

Bombay High Court

Sinhagad Technical Education ... vs Dy. Conservator Of Forest, Pune ... on 3 February, 2015

Bench: A.S. Oka

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wp-72

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7235 OF 2013

Sinhagad Technical Education Society)
through its duly Authorized President)
Prof. Maruti N. Navle,)
having office address at Sr. No.44/1,)

Vadgaon Budruk off Sinhagad Rd.,)
Pune - 411 041.) ... Petitioner

Versus

1. Dy. Conservator of Forest)
2. Collector of Pune)
3.)
4.)

The State of Maharashtra)
The Union of India)
... Respondents

Shri. Vineet B. Naik, Senior Advocate i/by Mr. Sukand R. Kulkarni, for
the Petitioner
Shri. A.B. Vagyani, Government Pleader a/w Mrs. M.P. Thakur, AGP, for

Respondent Nos.1 to 3 in W.P. No.7235 of 2013

Shri. D.A. Dube, for the Respondent No.4 - Union of India in

No.7235 of 2013.

CORAM : A.S. OKA & A.S. GADKARI, JJ.

JUDGMENT RESERVED ON: 24th DECEMBER, 2014

JUDGMENT PRONOUNCED ON : 3rd FEBRUARY, 2015

JUDGMENT (PER A.S. OKA, J)

1. A notice for final disposal was issued in this Petition.

Accordingly, the Petition is taken up for final hearing.

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THE FACTS OF THE CASE AND THE CHALLENGE IN THE PETITION

2. This Petition concerns lands bearing Gat Nos.310 and 311 situated at village Kusgaon Budruk, Taluka Maval, District Pune (hereinafter referred to as "the said lands"). The Petitioner Trust is claiming to be the owner of the said lands on the basis of separate registered Sale Deeds executed by one Mr. Gajanan Krushnaji Bapaye and others.

3. The Petitioner Trust has constructed an educational campus on the adjacent land bearing Gat No.309. The Petitioner Trust proposes to undertake a project of setting up a Golf course on the said lands. No activities could be started on the land bearing Gat No.310 out of the said lands as there is an ad-interim order of this Court. However, the work of internal access road was started on the land

bearing Gat No.

311. The said work was objected by the officers of the Forest Department.

4. A letter dated 19th June, 2013 was issued by the Deputy Conservator of Forests, Division Pune to the President of the Petitioner stating that the lands bearing Gat Nos. 310, 311, 312 and 314 were private forests under the provisions of the Maharashtra Private Forests 2 of 27 :: Downloaded on - 03/02/2015 23:46:02 :: 3 wp-7235.13 (Acquisition) Act, 1975 (for short "the said Act of 1975"). It was stated in the said letter that though the lands bearing Gat Nos.311, 312 and 314 have been restored to the owners under Section 22A of the said Act of 1975, the said lands continue to have the status of reserved forest and, therefore, for carrying on any non forest activities including the use as a Golf course, prior permission of the Union of India was necessary.

5. The contention in the Petition is that on 21 st August, 1979, by an order passed under Section 22A of the said Act of 1975, the land bearing Gat No.311 was restored to its original owner Shri Purushottam Hari Bapaye. It is contended that in the said order of restoration, no restriction on user thereof has been imposed. It is stated that the Petitioner intends to set up a Golf course only on the said lands bearing Gat Nos.310 and 311 and, therefore, the allegations as regards the other Gat numbers in the letter dated 19th June, 2013 are not relevant.

The substantive prayer in this Petition under Article 226 of the Constitution of India is for quashing and setting aside the said impugned notification dated 19th June, 2013 and for a direction to the Respondents not to obstruct the project of setting up of a Golf course on the said lands.

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AFFIDAVIT IN REPLY OF THE STATE GOVERNMENT

6. An affidavit-in-reply has been filed by Shri Rajendra Shankarao Kadam, the Deputy Conservator of Forests, Pune Forest Division, Pune. Reliance is placed in the said affidavit on the provisions of the said Act of 1975 as well as the provisions of the Indian Forest Act, 1927 (for short "the said Act of 1927"). It is contended that in view of Clause (f) of Section (2) of the said Act of 1975, a "private forest"

means and includes any land in respect of which a notice has been issued under Sub-Section (3) of Section 35 of the said Act of 1927, but excluding an area not exceeding two hectares as the Collector may specify. It is contended that on 30 th August, 1975, which is the appointed day under the said Act of 1975, all private forests as defined in Clause (f) of Section 2 stand vested in the State Government and all the subsisting rights of the owners stand extinguished. It is contended in the

