

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

FRIDAY, THE 29TH OCTOBER 2010 / 7TH KARTHIKA 1932

WP(C) .No. 44 of 2005(E)  
-----

PETITIONER(S) :  
-----

1. K.O.THOMAS,  
KIZHAKKEYIL VEEDU, P.O. DHONI, PALAKKAD.
2. THOMAS K.J.,  
PAREMACKAL KOLUTHARA, NOCHIPPULLY,  
PUTHUPARIYARAM, PALAKKAD.

BY ADV. SRI.P.RAMAKRISHNAN

RESPONDENT(S) :  
-----

1. STATE OF KERALA,  
REPRESENTED BY SECRETARY TO GOVERNMENT,  
FOREST AND WILD LIFE, GOVERNMENT SECRETARIAT,  
THIRUVANANTHAPURAM.
2. THE DIVISIONAL FOREST OFFICER,  
OLAVAKKODE, PALAKKAD.
3. THE FOREST RANGE OFFICER,  
OLAVAKKODE SPECIAL RANGE, OLAVAKKODE, PALAKKAD.

GOVERNMENT PLEADER SHRI.P.M.POULOSE

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD  
ON 29/10/2010, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:

APPENDIX

PETITIONER(S) ' EXHIBITS

- P1. COPY OF THE CERTIFICATE OF PURCHASE ISSUED TO P1.
- P2. -DO- P2.
- P3. COPY OF THE JUDGMENT IN M.F.A.NO.277/81 OF THIS COURT.
- P4. COPY OF THE SALE DEED DTD.9.4.1991.
- P5. COPY OF THE SALE DEED DTD.12.6.89.
- P6. COPY OF THE SALE DEED DTD.14.9.91.
- P7. COPY OF THE JUDGMENT IN O.P.No. 798/1991 OF THIS COURT.
- P8. COPY OF THE PETITION DTD.18.2.04.
- P9. COPY OF THE PETITION DTD.18.2.04.
- P10. COPY OF THE REPORT DTD.1.8.95 OF THE VILLAGE OFFICER, PUTHUPARIYARAM.
- P11. COPY OF THE ORDER DTD.30.12.95 OF THE LAND TRIBUNAL, PALAKKAD.
- P12. COPY OF THE REPORT DTD.1.8.95 -DO-
- P13. COPY OF THE ORDER DTD.30.12.95 OF THE LAND TRIBUNAL, PALAKKAD.
- P14. COPY OF THE JUDGMENT OF THE FOREST TRIBUNAL, PALAKKAD, IN O.A.NOS.136 & 137 OF 1979

RESPONDENT(S) ' EXHIBITS:

- R1A. COPY OF THE RECEIPT ISSUED BY THE APPLICANT.

sdk+

///True copy///

P.A. to Judge

S.SIRI JAGAN, J.

=====

W.P.(C).No.44 of 2005

=====

Dated this the 29<sup>th</sup> day of October, 2010

J U D G M E N T

In this writ petition, the petitioners are aggrieved by the action of the respondents in interfering with the enjoyment of a property, which they purchased. That property was originally the subject matter of proceedings under the Kerala Private Forests (Vesting & Assignment) Act, 1971. That resulted in Ext.P14 order of the Forest Tribunal, Palakkad, which is a common order in O.A.Nos.136/1979 and 137/ 1979. This writ petition relates to the property involved in O.A.No.137/ 1979. According to the petitioners, by that order, the Forest Tribunal found that the property in question is not a private forest. Despite the same, the respondents are interfering with the enjoyment of the property by the petitioners on the ground that in respect of that property, a notification under Section 5 of the Kerala Preservation of Trees Act has been issued and, therefore, the petitioners cannot cut trees from the property, which is prohibited by Section 5 of the said Act.

