest department resumed an area of 142.39 acres of land during the year 1976. The balance portion remained with the encroacher, the firm. Out of the 142.39 acres resumed by the Forest Department, it appears that an extent of 38.42 acres had been cultivated with cardamom. The firm who appears to have been in possession of 108 acres on the basis of the encroachment and from whom 142.39 has been

resumed as encroached area, appears to have moved a petition before the Government praying that its encroachment may be regularised and it may be granted a lease of the encroached forest land as well. The Government by order dated 16-10-1980 decided to grant a lease of 108 acres of encroached land continuing in the possession of the firm and 38.42 acres of planted area which had been resumed along with other extents by the Forest Authorities, making in all 146.42 acres for raising cardamom cultivation. The order Ext. P1 indicated that the area of 146.42 acres taking in 108 acres of trespassed land in which cardamom had been cultivated and which continued to be in the possession of the firm and the extent of 38.42 acres of cultivated area resumed by the Forest Department would be leased to the Managing Partner of the firm on certain terms and conditions set out in that order. The proposed lease was to be for a period of 20 years and the lease was to be deemed to have been commenced from the date of the order. The rent was Rs. 50/- per acre subject to revision under the relevant Act, and the area was to be used by the lessee for the cultivation of cardamom only. It also contained a stipulation that the lease shall not cause any damage to the forest tree growth in the area and the lessee will have no right over the tree growth whether naturally grown or artificially regenerated. The lessee was also not entitled to cut and remove any existing trees. A penal rent was to be recovered from him for the encroachment he had earlier made. The Chief Conservator of Forests, Trivandrum was to take further action in the matter.

3. Before any effective action could be taken, the Forest (Conservation) Act came into force on 25-10-1980. Without reference to that Act or applying his mind to the possible effects of that Act, the Divisional Forest Officer, Nenmara issued Ext. P2 notice to the Managing Partner of the firm calling upon him to remit a sum of Rs. 6,56,582.15 and to produce the original chalan receipt immediately so as to enable him to take further action. The firm thereupon filed O.P. 6991 of 1983 before this court seeking the issue of a writ of mandamus directing the Chief Conservator of Forests, Trivandrum and the State of Kerala to act in furtherance of the order of the Government dated 16-10-1980 marked herein as Ext. P1 and which was marked in that Original Petition also as Ext. P1. In that Original Petition, a copy which has been marked as Ext. P3 here, the firm stated that the draft of the lease deed required to be executed by the firm had not yet been finalised by the Chief Conservator of Forests, that the Chief Conservator of Forests and the State were bound to execute the lease deed immediately so as to enable the firm to raise money on the security of the properties contained therein and that a writ of mandamus is liable to be issued as prayed for. In the counter affidavit filed on behalf of the respondents in that Original Petition, marked here as Ext. P4, the history of the proceedings leading to the passing of Ext. P1 order was set out and it was stated that as ordered by the Government, the firm had remitted the amount of Rs. 6,56,582.15 towards the penal lease rent and compensation for tree growth removed from the total encroached area, and based on the said order of the Government, necessary draft lease deed was prepared and it was under consideration of the Government.

The lease deed had not been executed. It was pointed out that immediately after the Government Order dated 16-10-1980, the Forest (Conservation) Ordinance of 1980 was issued by the Central Government prohibiting all non-forestry operations in forest areas. The Government was therefore forced to think about the leasing out of the lands in question. It was stated that the firm had no claim over the area and the firm cannot demand the leasing out of the area. It was for the Government to decide whether to lease out the lands or not, in the light of the provisions of the Central Enactment. When that Original Petition came up for final hearing, a learned single Judge of this court, by judgment dated 8-12-1987, a copy of which has been marked as Ext. P4(a), after noticing the contentions of parties held that on the materials available the court was not in a position to decide whether the various lands involved had already been broken up or cleared prior to the coming into force of the Central Act 69 of 1980 and the only course open to the court was to direct the Conservators of Forests and the State to examine the question whether the forest lands in dispute had already been broken up prior to 1980 or not. It was also observed that if it had been broken up, the provisions of Act 69 of 1980 will not have any application to the instant case, and in such a situation, there was no reason for not complying with the direction contained in Ext. P1. The authority was therefore directed to comply with Ext. P1 in case the forest land had already been broken and cleared prior to the coming into force of Act 69 of 1980. It is pursuant to this direction, that the Government passed the order dated 8-10-1988, a copy of which has been marked as Ext. P6, holding that the condition regarding forest lands having already been Broken up and cleared prior to the coming into force of Act 69 of 1980, was not satisfied in this case and therefore the Government were unable to comply with the order Ext. P1. The request of the firm to execute the lease was thus rejected. In the present Original Petition the firm has challenged that order of the Government.