affidavit-in-reply that a notice under Sub-Section (3) of Section 35 of the said Act of 1927 was issued to Shri Purushottam Hari Bapaye on 5th November, 1958 in relation to the land bearing Survey No.130/1 (Gat No.311), Survey No.130/3 (Gat No.313) and Survey No.130/4 (Gat No.314). It is contended that the lands subject matter of the said notice became private forests which stood vested in the State with effect from 30th August, 1975. It is pointed out that the Assistant Conservator of Forests passed an order on 23 rd February, 2004 in respect of the said 4 of 27 ::: Downloaded on - 03/02/2015 23:46:02 ::: 5 wp-7235.13 lands alleging that by encroaching upon the said lands, the Petitioner has carried out non-forest activities which include construction of incomplete RCC work. Reliance was placed on Sub-Section (1) of Section 3 and Sub-Section (3) of Section 3 of the said Act of 1975 in the said Order by contending that the said lands are deemed reserved forests. Therefore, the Petitioner was called upon to show cause as to why it should not be evicted from the lands subject matter of the order and as to why action under the said Act of 1927 as well as the Forest Conservation Act, 1980 (for short "the said Act of 1980") should not be initiated. On 21st May, 2004, a notice/order was issued by the Assistant Conservator of Forests to the Petitioner stating that the Petitioner has illegally encroached upon the forest lands bearing Gat Nos.309 and 310 and, therefore, the Petitioner was directed to forthwith remove the encroachments and vacate the lands bearing Gat Nos.309 and 310.

Being aggrieved by the said order, an Appeal was preferred by the Petitioner before the Divisional Commissioner, Pune. The Divisional Commissioner, by his Judgment and Order dated 29th January, 2007 allowed the said Appeal and proceeded to set aside the said order dated 21st May, 2004. The Assistant Conservator of Forests, Pune challenged the said order of the Divisional Commissioner by preferring an Appeal before the State Government. The State Government, by its order dated 26th March, 2008 dismissed the Appeal. However, the State 5 of 27 ::: Downloaded on - 03/02/2015 23:46:02 ::: 6 wp-7235.13 Government directed that if there is a doubt whether the provisions of the said Act of 1975 are applicable, proceedings may be initiated under Section 6 of the said Act of 1975.

7. It is pointed out that applications made by the Petitioner for restoration of the lands bearing Gat Nos.309 and 310 under Section 22A of the said Act of 1975 were withdrawn without giving any reasons. It is pointed out that by three separate orders dated 21 st August, 1979, 28th August, 1979 and 28th August, 1979 under Section 22A of the said Act of 1975, the lands bearing Gat Nos.311, 312 and 314 were restored back to the original owner. It is contended that though orders of restoration have been made, still the said lands would be governed by the provisions of the said Act of 1927. It is pointed out in the affidavit that on 18th January, 2011, an order was issued by the Competent Authority-cum-Assistant Conservator of Forest in respect of Gat No.311 alleging that the Petitioner had started non-forest activities thereon. The said order was challenged by the Petitioner by preferring an Appeal. The Additional Commissioner, Pune Division, Pune by order dated 26th July, 2011 allowed the Appeal by setting aside the said order. The Additional Commissioner directed the District Collector, Pune to hold an inquiry for alleged breach of Section 42 of the Maharashtra Land Revenue Code, 1966 (for short "the said Code") and in case the 6 of 27 ::: Downloaded on - 03/02/2015 23:46:02 ::: 7 wp-7235.13 breach is established, to proceed under Section 45 of the said Code. It is contended in the reply that the activity of setting up a Golf course on lands bearing Gat Nos.310, 311, 312, 313 and 314 cannot be started. It is contended that though the lands bearing Gat

Nos.311, 312 and 314 are restored under Section 22A of the said Act of 1975, without permission of the Government of India, non-forest activity cannot be carried out thereon.

SUBMISSIONS

8. The learned Senior Counsel appearing for the Petitioner relied upon the recent decision of the Apex Court in the case of Godrej & Boyce Mfg. Co. Ltd. & Another Vs. State of Maharashtra & Ors. 1 and other connected matters (for short "the case of Godrej"). He invited our attention to the findings recorded by the Apex Court. He urged that the Apex Court held that mere issuance of a notice under Sub-Section (3) of Section 35 of the said Act of 1927 is not sufficient for any land being declared as a "private forest" within the meaning of Sub-Clause (iii) of Clause (f) of Section 2 of the said Act of 1975. He submitted that the Apex Court held that the word "issued" in Sub-Clause (iii) of Clause (f) of Section 2 of the said Act of 1975 should not be given a literal interpretation but the same should be given a broad meaning. He urged that the Apex Court specifically held that the law laid down in its earlier 1 (2014)3 SCC 430 7 of 27 ::: Downloaded on - 03/02/2015 23:46:02 ::: 8 wp-7235.13 Judgment in the case of Chintamani Gajanan Velkar Vs. State of Maharashtra 2 has been expressly overruled. He pointed out that the Apex Court has considered a decision of the Full Bench of this Court in 3. the case of Janu Chandra Waghmare Vs. State of Maharashtra

