(2015) 03 KL CK 0216

High Court Of Kerala

Case No: W.A. No. 931 of 2012 in W.P.(C) 231 of 2008

S. Muhammed Ismail		APPELLANT
	Vs	
State of Kerala and Others		RESPONDENT

Date of Decision: March 25, 2015

Acts Referred:

- Constitution of India, 1950 - Article 14, 19, 226, 253, 254
- Evidence Act, 1872 - Section 41, 42
- Forest (Conservation) Act, 1980 - Section 2, 2(i)
- Kerala Forest Act, 1961 - Section 19, 4, 7
- Kerala Land Reforms Act, 1963 - Section 3(2), 3(3)
- Kerala Private Forests (Vesting and Assignment) Act, 1971 - Section 2(c), 2(f), 3, 3(1), 4

Hon'ble Judges: Antony Dominic, J; Alexander Thomas, J

Bench: Division Bench

Advocate: G. Hariharan and Praveen H., for the Appellant; M.P. Madhavankutty, Advocates for the Respondent

Final Decision: Allowed

Judgement

Antony Dominic, J.

The appellant filed W.P. (C) No. 231/2008 seeking to quash Ext. P23 order of the 3rd respondent and the notification No. C4-21437/2000 to the extent it included 530 acres of land of the appellant. By the judgment under appeal, without going into the merits of the contentions raised, the learned Single Judge held that the remedy of the appellant is to move the Tribunal constituted under Section 10 of the Kerala Forest (Vesting and Management of Ecologically Fragile Lands) Act, 2003 (hereinafter referred to as ''Act 21 of 2005'', for short). It is this judgment which is challenged before us.

2. Appellant''s father late A. Sulaiman Rawther was the owner and was in possession and enjoyment of a plantation known as Oravampadi Estate in Palakkad District, the

total extent of which was 550 acres. On the implementation of the Kerala Private Forests (Vesting and Assignment) Act, 1971 (hereinafter referred to as ''Act 26 of 1971''), which came into force from 10.05.1971, the estate was notified as a private forest vested in the State under Section 3 of the Act. Thereupon appellant''s father filed OA No. 139/1977 before the Forest Tribunal, Palakkad, constituted under Section 8 of Act 26 of 1971. By Ext. P4 order dated 28.05.1981, the Tribunal found that 215 acres was a coffee plantation, 225 acres was a cardamom plantation and that the 20 acres occupied by quarters, swamps, roads and streams will come under the ancillary clause. It also exempted 5 acres claimed as nursery and 65 acres claimed as shelter belts and wind belts. Thus, 530 acres was declared to be not a private forest, being plantation as on 10.05.1971 and as lands coming under the ancillary clause. In so far as the remaining 20 acres of the estate is concerned, the Tribunal held that it, being reserved as fuel area, continued to be private forest within the meaning of Act 26 of 1971.

3. The respondents in the OA filed MFA No. 1 of 1982 before this Court, challenging the order of the Tribunal. By Ext. P5 judgment dated 03.08.1983, a Division Bench of this Court dismissed the appeal. Subsequently, the appellants in the MFA filed R.P. No. 19 of 1984 under Section 8C(2) of Act 26 of 1971. By Ext. P6 order dated 17.09.1984, this Court allowed the review and the appeal was restored to file. The appellant''s father challenged Ext. P6 order in Civil Appeal No. 120/1986 before the Apex Court. During the pendency of the appeal, on 28.06.1988, the appellant''s father passed away and the legal heirs of the deceased got impleaded in the appeal and prosecuted the matter. The Apex Court heard the appeal along with some other cases and the appeal was allowed by Ext. P7 judgment and Ext. P8 is the decree passed in the appeal.