4. When the Original Petition came up before the learned single Judge, the petitioners relied on the decision of the Supreme Court in State of Bihar Vs. Bansi Ram Modi and Others, to contend that Forest (Conservation) Act is not applicable to forests which had already been broken up prior to the coming into force of that Act. The State relied on the decision in Ambica Quarry Works v. State of Gujarat and Ors., (1987) 1 SCC 213 to contend that the Act would apply to the case on hand. The learned single Judge felt that a different note has been struck by the decisions. The case was therefore, adjourned for being heard by a Division Bench u/s 3 of the High Court Act. It is thus that the Original Petition has come up before us.

5. There is no dispute before us that the 146.42 acres of land involved was part of a reserve forest when it was encroached upon by the firm. The firm had planted cardamom in that encroached area. The planting was prior to 25-10-1980, when the Forest (Conservation) Act came into force. The case of the firm is that since the land had already been used for a non-forest purpose by being broken up, the Conservation Act cannot have any application. The case on

behalf of the State and the finding in Ext. P6 is that the land cannot be treated as broken up within the Explanation to Section 2 of the Conservation Act, so as to hold that the Conservation Act had no application to the lands in question. In Ext. P4(a) judgment, on the earlier occasion, the learned Judge proceeded on the basis that if the land had been broken up the Act may not have application. But the question whether in view of Clause (1) of Section 2 of the Conservation Act, prior approval under that Act would not be required was not considered. It may be profitable at this stage to extract Section 2 of the Forest (Conservation) Act.

""2. Restriction on the preservation of forests or use of forest land for non-forests purpose Notwithstanding anything contained in any other law for the time being in force in a State no State, Government or other authority shall make, except with the prior approval of the Central Government, any order directing-

(i) that any reserved forest (within the meaning of the expression "reserved forest" in any law for the time being in force in that State) or any portion thereof, shall cease to be reserved.

(ii) that any forest land of any portion thereof may be used for any non-forest purpose.

Explanation:-- For the purpose of this section "non-forest purposes" means breaking up or clearing of any forest land or portion thereto for any purpose other than reafforestation".

6. We must initially observe that this land was reserved forest at the time it was encroached upon by the firm. There is no case that after the firm had encroached upon the land and cultivated it with cardamom, the lands had been dereserved. Section 3 of the Kerala Forest Act enables the Government to constitute any land at the disposal of the Government as the reserve forest. Section 4 of that act confers the power on the Government to notify and land as reserve forest after fulfilling the formalities referred to therein. Provisions have been made to enquire into the claims made pursuant to or subsequent to such notification and a proclamation u/s 6 is also contemplated. Once any land has been notified as reserve forest, Section 22 provides that no right of any description shall be acquired in or over a reserved forest except under a grant or contract in writing made by or on behalf of the Government. Section 26 of the Act confers a power on the Government, again by notification in the gazette, to direct that from a date to be fixed by such notification, any forest or any portion thereof reserved or deemed to be reserved under that Act shall cease to be reserved. There is no case for the firm that the land in question ceased to be reserved by virtue of any notification u/s 26 of the Kerala Forest Act. It is therefore clear that notwithstanding the trespass by the firm and the planting of cardamom therein, the land continued to be reserve forest. It is not shown that the forest trees were not and removed. In fact, Clause (vi) of paragraph 6 of the Ext. P1 order itself indicates that the forest tree growth continued to exist in the lands. Going by Section 2(i) of the Forest (Conservation) Act, it is clear that no land notified as

reserve forest shall cease to be reserve forest without prior approval of the Central Government. The demise of the land which continues to be reserve forest, cannot therefore be made without the prior sanction of the Central Government. According to us, on this ground also, the claim of the firm for leasing of the land to it without the prior approval of the Central Government, cannot be sustained.

7. As we read Section 2 of the Forest (Conservation) Act, 1980 it seems to us, that Explanation is relevant only to Clause (ii) of Section 2 of the Act and the Explanation has relevance only to use of the land for non-forest purposes. The Explanation that non-forest purpose means breaking up or clearing of. of any forest land for any purpose other reafforestation cannot cover Clause (i) of Section 2 dealing with reserve forest and the prior approval needed to de-reserve such a forest. In our view therefore, even if the land had been broken up prior to 25-10-1980 and used for a non-forest purpose that would not by itself do away with the need to have prior approval of the Central Government, in view of the fact that the land that is proposed to be leased out for cardamom cultivation is Reserve Forest.