9. Coming to the facts of the present case, he urged that no evidence has been produced by the Respondents to show that the notice under Sub-Section (3) of Section 35 of the said Act of 1927 dated 5th November, 1958 addressed to Shri Purushottam Hari Bapaye was served to him. He, would, therefore, urge that in the light of the law laid down by the Apex Court in the case of Godrej, the said lands cannot be said to be private forests under Sub-Clause (3) of Clause (f) of Section 2 of the said Act of 1975 and, therefore, there is no vesting of the said lands subject matter of the said notice in the State Government under Section 3 of the said Act of 1975.

10. The learned AGP supported the impugned notice. He urged that even the Petitioner accepted that the land bearing Gat No.311 was a private forest as on the application made by the Petitioner, an order of restoration under Section 22A of the said Act of 1975 was passed. He urged that there is no order of restoration in respect of the land bearing Gat No.310 and the application made by the Petitioner for restoration 2 (2000)3 SCC 143 3 AIR 1978 Bombay 119 8 of 27 ::: Downloaded on - 03/02/2015 23:46:02 ::: 9 wp-7235.13 under Section 22A was in fact withdrawn. He urged that the impugned notice dated 19th June, 2013 is legal and valid.

CONSIDERATION OF THE FACTUAL ASPECTS

11. We have given careful consideration to the submissions.

The Petition concerns only two lands described as the said lands bearing Gat Nos.310 and 311 situated at village Kusgaon Budruk. Going by the stand taken in the affidavit-in-reply of Shri Rajendra Kadam and in particular paragraph 1, old Survey No.129 corresponds to Gat No.310 and old Survey No.130/1 corresponds to Gat No.311. In the said affidavit, reliance has been placed on a notice dated 5 th November, 1958 purportedly issued under Sub-Section (3) of Section 35 of the said

Act of 1927 addressed to Shri Purushottam Hari Bapaye in respect of Survey No.130/1 (Gat No.311), Survey No.130/3 (Gat No.313) and Survey No.130/4 (Gat No.314). Thus, going by the stand taken by the Respondents, out of the said lands, a notice under Sub-Section (3) of Section 35 of the said Act of 1927 was issued only in relation to the land bearing Gat No.311. In the same affidavit, it is stated that on 5 th August, 2004, the Petitioner made an application for restoration of lands bearing Gat Nos.309 and 310 under Section 22A of the said Act of 1975. It is stated that the said application was withdrawn on 27 th February, 2007. It is stated that in respect of the land bearing Gat 9 of 27 :: Downloaded on - 03/02/2015 23:46:02 :: 10 wp-7235.13 No.311 (Survey No.130/1), order No.409 dated 21 st August, 1979 was passed by the Sub-Divisional Officer, Pune under Section 22A of the said Act of 1975. It is pointed out that even by separate orders passed on 28th August, 1979, the lands bearing Gat Nos.313 and 314 were also restored under Section 22A of the said Act of 1975.

12. The order dated 21st May, 2004 was passed under Section 50(2) of the said Code by the Assistant Conservator of Forests only in relation to Gat Nos.309 and 310. The said order was set aside by the order dated 29th January, 2007 passed by the Additional Commissioner, Pune Division, Pune which is confirmed by the State Government. It is pointed out that the subsequent order dated 18 th January, 2011 issued by the Assistant Conservator of Forests in relation to Survey No.311 directing the removal of construction thereon was set aside by the Additional Divisional Commissioner, Pune by Judgment and Order dated 26th July, 2011 and an inquiry under Section 42 of the said Code has been ordered.

13. Thus, in relation to Gat No.310, going by the affidavit of the Respondents, there is no notice issued under Sub-Section (3) of Section 35 of the said Act of 1927. The only notice under Sub-section (3) of Section 35 relied upon in the affidavit dated 5 th November 1958 is at Exhibit 1 to the reply. The notice relates only to Gat Nos.311, 313 10 of 27 :: Downloaded on - 03/02/2015 23:46:02 :: 11 wp-7235.13 and 314. Another factual position which needs to be noted is that the impugned letter dated 19th June, 2013 alleges that the lands bearing Gat Nos.310 to 314 stand acquired under the said Act of 1975 out of which the lands bearing Gat Nos.311, 313 and 314 have been restored to the Owner under Section 22A of the said Act of 1975. It is stated that even on the restored lands, non-forest activities cannot be made without permission of the Central Government as the restored lands continue to be reserved forests within the meaning of the said Act of 1927. Thus, the impugned notice has been issued on the basis of vesting of the said lands under the provisions of the said Act of 1975.