4. In the light of the above orders and judgments, though 530 Acres of land, which was held to be a plantation, should have been restored to its owners, that was not done. Thereupon, the appellant filed Contempt of Court Case No. 131/1997 before this Court. The contempt case was disposed of by Ext. P9 judgment, where, reluctantly, this Court accepted the apology tendered by the respondents and also the submission of the learned Advocate General that such mistakes would not be repeated in future. This was however, subject to payment of cost Rs. 5,000/- each by the respondents therein personally to the appellants. Thereafter, 214.4830 hectares of land comprised in Sy. No. 854/Part of Muthalamada Village of Chittoor Taluk was restored to its owners on 07.06.1997 and Ext. P10 certificate to that effect was issued by the Divisional Forest Officer, Nenmara on 11.07.1997. Ext. P11 is the copy of the survey sketch certified by the Divisional Forest Officer, Nenmara in respect of the property restored to the appellant.

5. According to the appellant, since then, he and the other co-owners were in possession and enjoyment of the property and the property was being managed by the appellant on behalf of the other co-owners. Exts.P13 series and P14 are the tax

receipts and possession certificates. Exts.P16 to P18 are the certificates of registration of the Coffee Estate, Cardamom Estate and Coffee Estate.

6. Subsequently, Kerala Forest (Vesting and Management of Ecologically Fragile Lands) Ordinance 2000 (6 of 2000) was promulgated with effect from 2.6.2000. This ordinance was replaced by Ordinance Nos. 8 of 2000, 3 of 2001, 16 of 2001 and thereafter by Act 21 of 2005. The Ordinances and Act 21 of 2005 were with effect from 02.06.2000. Under Ordinance 8 of 2000, by notification dated 26.08.2000 published in the Kerala Gazette, dated 19.09.2000, 187.089 hectares out of 530 acres (462.10 acres) was notified as ecologically fragile land. This has been notified in 3 bits as per item Nos. 38, 39 and 40 of the notification. A copy of the notification is Annexure R5(b). It was in this back ground the writ petition was filed challenging the notification and this Court, by order dated 03.01.2008, directed the respondents not to dispossess the appellant until further orders. However, in the counter affidavit dated 03.02.2008, the 5th respondent asserted that the land having been statutorily vested in the State, is in the possession of the respondents and that there was no need to dispossess the appellant, who was not in possession of the land. It was this writ petition which was disposed of by the learned Single Judge relegating the appellant to pursue his remedies before the Tribunal, constituted under Section 10 of Act 21 of 2005.

7. We heard the counsel for the appellant and the learned Special Government Pleader who appeared for the respondents.

8. According to the counsel for the appellant, the issues arising in this case are fully covered in his favour in view of the principles laid down by the Division Bench of this Court in State of Kerala Vs. Kumari Varma, (2011) 1 KLT 1008 . On the other hand, learned Special Government Pleader contended to the contrary and placed reliance on the Division Bench judgment of this Court in W.P. (C) No. 18134/2006 and connected cases.

9. We have considered the submissions made. The undisputed facts of the case are that Act 26 of 1971 was implemented with effect from 10.05.1971, the appointed date specified under the said Act. As held by the Apex Court in State of Kerala and Another Vs. Pullangode Rubber and Produce Co. Ltd. and Others, AIR 1999 SC 2523 : (1999) 5 JT 154 : (1999) 4 SCALE 303 : (1999) 6 SCC 92 : (1999) 3 SCR 1163 , the question as to whether a land is a private forest or a plantation exempted from the purview of Act 26 of 1971, is to be determined with reference to the position as on 10.05.1971, the appointed day under Act 26 of 1971. Treating it a private forest as on 10.05.1971, the plantation of the appellant was illegally treated as a private forest vested in the State under Section 3 of Act 26 of 1971. The legality of the vesting of the land was the subject matter of OA No. 139/1977, a proceeding under Section 8 of Act 26 of 1971. In Ext. P4 order, the Forest Tribunal recorded a finding that 440 acres of land was a plantation as on 10.05.1971, the appointed day under Act 26 of 1971 and that 90 acres was used for ancillary purposes. Accordingly, 530 acres of

land were exempted from vesting under section 3 of Act 26 of 1971. This order passed by the Forest Tribunal was upheld by this Court and by the Apex Court.