8. The next question is whether the Government was right in holding that the land cannot be said to be broken up prior to the coming into force of the Forest (Conservation) Act, so as to dispense with the prior approval of the Central Government. According to learned counsel for the firm, since the Government had already decided to grant the lease, the ratio of the decision in *State of Bihar Vs. Banshi Ram Modi and Others*,) would apply to this case and therefore nothing stood in the way of the Government executing the lease deed pursuant to Ext. P1. The learned Government Pleader on the other hand submitted that in the light of the decision in *Ambika Quarry Works v. State of Gujarat and Ors.*, (1987) 1 SCC 213 , the contention raised on behalf of the firm cannot be accepted. In *Ambika Quarry Work's* case, the Supreme Court had distinguished the decision in *Banshi Ram's* case by pointing out to the peculiar facts of that case and the fact that a lease had already been given for mining purposes in that case, and that the situation would be different in a case where the lessee was seeking a renewal of the Quarry lease or the act proposed would lead to further deforestation or at least it will not help reclaiming back the areas where deforestation have taken place. In the case on hand also, there is no subsisting lease in favour of the firm to attract the ratio of *Banshi Ram's* case. On the other hand, what is sought for by the firm is the grant of a lease pursuant to a Government Order issued prior to the coming into force of the Forest (Conservation) Act. Keeping in view the object of the Act as expounded in *Ambika Quarry Works's* case, it is clear that no lease could be granted even if it was by way of renewal without complying with the requirements of Section 2 of the Forest (Conservation) Act. We are therefore clear in our mind that the decision in *Ambika Quarry Works'* case squarely applies and the contention of the firm that no prior approval of the Central Government is necessary for the purpose of lease in this case cannot be accepted. It has also to be noted that the

decision in Ambika Quarry Works" case has been followed by the Supreme Court in Rural Litigation and Entitlement Kendra Vs. State of U. P., Their Lordships observed therein, thus of Page 2201; of AIR :

"In Banshi Ram Modi's case (supra) what was being considered was extension of the leases for another mineral which was found while exploitation under the existing mining lease was undertaken. We agree with the view expressed by Brother Mukheriji that the Conservation Act of 1980 applies to renewals as well and even if there was a provision for renewal in the lease agreement on exercise of lessee's option, the requirements of 1980 Act had to be satisfied before such renewal could be granted".

In other words, the distinction between a case where there was a subsisting lease of forest land as on the date of the Conservation Act and a lease or a renewal was sought subsequent to the coming into force of the Conservation Act was emphasised. In the case on hand, there cannot be any doubt that what the lessee is seeking is the grant of a lease to him, no doubt pursuant to the order of the Government issued prior to the coming into force of the Forest (Conservation) Act. But the fact remains that what is sought is the grant of a lease of reserve forest and the grant not having come into force prior to the commencement of the Forest (Conservation) Act, the lease could not be granted without complying with Section 2 of the Forest (Conservation) Act.

9. It is not as if the further formalities are not to be complied with for the proposed lease for it to come into force, though with effect from the date of the order Ext. P1 dated 16-10-1980. Ext. P1 itself shows that the Government order was only one according sanction for leasing out an area of 146.42 acres. It also directs the Chief Conservator of Forests, Trivandrum, to take further action in the matter. The firm also understood that the deed of lease had to be executed and it is in that behalf that it applied for the issue of a writ of mandamus before this Court. It is therefore obvious that the parties contemplated the execution of a lease deed and the order Ext. P1 could be understood only as an order permitting the grant of such a lease. Though the order preceded the coming into force of the Forest (Conservation) Act, since the lease itself was not executed before the coming into force of that Act, it was necessary to comply with the requirements of Section 2 of the Conservation Act.

10. Though in the view of our conclusion as above, it may not be strictly necessary, we will also consider whether the Government was right in holding that the land had not been broken up and cleared prior to the coming into force of the Conservation Act. Ext. P1 itself shows that forest tree growth remained in the area (see condition No. (vi), that the area will not be dereserved (see Clause No. (viii), that the area will be used by the lessee for the cultivation of cardamom only (see Clause (v)). It is submitted by learned Government Pleader that for raising cardamom cultivation only the undergrowth is removed since cardamom plants require shade and merely because the firm trespassed into a portion of forest land and raised cardamom cultivation therein after removing forest

undergrowth, it cannot be said that the land has been broken up or cleared off. There is no pleading on behalf of the firm that the forest was cleared for the purpose of planting cardamom. In the absence of any specific pleading on the side of the firm that the forest had been cleared prior to the planting of cardamom or at least prior to the coming into force of the Forest (Conservation) Act, it is not possible to hold that the Forest (Conservation) Act does not have any application, in view of the land being broken up within the meaning of Explanation to Section 2 of the Act. It is no doubt true that the order of the Government on this aspect is not detailed or satisfactory, but in view of our conclusion as above we do not think it necessary to direct a reconsideration of the question afresh. We feel that in the absence of any specific pleading on the side of the firm that the forest had been cleared prior to the relevant date, we would not be unjustified in holding that the firm has not shown that the land in question had ceased to be forest, for the purpose of the Forest (Conservation) Act.

In the result, on an anxious consideration of the relevant aspects, we hold that the Forest (Conservation) Act, 1980 does apply to the lands in question and consequently the reliefs prayed for by the petitioner cannot be granted in the form in which they are sought. We dismiss this Original Petition. But, in the circumstances of the case we make no order as to costs.