CONSIDERATION OF THE LAW ON THE CONTROVERSY

14. It will be necessary to make a reference to the relevant provisions of the said Act of 1975. Clause (c-i) of Section 2 and Clause

(f) of Section 2 read thus :-

"(c-i) "forest" means a tract of land covered with trees (whether standing, felled, found or otherwise), shrubs, bushes, or woody vegetation, whether of natural growth or planted by human agency and existing or being maintained with or without human

effort, or such tract of land on which such growth is likely to have an effect on the supply of timber, fuel, forest produce, or grazing facilities, or on climate, stream flow, protection of land from erosion, or other such matters and includes -

(i) land covered with stumps of trees of forest;

(ii) land which is part of a forest or lies within it or was 11 of 27 ::
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(iii) Such pasture land, water-logged or cultivable or non-cultivable land, lying within or linked to a forest, as may be declared to be forest by the State Government;

(iv) forest land held or let for purpose of agriculture or for any purposes ancillary thereto;

(v) all the forest produce therein, whether standing, felled, found or otherwise."

"(f) "private forest" means any forest which is not the property of Government and includes, -

(i) any land declared before the appointed day to be a forest under section 34A of the Forest Act;

(ii) any forest in respect of which any notification issued under sub-section (1) of section 35 of the Forest Act, is in force immediately before the appointed day;

(iii) any land in respect of which a notice has been issued under sub-section (3) of section 35 of the Forest Act, but excluding an area not exceeding two hectares in extent as the Collector may specify in this behalf;

(iv) land in respect of which a notification has been issued under section 38 of the Forest Act;

(v) in a case where the State Government and any other person are jointly interested in the forest, the interest of such person in such forest;

(vi) sites of dwelling houses constructed in such forest which are considered to be necessary for the convenient enjoyment or use of the forest and lands appurtenant thereto;"

Sections 3, 5 and 6 of the said Act of 1975 read thus :-

12 of 27 ::: Downloaded on - 03/02/2015 23:46:02 ::: 13 wp-7235.13 "3.(1) Notwithstanding anything contained in any law for the time being in force or in any settlement, grant, agreement, usage, custom or any decree or order of any Court, Tribunal or authority or any other document, with effect on and from the appointed day, all private forests in the State shall stand acquired and vest, free from all encumbrances, in, and shall be deemed to be, with all rights in or over the same or appertaining thereto, the property of the State Government, and all rights, title and interest of the owner or any person other than Government subsisting in any such forest on the said day shall be deemed to have been extinguished.

(2) Nothing contained in sub-section (1) shall apply to so much extent of land comprised in a private forest as is held by an occupant or tenant and is lawfully under cultivation on the appointed day and is not in excess of the ceiling area provided by section 5 of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961, for the time being in force or any building or structure standing thereon or appurtenant thereto.

(3) All private forests vested in the State Government under sub-section (1) shall be deemed to be reserved forests within the meaning of the Forest Act."

"5. Where any private forest stands acquired and vested in the State Government under the provisions of this Act, the person authorized by the State Government or by the Collector in this behalf, shall enter into and take over possession thereof, and if any person resists the taking over of such possession, he shall without prejudice to any other action to which he may be liable, be liable to be removed by the use of such force as may be necessary."

"6. Where any question arises as to whether or not any forest is a private forest, or whether or not any private forest or portion thereof has vested in the State Government or whether or not any dwelling house constructed in a forest stands acquired under this Act, the Collector shall decide the question, and the decision of the Collector shall, subject to the 13 of 27 ::: Downloaded on - 03/02/2015 23:46:02 ::: 14 wp-7235.13 decision of the Tribunal in appeal which may be preferred to the Tribunal within sixty days from the date of the decision of the Collector, or the order of the State Government under section 18, be final."

Section 22A and Section 24 of the said Act of 1975 read thus :-

"22A.(1)Notwithstanding anything contained in the foregoing provisions of this Act, if, on an application made by any owner of private forest, within a period of six months from the date of commencement of the Maharashtra Private Forests (Acquisition) (Amendment) Act, 1978, or suo motu at any time, the Collector, after holding such inquiry as he deems fit, is satisfied that the total holding

of land of such owner became less than twelve hectares on the appointed day on account of acquisition of his forest land under this Act or that the total holding of land of such owner was already less than twelve hectares on the day immediately preceding the appointed day, the Collector shall determine whether the whole of the forest land acquired from such owner or what portion thereof shall be restored to him, so, however, that his total holding of land, on the appointed day, shall not exceed twelve hectares.

(2) After the Collector has determined the area and situation of the land to be restored to any owner of private forest, the Collector shall make an order, that with effect from the date of his order, the land specified therein, which was acquired and vested in the State Government, shall cease to be a reserved forest within the meaning of the Forest Act, be deemed to have been regranted to the owner and shall be revested in him, subject, however, to all encumbrances, if any, lawfully subsisting on the day immediately preceding the appointed day, which shall stand revived. Possession of the land so restored shall be given by the Collector to the owner, as far as may be practicable under the circumstances, within a period of one month from the date of the order.