2. In respect of the property covered by Ext.P14 itself, another person had filed W.P.(C).No.17979/2003, which was disposed of by me on 22.10.2010. In that writ petition, I passed the following judgment:

'The petitioner is the purchaser of a property which originally belonged to one Mathan Abraham. The respondents originally took the stand that, that property is liable to be vested with the Government under the Kerala Private Forests (Vesting And Assignment) Act, 1971. The said Mathan Abraham filed an O.A. before the Forest Tribunal, Palghat as O.A. No.136/1979. The Forest Tribunal considered the said O.A. along with another O.A. and passed Ext.P2 judgment, wherein the

Tribunal found that 8.33 acres of property is not a private forest and therefore is not liable to be vested with the Government. The State filed an M.F.A. against Ext.P2 judgment of the Forest Tribunal which was dismissed by Ext.P3 judgment of this court. The petitioner in the writ petition would state that, R.P. No.118/1986 filed by the State against Ext.P3 was dismissed with costs on 11.12.1986. The State filed S.L.P. No. 4769/1987 before the Hon'ble Supreme Court which was also dismissed on 27.07.1987. Subsequently the petitioner purchased the said property from the said Mathan Abraham. But the respondents did not permit the petitioner to clear the land for cultivation on the ground that a notification under Section 5 of the Kerala Preservation of Trees Act, 1986 has been published in respect of the said property and therefore the petitioner cannot cut trees from that property. According to the petitioner, the petitioner is not aware of any such notification and even if there is such a notification that is unsustainable insofar as Section 5 does not apply to the property in question as the same is not a private forest, cardamom hills reserve or any other area cultivated with cardamom, in respect of which only a notification under Section 5 can be issued. The petitioner therefore seeks the following reliefs:

*"a) Issue a writ or mandamus or other appropriate writ or order directing the 2<sup>nd</sup> respondent to take up and dispose of Exhibit P-5 in accordance with law,*

*b) Hold that the notification, if any, issued under Section 5 of the Kerala Preservation of Trees Act 1986, in respect of the petitioner's property covered by Exhibit P-1 is without jurisdiction and wholly unsustainable;*

*c) Declare that the petitioner is entitled to deal with the petitioner's properties under his ownership and possession, referred to in Exhibit P-1 in the best manner possible, at his discretion and without interference from the respondents 1 to 3,"*

2. A counter affidavit has been filed by the 2<sup>nd</sup> respondent, wherein they would take the contention that, the O.A. filed by Mathan Abraham was allowed not because it is not a private forest but because it was exempted under Section 3 (2) of the Kerala Private Forests (Vesting And Assignment) Act, 1971, in which case Section 5 of the Preservation of Trees Act would apply. They would, without specifying either the number, date of the notification or the date of gazette in which it was published, take the contention that, the notification under Section 5 of the Kerala Preservation of Trees Act, 1986 was also effected. According to the respondents, in view of the fact that, the property in question is a private forest and the Forest Tribunal has only exempted the said property from vesting under the Kerala Private Forests (Vesting and Assignment) Act, Section 5 of the Kerala Preservation of Trees Act, 1986 is applicable.

3. I have considered the rival contentions in detail.

4. Section 5 of the Kerala Preservation of Trees Act, 1986 reads thus:

**"5. Prohibition of cutting of tree in notified areas.-** (1) *Notwithstanding anything contained in any law for the time being in force, or in any judgment, decree or order of any Court, tribunal or other authority, or in any agreement or other arrangement, the Government may, with a view to preserving the tree growth in private forests or in the Cardamom Hills Reserve or in any other areas cultivated with cardamom, by notification in the Gazette, direct that no tree standing in any such area specified in the notification shall be cut, uprooted, burnt or otherwise destroyed except on the ground that-*

- (a) *the tree constitutes a danger to life or property; or*
- (b) *the tree is dead, diseased or windfallen:*

*Provided that the provisions of this sub-section shall not be deemed to prevent the pruning of any tree as required by ordinary agricultural or horticultural practices.*

(2) *No person shall, without the previous permission in writing of the authorised officer, cut, uproot, burn or otherwise destroy or cause to be cut, uprooted, burnt or otherwise destroyed any tree in any area specified in the notification under sub-section (1) on any of the grounds specified therein."*