10. In implementation of the orders passed by the Tribunal, which was upheld by this Court and the Apex Court, 214.4830 hectares of land comprised in Sy. No. 854/Part of Muthalamada Village of Chittoor Taluk was restored to its owners on 07.06.1997 and the same has been certified by the Divisional Forest Officer, Nenmara in Ext. P10 certificate dated 11.07.1997. However, as per Annexure R5(b), on the premise that the land is a forest as on 02.06.2000, 462.10 acres was again notified as ecologically fragile land vested in the State under Section 3(1) of Act 21 of 2005. In Ext. P19 application filed under Section 19(3)(b) of Act 21 of 2005, the appellant prayed for revision of the notification. But the Custodian rejected his prayer by Ext. P23 order.

11. As we have already stated, the issue raised before us is whether the case of the appellant is covered in his favour by the Division Bench Judgment in Kumari Varma''s case (supra) or whether it is covered against him by the judgment of the Division Bench in W.P.(C) No. 18134 of 2006 and connected cases.

12. Kumari Varma (supra) is a case where by a notification under Act 26 of 1971, 348 acres of land in R.S. No. 292/1A in Naduvil Village, Taliparamba Taluk, Kannur District belonging to her father was notified to be private forest and consequently, the possession and ownership of the land was treated as vested in the Government under Section 3 of the Act. Thereupon, O.A. No. 90/1979 was filed before the Tribunal and the Tribunal recorded a finding that an extent of 105 acres of land was a cardamom plantation and excluded it from the definition of private forest under the Act. The Tribunal also recorded a finding that a further extent of 9.95 acres of land is required to be exempted on the ground that it was used for the purposes ancillary to the activity of plantation. In appeals filed by both sides before this Court and thereafter before the Apex Court, the order passed by the Tribunal was upheld. The judgment of the Apex Court was rendered on 04.08.2006 Kumari Varma Vs. State of Kerala and Another, AIR 2006 SC 3048 : (2006) 7 JT 223 : (2006) 7 SCALE 561 : (2006) 6 SCC 505 : (2006) AIRSCW 4200 : (2006) 6 Supreme 254 .

13. During the pendency of the litigation, the Ordinances were promulgated and finally Act 21 of 2005 was enacted, all with effect from 02.06.2000. In view of the declaration contained in Section 4 of the said Act, notification dated 21.04.2001 was issued by the State of Kerala declaring that ownership and possession of various items of land mentioned in the schedule to the notification were vested in the Government of Kerala, free from all encumbrances and that all the rights, title and interest of the owner or any other person shall stand extinguished from the date of commencement of the Ordinance, i.e., 02.06.2000. By this notification, an extent of 24.28 hectares of land belonging to the claimant was also notified and this was later amended as 35.105 hectares in R.S. No. 292/18. In the Writ Petitions that were filed challenging the above mentioned notifications, the learned Single Judge quashed

the notifications in Kumari Varma v. State of Kerala and Others [2009 (4) KHC 487]. State of Kerala filed appeals which were dismissed by the Division Bench by its judgment in State of Kerala Vs. Kumari Varma, (2011) 1 KLT 1008 . The Division Bench, after noticing the above facts, upheld the judgment holding thus:

"8. In coming to the conclusion that the impugned notifications are illegal, the learned Judge relied upon the fact that the property covered under the said notifications was held to be a cardamom plantation under the provisions of the Private Forest Act, 1971 by the Tribunal constituted under the said Act (the details of which have already been narrated in the judgment), which finding was eventually confirmed by the Supreme Court. The learned Judge also took note of the fact that the possession of the said property was taken by the Government from the relevant date, i.e. 10.5.1991, under the said Act in view of the wrong declaration made under the Private Forest Act. The learned Judge further recorded that the possession of the said property was wrongly taken by the State under the provisions of the Private Forest Act, a conclusion which is irresistible in view of the judgment of the Supreme Court referred to earlier, and further held as follows:

"If that be so, it is the duty of the Government to maintain the nature and status of the lands from the date of vesting till it is handover to the owner. The Government once declared the land as a private forest and while the notification was in force, the Government again notified this land under S. 3(1) of the present Act. Since the property is excluded under S. 2(b) and 2(c) of the present Act, the notification issued under S. 3(1) of the Act is illegal. It is open to the Government to proceed against the said property in accordance with S. 15 and other related provisions, if so advised."