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(3) If the amount payable to the owner of private forest under section 7 has been paid to him or the holder of the encumbrances, if any, the Collector shall determine what would have been the amount or the proportionate amount payable to him under section 7 in respect of the land restored to him under sub-section (2), without taking into consideration the deductions to be made for paying the holders of encumbrances, if any, and shall by order direct the owner to repay the amount so determined to the State Government, within a period of six months from the date of receipt of such order by the owner. If the amount is not repaid in time, it shall be recoverable as an arrears of land revenue. When any amount due is repaid by the owner to the State Government, he shall be entitled to make necessary adjustment with the holders of encumbrances, if any, for any payment made to them by the State Government in respect of the land revested in the owner.

(4) Notwithstanding anything contained in the Code or this Act, no appeal shall lie against any decision or order of the Collector under this section, but the Commissioner or the State Government may, within a period not exceeding one year from the date of such decision or order, -

(a) call for the record of any inquiry or proceedings of the Collector for the purpose of satisfying himself or itself as to the legality or propriety of such decision or order, and as to the regularity of such proceedings, as the case may be, and

(b) pass such order thereon as he or it deems fit:

Provided that, no such decision or order shall be modified, annulled or reversed, unless opportunity has been given to the interested parties to appear and to be heard.

(5) Any decision taken or order made under this section by the Collector, subject to any revision by the 15 of 27 :: Downloaded on - 03/02/2015 23:46:02 :: 16 wp-7235.13 Commissioner or the State Government, and any order made by the Commissioner or the State Government in revision, shall be final and conclusive and shall not be questioned in any suit or proceeding in any Court.

(6) Nothing contained in this section shall apply to any land in a private forest which was used immediately before the appointed day for extracting of minor minerals such as stone quarries. Accordingly, such land shall not be taken into consideration and shall not be liable to be restored under this section."

"24.(1) On and from the appointed day, sections 34A, 35, 36, 36A, 36B, 36C and 37 of the Forest Act shall stand repealed.

(2) Notwithstanding anything contained in sub-section (1), on and from the date of commencement of the Maharashtra Private Forests (Acquisition) (Amendment) Act, 1978, sections 34A, 35, 36, 36A, 36B, 36C and 37 of the Forest Act, shall, in respect of the lands restored under section 22A, be deemed to have been re-enacted in the same form and be deemed always to have been in force and applicable in respect of such lands, as if they had not been repealed."

15. Another provision which is relevant is Section 35 of the said Act of 1927 as amended by Bombay Act No.24 of 1955 and the Maharashtra Act No.6 of 1961 which reads thus :

"35. Protection of forests for special purposes.-(1) The State Government may, by notification in the Official Gazette, regulate or

prohibit in any forest or waste- land -

(a) the breaking up or clearing of land for cultivation;

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(b) the pasturing of cattle; or

(c) the firing or clearing of the vegetation; when such regulation or prohibition appears necessary for any of the following purposes:-

(i) for protection against storms, winds, rolling stones, floods and avalanches;

(ii) for the preservation of the soil on the ridges and slopes and in the valleys of hilly tracts, the prevention of land slips or of the formation of ravines, and torrents, or the protection of land against erosion, or the deposit thereon of sand, stones or gravel;

(iii) for the maintenance of a water-supply in
ig (iv) springs, rivers and tanks;
for the protection of roads, bridges,
railways and other lines of
communication;
(v) for the preservation of the public health.

(2) The State Government may, for any such purpose, construct at its own expense, in or upon any forest or waste-land, such work as it thinks fit.

(3) No notification shall be made under sub-section (1) nor shall any work be begun under sub-section (2), until after the issue of a notice to the owner of such forest or land calling on him to show cause, within a reasonable period to be specified in such notice, why such notification should not be made or work constructed, as the case may be, and until his objections, if any, and any evidence he may produce in support of the same, have been heard by an officer duly appointed in that behalf and have been considered by the State Government.

(4) A notice to show cause why a notification under sub-section (1) should not be made, may require that for any period not exceeding one year, or till the date of the

making of a notification, whichever is earlier, the owner of such forest and all persons who are entitled or 17 of 27 :: Downloaded on - 03/02/2015 23:46:02 :: 18 wp-7235.13 permitted to do therein any or all of the things specified in clause (i) of sub-section (1), whether by reasons of any right, title or interest or under any licence or contract or otherwise, shall not, after the date of the notice and for the period or until the date aforesaid, as the case may be, do any or all the things specified in clause (i) of sub- section (1), to the extent specified in the notice.

