

KERALA HIGH COURT

George A. Leslie

Vs

State of Kerala

(P.R Nayar, C.J. K Mathew and V G Nambiyar, JJ.)

09.01.1969

JUDGMENT

K Mathew, J.

1. Linwood and Shendurni Estates in Kulathupuzha Village, Pathanapuram Taluk, belonged at the relevant time to a partnership. The firm appointed the 2nd petitioner as Its agent to manage the estates The aforesaid estates formed part of a bigger estate known as Herford Estate, covering an area of 374.83 acres. The land comprised in that estate belonged to the erstwhile Government of Travancore and was assigned under the Rules for the sale of Waste Land on the Travancore Hills dated 24th April 1965 to three persons by Ext. P-1 dated 29-12-1877.

2. The question of the right of the grantees in respect of trees other than the royal trees enumerated in Ext. P-1, hereinafter called the reserved trees, in this and similar grants was raised by the planters, and the Government of Travancore in their proceedings R. O. C. No. 161/1921/Rev. dt. 28 9 1923 corresponding to 12-3-1099 M. E, held that on payment of timber value of the reserved trees at a flat rate of Rs. 35/- per acre of wooded area, a grantee would acquire full rights to the reserved trees.

3. On 2nd February, 1894. Rules 26A and 26B were added to the Rules framed under Regulation III of 1097 (Government Land Assignment Regulation). Rule 26A provided that in regard to reserved trees, the grantee shall pay their value at such rate per acre of the wooded area of the grant, as may from time to time be fixed by Government, and on such payment, the absolute right over all reserved trees in the grant will vest in the grantee. The Government issued a notification on the same date, which reads;

"Under Rule 26A of the Rules for the sale of Government Lands on the Travancore Hills for coffee or tea cultivation dated the 25th February 1923, as amended by Notification Dis. No. 173 of 1924, it is hereby notified, with the sanction of His Highness the

Maharaja, that in the case of grants that may be made under the said Rules during a period of four years commencing from 1099 and ending with 1102 M. E. (inclusive) the rate at which the value of reserved trees on the grants is payable, is fixed at Bh, Rs. 35/-per acre of the wooded area of each grant.

2. The grantees of all estates assigned before 1099 may, on payment of the said rate of Bh. Rs. 35 per acre of the wooded area, and subject to the other conditions laid down in Rules 26A and 2613 relating to assignment of lands on the Travancore Hills for coffee or tea cultivation, acquire full rights over all the reserved trees in their grants; provided that no grantee shall be allowed to acquire any such right in respect of any portion only of his grant. Payment may, at the option of the grantee, be made in five equal annual instalments, but no rights will vest in him till full payment is made. Grantees unwilling to pay for, and purchase full rights over, reserved trees, will have the rights secured to them by their title deed and by the Rules applicable to their grants T. G. G. dt. 19-2-1924, Pt. IV, L. R., Dept, P. 306." (Govt Notifn. Dis. No. 173-1-24/Rev. dated 2nd February 1924).