9. The learned Additional Advocate General, Sri.Renjith Thampan, appearing for the State argued that this Court ought not to have entertained the Writ Petitions from out of which the instant appeals arise, in view of the fact that an effective alternative remedy is available to the respondent under S. 10 of the Ecologically Fragile Land Act, 2003 before the Tribunal constituted under S. 9 of the said Act and a further appeal to this Court against the decision of the Tribunal is provided under S. 11 of the said Act. Secondly the learned Additional Advocate General argued that irrespective of the fact whether the possession of property in dispute was taken illegally or otherwise under the Private Forests Act, situation as on the relevant date under the Ecologically Fragile Land Act, i.e. 02.06.2009, is that the property in dispute covered by the impugned notifications answers the description of ''ecologically fragile land'' as defined under S. 2(b)(1) of the said Act. It is immaterial as to how such a situation was brought about. It is further submitted by the learned Additional Advocate General that in view of the prohibition contained under S. 2 of the Forest (Conservation) Act, 1980 made by the Parliament, the State is prohibited from making any order directing that any reserved forest or any portion thereof shall cease to be reserved and also giving any direction that any forest land or any portion thereof may be used for any non-forest purpose. He therefore argued that

in view of the abovementioned restriction on the authority of the State, the State of Kerala has no option but to notify the land in question as an ecologically fragile land.

10. The first submission of the learned Additional Advocate General that this Court ought not to have entertained the Writ Petitions from out of which the instant appeals arise on the ground that the respondent has effective alternative remedy under S. 10 of the Act, we reject the same for the reason that complicated questions of law are involved in these matters and there is hardly any dispute regarding the facts of the case. At any rate, at the stage of the appeal, to allow the appeals and dismissing the Writ Petitions on the ground of the existence of an alternative remedy, in our opinion, would not secure any public interest except resulting in multiplicity of the litigation. It must be remembered that the existence of an alternative remedy would not be a bar for the exercise of jurisdiction under Article 226, but only one of the relevant considerations which should guide the Court in coming to a conclusion whether the discretionary jurisdiction under Art. 226 should be exercised in a given case or not.

11. Before we examine the further submissions of the learned Additional Advocate General and the submissions made by Sri. M.K.S. Menon, the learned counsel for the respondent/writ petitioner, we deem it appropriate to make a survey of the statutory position governing the forests in the State of Kerala.

12. Section 3 of the Kerala Forest (Vesting and Management of Ecologically Fragile Land) Act, 2003 declares that the ownership and possession of all ecologically fragile lands held by any person shall stand transferred to and vest in the Government free from all encumbrances etc. S. 3(1) reads as follows:

"3. Ecologically fragile land to vest in Government.-- (1) Notwithstanding anything contained in any other law for the time being in force, or in any judgment, decree or order of any Court or Tribunal or in any custom, contract or other documents, with effect from the date of commencement of this Act, the ownership and possession of all ecologically fragile lands held by any person or any other form of right over them, shall stand transferred to and vested in the Government free from all encumbrances and the right, title and interest of the owner or any other person thereon shall stand extinguished from the said date."

13. Section 3(2) [S. 3(2). The lands vested in the Government under sub-section (1) shall be notified in the Gazette and the owner shall be informed in writing by the custodian and the notification shall be placed before the Advisory Committee constituted u/S. 15 for perusal.] mandates that the factum of the vesting of lands in the Government by virtue of sub-s.(1) shall be notified in the Gazette. It further mandates that: (i) such a fact shall be informed in writing to the owner of the land, and (ii) the notification be placed before an Advisory Committee constituted under S. 15.