(5) A notice issued under sub-section (3) shall be served on the owner of such forest in the manner provided in the Code of Civil Procedure, 1908, for the service of summons and shall also be published in the manner prescribed by rules.

(5-A) Where a notice issued under sub-section (3) has been served on the owner of a forest in accordance with sub-section (5), any person acquiring thereafter the right of ownership on that forest shall be bound by the notice as if it had been served on him as an owner and he shall accordingly comply with the notice, requisition and notification, if any, issued under this section.

(6) Any person contravening any requisition made under sub-section (4) in a notice to show cause why a notification under sub-section (1) should not be made shall, on conviction, be punished with imprisonment for a term which may extend to six months or with fine or with both.

(7) Any person contravening any of the provisions of a notification issued under sub-section (1) shall, on conviction, be punished with imprisonment for a term which may extend to six months, or with fine, or with both."

Section 36-A of the said Act incorporated by Bombay Act No.24 of 1955 reads thus:-

"36-A. Manner of serving notice and order under section 18 of 27 :: Downloaded on - 03/02/2015 23:46:02 :: 19 wp-7235.13

36.- The notice referred to in sub-section (1) of Section 36 and the order, if any, made placing a forest under the control of a Forest Officer shall be served on the owner of such forest in the manner provided in the Code of Civil Procedure, 1908, for the service of summons."

16. In the case of Janu Chandra Waghmare, a Full Bench of this Court held that a land owner who has been issued a notice under Sub-

Section (3) of Section 35 of the said Act of 1927 (but was not heard) has an opportunity to contend that his or her land is not a forest within the meaning of Clause (c-i) of Section 2 of the said Act of 1975 and that such land does not vest automatically in the State by virtue of the said Act of 1975. In the case of Chintamani

Gajanan Velkar, the Apex Court considered the question whether mere issuance of a notice under Sub-

Section (3) of Section 35 of the said Act of 1927 per se attracted Sub-

Clause (iii) of Clause (f) of Section 2 of the said Act of 1975. In paragraph 19 of the said decision in the case of Chintamani Velkar, the Apex Court held thus :-

"19. In our view, the legislature has not made any discrimination in regard to the matters where the notification had been issued under Section 35(1) of the Forest Act, 1927 on the one hand and in cases where notification had not been issued and the matter stood still at the stage of notice under Section 35(3) on the other. In the latter cases, the legislature thought it fit to exclude 2 hectares of the landholder from vesting. If that was done, a notice that was issued under Section 35(3) would itself be sufficient and if such notice was issued before the appointed 19 of 27 :::: Downloaded on - 03/02/2015 23:46:02 :::: 20 wp-7235.13 day i.e. 30-8-1975 the land would vest in the State subject, of course that the Collector has to specify the particular extent of 2 hectares which can be retained by the landholder. There is no need for any service of such notice before 30-8-1975, nor for an inquiry nor for a notification under Section 35(1)."

(emphasis added)

17. Now, it will be necessary to make a reference to the decision of the Apex Court in the case of Godrej. Paragraph 1 of the said decision reads thus :-

" The principal question for consideration is whether the mere issuance of a notice under the provisions of Section 35(3) of the Forest Act, 1927 is sufficient for any land being declared a "private forest" within the meaning of that expression as defined in Section 2 (f) (iii) of the Maharashtra Private Forests (Acquisition) Act, 1975. In our opinion, the question must be answered in the negative. Connected therewith is the question whether the word "issued" in Section 2(f) (iii) of the Maharashtra Private Forests Acquisition Act, 1975 read with Section 35 of the Forest Act, 1927 must be given a literal interpretation or a broad meaning. In our opinion the word must be given a broad meaning in the surrounding context in which it is used. A tertiary question that arises is, assuming the disputed lands are forest lands, can the State be allowed to demolish the massive constructions made thereon over the last half a century? Given the facts and circumstances of these appeals, our answer to this question is also in the negative."

(emphasis added)

18. The Apex Court proceeded to consider its earlier decision in the case of Chintamani Gajanan Velkar. In the facts of the case, the Apex Court considered the question whether the disputed land was a forest under Clause (c-i) of Section 2 of the said Act of 1975.

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Thereafter, the Apex Court considered the question whether mere issuance of a notice under Sub-Section (3) of Section 35 of the said Act of 1927 attracts Sub-Clause (iii) of Clause (f) of Section 2 of the said Act of 1975. In paragraph 55, the Apex Court held thus :

"55. A notice under Section 35(3) of the Forest Act is intended to give an opportunity to the owner of a forest to show cause why, inter alia, a regulatory or a prohibitory measure be not made in respect of that forest. It is important to note that such a notice presupposes the existence of a forest. The owner of the forest is expected to file objections within a reasonable time as specified in the notice and is also given an opportunity to lead evidence in support of the objections. After these basic requirements are met, the owner of the forest is entitled to a hearing on the objections. This entire procedure obviously cannot be followed by the State and the owner of the forest unless the owner is served with the notice.