4. The 2nd petitioner stating that the effect of the notification was that on payment at the rate of Rs. 35/- per acre of wooded area, the title to the reserved trees would vest in the firm, sent a letter (Ext. P-2) on 8-12-1962 to the 3rd respondent praying for permission to cut and remove the reserved trees in 99.65 acres in Linwood estates, that Is. 46.56 acres in Sy. No. 931/2'1 and 53.09 acres in Sy. No. 931/1 in Kulathupuzha Village on payment at the said rate. As there was no response to this letter, the 2nd petitioner made an application to the 3rd respondent (Ext. P-4) on 5-3-1963 repeating the prayer. The consent of the partners to the permission sought by the 2nd petitioner was given under Ext. P-5. Thereafter, the Forest Department made a proposal to the 2nd petitioner by its letter (Ext. P-6) dt 25-3-1964 whether the 2nd petitioner was willing to give a written undertaking to abide by the decision of the Government as regards the rate payable for the tree growth. The 2nd petitioner agreed to pay at the rate to be fixed by Government (Ext. P-7). The 3rd respondent then sent Ext. P-8 letter to the 2nd petitioner on 29-8-1964 stating that at the rate of Rs. 100/- per acre of the wooded area a sum of Rupees 10164.85 was payable and directing the 2nd petitioner to pay the same and produce the stamp papers for executing an agreement (Ext. P-8). Accordingly, the 2nd petitioner remitted the amount in the State Bank of Travancore, Punalur, and sent the chalan receipt to the 3rd respondent on 10-9-1964. The 3rd respondent by his letter to the 2nd petitioner (Ext. P-IO) dated 29-10-1964 stated that a complete enumeration of the tree growth had been made and that on valuation, the amount payable by the 2nd petitioner would come to Rs. 1,40,700 and directing the 2nd petitioner to produce sureties undertaking to abide by the final decision of Government "in regard to the revised rate to be fixed in case the revised rate exceeds Rupees 100 per acre." The 2nd petitioner then represented

to the 3rd respondent (Ext. P-11) that the amount already remitted would be more than what is legally due and requesting him to pass the necessary orders permitting the 2nd petitioner to remove the tree growth. The 2nd respondent, in reply, informed the 2nd petitioner that adequate security has to be provided to cover the difference between the value of the timber at seigniorage rate and the provisional value of Rs. 100 per acre (Ext. P-13). Thereafter by G. O. No. 185/Rev. dt. J2-3-1965 and by notification S. R. O. No, 117/65 published in the Kerala Gazette No. 12 dated 23rd March 1965, Government replaced Rules 26A and 26B by Rule 26 (1) to (7). The new rule provided that when the Government lands are granted, the grantee should, instead of paying a flat rate timber value for the wooded area in the grant, pay the value of all the trees in the grant at the average market rate for each species or at the current seigniorage rate, whichever is higher, as fixed by the Chief Conservator or such other officer as may be authorised by him. The Government by Ext. P-14 directed a calculation of the amount due from the 2nd petitioner on this basis and realisation of the balance amount from it. The 2nd petitioner by Ext. P-16 letter denied its liability to pay any amount in excess of Rs. 35 per acre of wooded area and prayed for refund of the excess amount paid. The Government by Ext. P-17 dated 15-5-1965 directed that if the 2nd petitioner will not pay the amount as directed, action will be taken in the light of the notification G. O. (P) 185/Rev. dated 12-3-1965, viz., the Chief Conservator of Forests or any officer authorised by him in this behalf will enter the estates and cut and remove the trees.

5. The petitioners pray for issue of a writ of certiorari or other appropriate writ, or order quashing the proceedings of Government evidenced by Ext. P-14 as also their proceedings No. 6812/F3/65/AD dt. 22-3-1965, for the issue of a writ of mandamus or other appropriate writ, or order, directing the respondents to grant the required permission and free pass to enable the 2nd petitioner or its nominee to cut and remove the tree growth in the wooded area In 99.65 acres in the Kulathupuzha Village, and for a direction to the respondents to refund a sum of Rupees 7016.60, the amount paid in excess of the rate of Rs. 35/- per acre of wooded area.

6. When the writ petition came up for hearing before a single Judge, as he felt considerable doubt about the correctness of the decision of the Division Bench in O. P. No. 337 of 1957. (Ker) he referred the case to a Division Bench, The Division Bench has placed the case before a Full Bench and that is how the matter comes before us.

7. It was submitted for the petitioners that the grantees acquired full right in the reserved trees comprised in Ext. P-1 granted by the terms of the grant, that their only obligation if they cut and carry the timber of the reserved trees outside the limits of the grant is to pay kuttikanom or customs duty or both, as the case may be, that 'kuttikanom' is a nominal fee, or tax, levied in the exercise of the sovereign power of the State, and cannot be so enhanced as to represent the market value of the timber.