Going by the same, a notification under Section 5 can be issued only in respect of a property which is a private forest or a cardamom hills reserve or any other area cultivated with cardamom. The respondents have no case that, the area is a cardamom hills reserve or other area cultivated with cardamom. Therefore, the only question to be decided in this case is as to whether the property in question is a private forest or not. It is not disputed before me by the respondents that, the area in question is covered by Ext.P2 judgment of the Forest Tribunal, Palakkad. The contention raised is that, in paragraph 11 of Ext.P2 judgment, the Forest Tribunal had considered the question of exemption under Section 3 (2) of the Act, which would go to show that, the said property was exempted from vesting not because it is not a private forest but because the land is eligible for exemption under Section 3 (2) of the Kerala Private Forests (Vesting And Assignment) Act, 1971. I am of opinion that, that is a misreading of Ext.P2 judgment. In Ext.P2 judgment, the Forest Tribunal raised four points for consideration, namely: (1) Whether the petitioner is entitled to the property in question? (2) Whether the disputed areas are private forests? (3) Whether the petitioner is entitled to exemption under Section 3 (2) of the Act? & (4) Where the petitions barred by limitation? The first point was answered in favour of the petitioner in the O.A. Thereafter, point No.2 was elaborately considered and the Tribunal came to the following conclusion:

*"Therefore the State has not proved that this area has got the characteristic of a forest or is otherwise a forest. I hold that the properties scheduled in the Petitions are not proved to be private forests. Points answered in favour of the Petitioners."*

But the Forest Tribunal went on to consider point No.3 also, although it was not necessary in view of the findings on point No.2. The Tribunal considered as to whether, if the land was private forest, the petitioner in the O.A. would have been eligible for exemption under Section 3 (2) of the Act and entered a finding that, in respect of the extent to which the petitioner has got title he would be entitled to exemption under Section 3 (2) of the Act as well. The learned Government Pleader would heavily rely on the decision on point No.3. As I have already stated, that is a misreading of the judgment. It is after categorically finding that, the property in question is not a private forest, the Tribunal went on to consider whether, if the land was private forest, the petitioner is entitled to exemption from the provisions of the Act, with the preface that, in view of the finding on point No.2, point No.3 does not arise for consideration and if a finding is necessary it will be as stated in paragraph 11. As such, I have no doubt in my mind that, by Ext.P2 the Forest Tribunal categorically entered a finding that the property in question is not a private forest.

5. In fact, except a vague statement in paragraph 5 of the counter affidavit that the area covered by Ext.P2 judgment was restored to the applicant and notification under Section 5 of the Kerala Preservation of Trees Act, 1986 was also effected, the respondents have not chosen even to state the number or date of the notification or the date of the gazette notification in which it was published. This assumes importance since in the Original Application the petitioner claimed that, he is not aware of any such notification. Therefore, it is not even clear as to whether there is any notification under Section 5 at all.

6. Even if there is such a notification, it will be contrary to Section 5, insofar as I have already held that the property is not a private forest and Section 5 is not applicable to the property at all. Accordingly, I am satisfied that the petitioner is entitled to succeed in this writ petition. Accordingly the writ petition is allowed. It is declared that, the property in question is not liable to be notified under Section 5 of the Kerala Preservation of Trees Act, 1986 and even such a notification has been issued it would be ultravires the provisions of the Kerala Preservation of Trees Act, 1986. It is declared so. Consequently the petitioner is entitled to deal with the property without any restriction under the Kerala Preservation of Trees Act, 1986. The respondents shall not interfere with the possession and enjoyment of the property by the petitioner on the ground that the property is notified under Section 5 of the Kerala Preservation of Trees Act, 1986, in any manner.

The writ petition is allowed as above.'

The facts of this case are exactly identical to the facts of that case. In fact, in the order of the Forest Tribunal, the finding that the property is not a private forest is common to both properties involved in the two O.As. Therefore, after hearing, I am satisfied that this writ petition can also be disposed of in terms of that judgment. Accordingly, this writ petition is disposed of in terms of that judgment.

sdk+

Sd/-  
S.SIRI JAGAN, JUDGE

///True copy///

P.A. to Judge