Therefore, service of a notice issued under Section 35(3) of the Forest Act is inherent in the very language used in the provision and the very purpose of the provision."

(emphasis added) In paragraph 56, the Apex Court referred to Sub-Section (4) of Section 35 and thereafter in paragraphs 58 and 59, the Apex Court held thus :-

"58. Finally, Section 35(5) of the Forest Act mandates not only service of a notice issued under that provision "in the manner provided in the Code of Civil Procedure, 1908, for the service of summons" (a manner that we are all familiar with) but also its publication "in the manner prescribed by rules". This double pronged receipt and confirmation of knowledge of the show-cause notice by the owner of a forest makes it

clear that Section 35(3) of the Forest Act is not intended to end the process with the mere issuance of a notice but it also requires service of a notice on the owner of the forest. The need for ensuring service is clearly to protect the interests of the owner of the forest who may have valid reasons not only to object to the issuance of regulatory or prohibitory directions, but also to enable him/her to raise a jurisdictional issue that the land in question is actually not a forest. The need for ensuring service is also to prevent damage to or destruction of a forest."

(emphasis added) In paragraph 59, the Apex Court held that -

"59. Unfortunately, Chintamani [Chintamani Gajanan Velkar v. State of Maharashtra, (2000) 3 SCC 143] missed these finer details because it was perhaps not brought to the notice of this Court that Section 35 of the Forest Act as applicable to the State of Maharashtra had sub-sections beyond sub-section (3).

This Court proceeded on the basis of Section 35 of the Indian Forest Act, 1927 as it existed without being aware of the amendments made by the State of Maharashtra and the erstwhile State of Bombay. This, coupled with the factually incorrect view that two hectares of forest land [The correct factual position is that Section 2(f)(iii) of the Private Forests Act excluded "an area not exceeding two hectares".] were excluded for the benefit of the landholder led this Court to give a restrictive meaning to "issue"."

In paragraphs 60 to 62, the Apex Court held thus :-

"60. In Chintamani [Chintamani Gajanan Velkar v. State of Maharashtra, (2000) 3 SCC 143] this Court relied on the decision rendered in CIT v. Bababhai Pitamberdas [1993 Supp (3) SCC 530] to conclude that a word has to be construed in the context in which it is used in a statute and that, therefore, the decisions 22 of 27 ::: Downloaded on - 03/02/2015 23:46:02 ::: 23 wp-7235.13 rendered in Banarsi Debi v. ITO [AIR 1964 SC 1742 : (1964) 7 SCR 539] and CWT v. Kundan Lal Behari Lal [(1975) 4 SCC 844 : 1975 SCC (Tax) 469] to the effect that: (Chintamani case [Chintamani Gajanan Velkar v. State of Maharashtra, (2000) 3 SCC 143] , SCC p. 149, para 20) "20. ... the word 'issue' has been construed as amounting to 'service' are not relevant for interpreting the word 'issued' used in Section 2(f) [of the Private Forests Act]."

61. It is true, as observed above, that a word has to be construed in the context in which it is used in a statute. By making a reference in Section 2(f)(iii) of the Private Forests Act to "issue" in Section 35 of the Forest Act, it is clear that the word is dressed in borrowed robes. Once that is appreciated (and it was unfortunately overlooked in Chintamani [Chintamani Gajanan Velkar v. State of Maharashtra,

(2000) 3 SCC 143]) then it is quite clear that "issued" in Section 2(f)(iii) of the Private Forests Act must include service of the show-cause notice as postulated in Section 35 of the Forest Act.

62. We have no option, under these circumstances, but to hold that to this extent, Chintamani [Chintamani Gajanan Velkar v. State of Maharashtra, (2000) 3 SCC 143] was incorrectly decided and it is overruled to this extent. We may add that in Chintamani [Chintamani Gajanan Velkar v. State of Maharashtra, (2000) 3 SCC 143] the land in question was factually held to be a private forest and therefore the subsequent discussion was not at all necessary."

(emphasis added)

19. In paragraph 63, the Apex Court considered another issue which reads thus:

"63. Assuming that the word "issued" as occurring in Section 2(f)(iii) of the Private Forests Act must be literally and strictly construed, can it be seriously argued that it also has reference to a show-cause notice issued under Section 35(3) of the Forest Act at any given time (say in 1927 or in 1957)? Or would it be more reasonable to hold 23 of 27 :::: Downloaded on - 03/02/2015 23:46:02 :::: 24 wp-7235.13 that it has reference to a show-cause notice issued in somewhat closer proximity to the coming into force of the Private Forests Act, or a "pipeline notice" as Mr Nariman puts it?"