8. Looking at the terms of Ext. P-1, we are not satisfied that the title to the reserved trees passed to the grantees. The grant under Ext. P-1 was for the purpose of coffee cultivation. The purpose of the grant is relevant to show whether under the grant the reserved trees standing on the property were intended to be conveyed to the grantees. We are not concerned in this case with the title to the reserved trees which grew up after the grant. The petitioners have no case that any of the reserved trees in the estates was planted or grew up after the grant and that such a tree would stand on a different footing from the trees which stood on the property on the date of the grant. So, we are not called upon to consider any such case.

9. Ext. P-1 is a grant made under the Travancore Regulation II of 1040 and the Rules for the sale of Waste Land on the Travancore Hills dated 24th April 1865. It conferred a heritable and transferable interest in the grantees of the land comprised in it. Clause 5 in Ext. P-1, which is identical with Section 5 in Form A of the Rules for the sale of Waste Land on the Travancore Hills, is the relevant provision for deciding this question. It provides:

"Grantees can appropriate to their own use within the limits of the grant all timber except the following and such as may hereinafter be reserved, namely, Teak, Gole Teak, Blackwood, Ebony, Karcomthaly, Sandalwood; should they carry any timber without the limits of the grant, it will be subject to the pay ment of kuttikanom or customs duty or both, as the case may be, in the same way as timber ordinarily felled".

10. We think that if title to the reserved trees passed to the grantees, a provision of this nature would have been quite unnecessary. There was no purpose in stating that the grantees will be free to appropriate the reserved trees for consumption within the limits of the grant, if title to the trees passed to the grantees; the provision is a clear indication that the grantees were allowed to cut and appropriate the reserved trees for consumption within the limits of the grant as a matter of concession. That the title to the reserved trees did not pass to the grantees in this or similar grants is also made clear in R. O. C. No. 161/1921/Rev. dated 28-9-1923. That order shows that Rs. 35/- per acre of the wooded area was fixed by Government as the value of the reserved trees and that if a grantee were to pay at that rate, he would acquire the full rights in the trees. The understanding of the parties and Government that it was as value of the reserved trees that Rs. 35/- was fixed is clearly reflected in R. O. C. No. 161/1921/Rev. dated 28-9-1923. That reads:

"His Highness' Government have given their careful consideration to the whole question and they feel that it is desirable, both in the interests of the planters and of the Government, to set at rest the vexed question of timber rights on grants made for the cultivation of coffee or tea by conferring on the grantees absolute right over all the reserved trees within the limits of their grants, (except the five kinds of trees designated

'Royal trees' and described hereunder) after recovering the value of such trees at a flat or average rate per acre, The Royal trees are:-- Teak, Ebony, Blackwood, Karunthaly and Sandalwood. Government fixes this rate at Bh. Rs. 35 per acre and the value of reserved trees will be recovered at this rate, not on the entire area of each grant, but only on that portion of it which is ascertained on inspection to be 'wooded'. The idea of Government was to make this flat rate valuation applicable only to all grants made under the Old Waste Land Rules of 1865 and under the subsequently amended Rules up to July 1916, because under the amendment to Rule 26 of the Rules dated the 5th July 1916, the grantees were free to use on their grants timber of the reserved species for any purpose other than for buildings, free of payment. This position was intimated to the planters but as they nevertheless desire to secure full rights over reserved trees even on grants made subsequent to July 1916 by paying for them at the flat rate, Government have no objection to extend the flat rate of Bh. Rs. 35/- per acre to those grants as well, and they direct accordingly. This will make the flat rate universally applicable to all past grants made under all rules for the cultivation of coffee or tea, without any exception. The value of reserved trees on each Individual grants as fixed at the above rate will be payable in five equal annual instalments commencing from the current Malayalam year 1099. It is however open to any individual grantee either to pay up the whole amount due in a lump or in a smaller number of instalments than five as he chooses. The purchase of the tree-growth under the above arrangement should be made in respect of entire tree-growth on each grant or title deed area and no grantee will be permitted to purchase at a time such rights on a portion of any title-deed area.