14. Section 2(b) defines the ''ecologically fragile land'' as follows:

"2(b) "ecologically fragile lands" means,-

(i) any forest land or any portion thereof held by any person and lying contiguous to or encircled by a reserved forest or a vested forest or any other forest land owned by the Government and predominantly supporting natural vegetation; and

(ii) any land declared to be an ecologically fragile land by the Government by notification in the Gazette under Section 4;"

It can be seen from the above that under R. 2(b)(i) lands falling within the description contained thereunder become ecologically fragile lands by virtue of the operation of the law, though such an operation of law itself depends upon the existence of certain facts. On the other hand, sub-s.(ii) of S. 2(b) envisages that any land can be declared to be as an ecologically fragile land by the Government by notification in the Gazette under S. 4. Under what circumstances and in what manner such a declaration can be made need not be examined, as admittedly it is not the case of anyone of the parties before this Court that the lands in question, in these two appeals, fall under the said category. For the present it is sufficient to notice that there can be two categories or classes of lands which can be called ecologically fragile lands within the meaning of the 2003 Act.

15. The first category is any forest land held by any person subject to the condition that such land is lying contiguous to or encircled by either reserved or vested forest or any other forest land owned by the Government. Further such land predominantly supports natural vegetation. The expression forest land itself is not defined under the said Act but the expressions ''forest'' and ''land'' are individually defined under S. 2(c) and (d) as follows:

"(c) "forest" means any land principally covered with naturally grown trees and undergrowth and includes any forests statutorily recognised and declared as reserved forest, protected forest or otherwise, but does not include any land which is used principally for the cultivation of crops of long duration such as tea, coffee, rubber, pepper, cardamom, coconut, arecanut or cashew or any other sites of residential buildings and surroundings essential for the convenient use of such buildings:

(d) "land" includes rivers, streams and its origin and other water bodies;"

16. The expression ''forest'' is defined as any land principally covered with naturally grown trees and undergrowth. The expression also takes within its purview any forest "statutorily recognised and declared either as reserved forest or protected forest or otherwise". From the definition of the forest it can also be noticed that certain categories of land used principally for cultivation of crops for long durations are excluded from the purview of the definition of expression forest, though such lands might otherwise satisfy the definition of the expression forest. This aspect of the matter shall be examined at the appropriate place in the judgment.

17. First criterion is that the forest land must be held by any person. In view of the definition of the expression forest as noticed above, we are required to examine as to the circumstances under which any forest land can be held by a person. In our view the expression ''person'' occurring under S. 2(b)(i) must necessarily be understood as a person other than the State, whether natural or juridical for the simple reason under the scheme of the Act such lands are eventually stand transferred to and vest in the State.

18. To understand the possible circumstances under which forest land can be held by any person, we deem it appropriate to examine the scheme of the Kerala Forest Act, 1961 in so far as it is relevant for the present purpose. It was held by the Supreme Court in Bhavani Tea and Produce Co. Ltd. Vs. State of Kerala and Others, (1991) 1 JT 503 : (1991) 1 SCALE 319 : (1991) 2 SCC 463 : (1991) 1 SCR 550 as follows:-

"The provisions of the Vesting Act which was enacted in 1971 have, therefore, to be interpreted keeping in mind the relevant provisions of the above Acts [above Acts:

1. The Madras Preservation of Private Forests Act, 1949.

2. The Kerala Forests Act, 1961.

3. The Kerala Land Reforms Act, 1963.] in so far as plantations and private forests are concerned."

19. Chapter II of the said Act deals with reserved forest. S. 3 empowers the Government to declare any land, at the disposal of the Government, to be reserved forest after following the procedure stipulated under the said Chapter. S. 3 reads as follows:-

"3. Power to reserve forests.- The Government may constitute any land at the disposal of the Government a Reserved Forest in the manner hereinafter provided."