In paragraph 64, the Apex Court observed that :-

"64. In the absence of any time period having been specified for deciding a show-cause notice issued under Section 35 of the Forest Act, it must be presumed that it must be decided within a reasonable time."

(emphasis added) On the facts of the case before it, in paragraph 67, it was held thus:

"67. According to the State, a show-cause notice was issued to Godrej in 1957 (and assuming it was served) but no decision was taken thereon till 1975, that is, for about 18 years. This is an unusually long period and undoubtedly much more than a reasonable time had elapsed for enabling the State to take a decision on the show-cause notice. Therefore, following the law laid down by this Court, the show-cause notice must, for all intents and purposes be treated as having become a dead letter and the seed planted by the State yielded nothing."

(emphasis added) THE APPLICATION OF THE SETTLED LAW TO THE FACTS OF THE CASE

20. Now, we will have to apply the law laid down in the decision of the Godrej in the facts of the present case. Taking the statements in the affidavit-in-reply of Shri Rejendra Kadam, the Deputy Conservator of Forests, as correct, it is not even the case made out that the notice dated 5th November, 1958 under Sub-Section (3) of Section 24 of 27 ::: Downloaded on - 03/02/2015 23:46:02 ::: 25 wp-7235.13 35 of the Act of 1927 was served on Shri Purushottam Hari Bapaye. It is not the case made out that a notification under Sub-Section (1) of Section 35 was issued in relation to the said lands. We must note that in the said affidavit, reliance is placed only on the said notice dated 5 th November, 1958 which does not relate to the land bearing Gat No.310 at all and it relates to only Gat No.311(and Gat Nos.313 and 314 with which we are not concerned). It is not the case made out that the said notice was served to the predecessor-in-title of the Petitioner. In absence of service of notice, Sub-Clause (iii) of Clause (f) of Section 2 of the said Act of 1975 is not applicable to the land bearing Gat No.311.

Hence, the said land cannot be said to be a "private forest" under the said Act of 1975. Hence, the said lands subject matter of notice dated 5th November, 1958 will not vest in the State Government under Sub-

Section (1) of Section 3 of the said Act of 1975. Moreover, as held in the case of Godrej, the notice being of the year 1958, on 19 th June 2013 when the impugned communication was issued, for all intents and purposes, the same had become a dead letter.

21. Now, going back to the impugned notice, the same is based on an assumption that the said lands being "private forests" stand vested in the State Government under Section 3 of the said Act of 1975.

Going by the law laid down in the case of Godrej and taking the 25 of 27 ::: Downloaded on - 03/02/2015 23:46:02 ::: 26 wp-7235.13 statements in the affidavit-in-reply of Shri Rajendra Kadam as correct, the said lands bearing Gat Nos.310 and 311 cannot be said to be "private forest" under Sub-Clause (iii) of Clause (f) of Section 2 of the said Act of 1975 and, therefore, there is no vesting in the State Government by virtue of Section 3 of the said Act of 1975. Only on this ground that the impugned communication dated 19 th June, 2013 will have to be set aside.

22. We must make it clear that we have examined the issues raised only in the context of the contention in the impugned notice dated 19th June, 2013 that the said lands constituted private forests under the said Act of 1975 on the basis of the notice dated 5 th November, 1958 under Sub-Section (3) of Section 35 of the said Act of 1927. We make it clear that we have not examined the question of applicability of the provisions of the said Act of 1927 and the said Act of 1980 on any other ground. We have made no adjudication on the status of the said lands except the issue whether the same are private forests in accordance with Sub-Clause (iii) of Clause (f) of Section 2 of the said Act of 1927. The finding recorded in this Judgment is only to the extent that the said lands

bearing Gat Nos.310 and 311 are not "private forests" within the meaning of Sub-Clause (iii) of Clause (f) of Section 2 of the said Act of 1975 and did not vest in the State 26 of 27 ::: Downloaded on - 03/02/2015 23:46:02 ::: 27 wp-7235.13 Government under Section 3 of the said Act of 1975.

23. Hence, we pass the following order :-

ORDER

(i) Subject to the clarification issued as above in paragraph 22 above, we set aside the impugned communication dated 19th June, 2013 (Annexure 'D' to the Petition);

(ii) Only on the basis of the impugned communication dated 19th June, 2013, the Petitioner cannot be prevented from setting up a Golf course on the said lands. We make it clear that we have not examined the question whether even otherwise, the Petitioner is entitled to set up a Golf course on the said lands. It is obvious that the Petitioner will have to commence such activity only after obtaining permission of all concerned authorities in accordance with law;

(iii) Rule is accordingly made partly absolute with no orders as to costs.

(A.S. GADKARI, J)

(A.S. OKA, J)

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