2. If any individual grantee demurs to purchase rights over the reserved trees on his grant under the above arrangement, he will be left alone with his limited rights over such trees and such grants will be governed by the conditions in the existing title-deeds to him.

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11. That the 2nd petitioner was under no misapprehension as to the right of the grantees under Ext P-1 in regard to the reserved trees is clear from Ext. P-2 letter sent by it to the 3rd respondent. The letter states:

"As per the Notification No. Dis. 173 of 1094/Rev. dt. 2-2-1924, the grantees of all estates assigned before 1099 on payment of Rs. 35/- per acre of wooded area acquire right over tree growth. We therefore request permission for the removal of the growth from the

wooded area in Sy. No. 924/1 on payment of Rs. 35/- per acre. We are willing to pay Thadivila for the entire area of 108.90 acres granted under Title Deed No. 245 (in Sy. No. 924/1 of Kulathupuzha Village) and after final assessment of the wooded area we shall apply for refund of Thadivila paid for balance area."

12. Reference was made by counsel for the petitioners to the Travancore Pattom Proclamation of 1040, which conferred full rights in the land on tenants of pandarapattom land and the subsequent proclamations and notifications by which they acquired the full title to the trees in the land. They have no application to the land or trees comprised in Ext. P-1 grant.

13. The petitioners contend alternatively that if Ext. P-1 did not convey the title to the reserved trees to the grantees, the firm acquired full rights in the reserved trees by the 2nd petitioner depositing the value of the trees at Rupees 35/- per acre of the wooded area in 1964 in pursuance of the Notification of Government dated 2-2-1924 incorporating the provisions of R. O. C. No. 161/1921/Rev. dated 28-9-1923. The Waste Lands Regulation II of 1040 was repealed by Government Land Assignment Regulation (Regulation III of 1097). Section 7 of Regulation III of 1097 provided for rule-making power of Government. Section 7 (1) Section (f) read:

"Our Government may make rules;

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(f) prescribing the rates at which the land may be assigned and the rates at which tree-growth may be valued." Government purporting to act under the clause passed Rules 26A and 26B. The notification dated 2-2-1924 was made under Rule 26A. The contention that the firm acquired title to the reserved trees by depositing at the rate of Rs. 35/- per acre of the wooded area is based upon second paragraph of the notification dated 2-2-1924, The contention was that as no time limit was specified so far as grants made before 1099 M. E. were concerned, it was open to the firm to deposit the amount calculated in terms of the notification and acquire full rights over the reserved trees. Ext. P-4 would make it clear that the 2nd petitioner deposited the amount with a view to take advantage of the provisions in the notification, but we are not satisfied that the deposit has been made within the time required. If we look at the proceedings of Government in R. O. C. No. 161/1921/Rev. dated -28-9-1923, which preceded the notification, it will be clear that the Government did not make any distinction between grants made before and after 1099, as regards the period within which the deposit should be made. In both the cases, they said that the deposit should be made in five equal annual instalments commencing from the current Malayalam year 1099. So far as grants made before 1099 were concerned, the notification did not specify the time within which the five equal annual instalments should be paid. That this was

an inadvertent omission in the notification would perhaps be clear from the terms of the subsequent Government Order dated 19-11-1928, fixing the rate at Rs. 50/-. But assuming that the terms of the notification dated 2-2-1924 are alone relevant we think that the reasonable reading of the second paragraph of the notification is that the deposit must be made in five equal annual instalments commencing from the date of the notification or within a reasonable time of it. We do not think that the deposit made by the 2nd petitioner in the year 1964 would satisfy the requirement of paragraph 2 of the notification. A grantee before 1099 cannot choose his own time for paying the instalments, merely because the paragraph did not specify the point of time from which the instalment payment should commence.

14. We have great doubts whether Rule 26A and Rule 26B or Rule 26 (1) to (7) which replaced them, could have been passed by virtue of the rule-making power under Section 7 of Regulation III of 1097 as that Regulation dealt with only future assignment of Government lands. Although the Waste Lands Regulation (Regulation II of 1040) has been repealed by Government Land Assignment Regulation (Regulation III of 1097), and although that Regulation was concerned with assignment of Government lands, as it dealt with only future assignment, we are not sure that a rule regarding the incidents of grants made before the date of that Regulation could have been made under it. Even assuming that Rules 26A and 26B have been validly framed under Section 7 of Regulation III of 1097, and would apply to grants made before 1099, as already indicated, we do not think that the petitioners have satisfied the requirements of paragraph 2 of the notification, as they have not deposited the amount within the time. The result cannot be otherwise even if we assume that Rule 26A and the notification dated 2-2-1924 have no statutory backing. The notification would then amount to an offer by Government that if any grantee before 1099 were to make the deposit within the time, he would acquire the full rights in respect of the reserved trees comprised in the grant. The question whether there has been an acceptance of the offer by the firm or its agent in terms of the offer would pertain to the formation of a contract and could only be considered in a suit instituted for that purpose. A court exercising jurisdiction under Article 226 of the Constitution is not the proper forum for deciding the matter. The 2nd petitioner had agreed on 1-4-1964 under Ext. P-7 to pay at a rate per acre of the wooded area as may be fixed by Gov eminent. He cannot be allowed to urge in this proceeding that the agreement is not binding on him. Exta P-10 and P-13 put it beyond doubt that the rate fixed, namely, Rs. 100/- per acre was provisional. So, the further question whether after the deposit the Government were right in demanding further payments by the 2nd petitioner for the firm to acquire full rights in the reserved trees is one which relates to the terms and conditions of a contract, if one was formed, and the breach thereof and the remedy for that also must be sought in a suit. (See in this connection, the decisions reported in *Achuthan v. State of Kerala*¹, *C. K Achutan v. State of Kerala*², *(Mrs) Rajam Authi v. State of Kerala*³, and *V. Pun-nen Thomas v.*

*State of Kerala*⁴,

15. We do not think that there is any substance in the contention that the firm was bound to pay only kuttikanom or customs duty or both as the case may be when reserved trees are felled and taken out of the limits of the grant, that 'Kuttikanom' is only a tax or fee, and the fee or tax cannot be so enhanced as to represent the market value of the trees themselves.

16. In the Malayalam and English Dictionary by Rev. H. Gundert D. Ph. page 278, 'kuttikanom' is defined as meaning "the price of timber; fee claimable by the owner for every tree cut down by the renter". In "The Manual of Malabar Law" by Kadaloor Ramchandra Iyer. Chapter VII, page 44, it is stated: 'Kuttikkanom is a mortgage of forests by which the landlord assigns on mortgage a tract of forest land, receiving a stipulated fee for every tree felled by the mortgagee, the entire number of the trees to be cut down and the period within which they are to be felled being expressly fixed in the karar entered into between the parties....' In the Glossary attached to the Land Revenue Manual (1916) Vol. IV, at p. 883, the word 'Kuttikkanom' is said to mean "a fee paid to the Sirkar for felling trees other than royalties and tax-paying trees". In the Glossary of Administrative terms, English-Malayalam, by the Official Language Committee, at page 302, 'seigniorage' is defined as meaning--(Malayalam Script omitted--Ed.)

17. We do not think that "kuttikanom" is either a fee or tax. A tax or fee is levied in the exercise of sovereign power. We think that in the context "kuttikanom" means the Government's share of the value of the reserved trees. We have already said that Ext. P-1 grant did not convey the title to the reserved trees. All it did was to grant a concession to the grantees to appropriate the trees other than the royal trees enumerated in it, for consumption within the limits of the grant. The fact that Kuttikanom was a nominal payment in ancient days when the value of timber was little, should not make us forget its essential character. If Kuttikanom in the context means the Government's share of the value of the trees, the value of that share must necessarily vary with the market value of timber. If the petitioners think that the demand under Ext. P-14 does not represent the Government's share of the value of the reserved trees, or is in any way excessive, it will be open to them to file a suit to have that question considered and decided. We do not think it meet in this proceeding to decide that question. We are of the view that if Government have no power to fix the value of the reserved trees from time to time, under Section 7 (1) Section (f) of Regulation III of 1097 by framing rules so far as grants made before 1097 are concerned, the Government have power as owner of the trees to fix their value or the government's share in it and as already indicated if the petitioners think that the value fixed is high and does not represent the Government's share, it will be open to them to file a suit for appropriate relief

18. The petitioners' counsel referred to the decision of the Division Bench in O. P. No. 337 of

1957 (Ker) and said that the decision should govern this case. The ground on which that case was decided is that the notification of Government dated 2-2-1924 did not specify the time within which the deposit should be made so far as grants made before 1099 are concerned, and so it was open to the petitioner there, to make the deposit at any time before the notification was repealed and claim ownership of the trees in question there. The proceeding of the Government in R. O. C. No. 161/1921/Rev. dated 28-9-1923, which preceded the notification, was not brought to the attention of their Lordships when the case was argued; and when it was brought to their notice during the arguments on the review petition filed by the State, their Lordships said that there was nothing to show that the notification should be read along with the Government Order, and therefore, there was no time limit for depositing the amount. With respect, we are unable to reach that conclusion and we have indicated our reasons for it. If the notification did not form part of the Government Order, then, as we said, the reasonable construction of the notification would be that the amount must be deposited in five equal annual instalments commencing from the date of the notification or at any rate, within reasonable time of that date. The decision of the Division Bench in A. 3. No. 550 of 1962 (Ken only followed the decision in O. P. No. 337 of 1957 (Ker) without any fresh reasoning.

19. We do not think that any question of retrospective operation of R. 26 (1) to (7) arises in this case as Government was only regulating the value of the reserved trees, the title to which remained with them on the date when the rule was passed.

20. It was argued for the petitioners that since the 2nd petitioner deposited the amount on faith of the notification dated 2-2-1924, the Government were estopped from contending that the petitioners did not acquire the title to the reserved trees and so the Government were precluded from demanding from the 2nd petitioner any further amount by changing the rules. In support of the contention, reliance was placed on the ruling of the Supreme Court in *Union of India v. Anglo Afghan Agencies*⁹. We do not think that the firm or the 2nd petitioner acted upon the representation contained in the notification of Government dated 2-2-1924 or that any detriment was suffered by them by acting upon the representation. In Ext P-7 dated 1-4-1964, the 2nd petitioner had agreed that if and when the Government happen lawfully to enhance the rate, it would be liable and would pay at such enhanced rate. So, when it deposited the amount on 9-9-1964, it was fully aware of the liability to pay the enhanced rate. In order to found a plea of estoppel, there must be proof that the firm or the 2nd petitioner suffered detriment by acting upon the representation. There is no such plea or proof for it.

21. Counsel for the petitioners submitted that the direction in Ext. P-17 that action in the light of notification G. O. (P) 185/Rev. dated 12-3-1965 will be taken, namely, that the Chief Conservator of Forests or any officer authorised by him in this behalf will be at liberty to enter

the estates and cut and remove the reserved trees is unwarranted. If the direction is unwarranted, this is a matter to be agitated in a suit, because it is only as proprietor of the trees that the Government are asserting the right. Besides, there is no specific prayer in the writ petition to quash the provision in G. O. (P) 185/Rev. dated 12th March 1965, which sanctions this procedure.

We dismiss the petition but in the circumstances without any order as to costs.

Cases Referred.

11959 Ker LT 125 - (AIR 1959 Ker 239)

2AIR 1959 SC 490

3AIR 1964 Kerala 272

41968 Ker LJ 619 = (AIR 1969 Ker 81) (FB)

5 AIR 1968 SC 718