The expression "land at the disposal of Government" is defined under S. 2(g), which reads as under:

"2(g) "land at the disposal of Government" includes all unoccupied land, all temporarily occupied land and all land occupied without permission, whether assessed or unassessed; but does not include land, the properties of land holders such as Jenmies, Devaswoms, or holders of Inam lands; also all holdings of land in any way subject to the payment of land revenue direct to Government and all other registered holdings of land in proprietary right".

It can be seen from the above that the lands over which proprietary rights exists cannot be notified to be forest lands. However, even after a reserved forest is notified after following the procedure under Chapter II, still the State can create private rights by granting a patta, etc. under S. 7[7. Bar of accrual of forest right, prohibition of clearings, etc.- (1) During the interval between the publication of the notification under Section 4 and the date fixed by the notification under Section 19,

no right shall be acquired in or over the land included in such notification under Section 4, except under a grant or contract in writing made or entered into by, or on behalf of the Government or by, on behalf of, some person in whom such right, or power to create the same was vested when the notification under Section 4 was published or by succession from such person; and no clearings shall be made on such land, nor shall any person cut, collect, or remove any forest produce nor shall set fire to such land or kindle or leave burning any fire in such manner as to endanger the same.

(2) No patta shall, without the previous sanction of the Government, be granted in such land, and every patta granted without such sanction shall be null and void.

(3) Nothing in this Section shall be deemed to prohibit any act done with the permission in writing of the Forest Settlement Officer".].

20. Chapter III and IV of the Kerala Forest Act, 1961 deal with the regulation and protection of certain lands which are not notified to be reserved forest but are privately owned forest or waste land. Though the expression ''protected forest'' is not defined either under the Ecologically Fragile Lands Act or under the Forest Act, having regard to the statutory environment regulating the forest in the State of Kerala, the expression ''protected forest'' occurring under S. 2(c) of the Ecologically Fragile Land Act, in our opinion, must be understood in the light of the provisions of Chapter III and IV of the Kerala Forest Act, 1961.

21. The third category of Forest contemplated under S. 2(c) is an omnibus category which does not fall either under the expression ''reserved forest'' or ''protected forest''. Under this category fall ''private forests'' as defined under the Kerala Private Forest (Vesting and Assignment) Act, 1971. Under the said Act the expression private forest is defined under S. 2(f) as follows:

"(f) "private forest" means -

(1) in relation to the Malabar district referred to in sub-section (2) of Section 5 of the State Reorganisation Act, 1956 (Central Act 37 of 1956) -

(i) any land to which the Madras Preservation of Private Forests Act, 1949 (Madras Act XXVII of 1949), applied immediately before the appointed day excluding-

(A) lands which are gardens or nilams as defined in the Kerala Land Reforms Act, 1963 (1 of 1964);

(B) lands which are used principally for the cultivation of tea, coffee, cocoa, rubber, cardamom or cinnamon and lands used for any purpose ancillary to the cultivation of such crops or for the preparation of the same for the market.

Explanation.- Lands used for the construction of office buildings, godowns, factories, quarters for workmen, hospitals, schools and playgrounds shall be deemed to be lands used for purpose ancillary to the cultivation of such crops;

(C) lands which are principally cultivated with cashew or other fruit bearing trees or are principally cultivated with any other agricultural crop and

(D) sites of buildings and lands appurtenant to and necessary for the convenient enjoyment or use of, such buildings;

(E) any forest not owned by the Government, to which the Madras Preservation of Private Forests Act, 1949 did not apply, including waste lands which are enclaves within wooded areas.

(2) in relation to the remaining areas in the State of Kerala, any forest not owned by the Government, including waste lands which are enclaves within wooded areas.

Explanation.- For the purposes of this clause, a land shall be deemed to be a waste land notwithstanding the existence thereon of scattered trees or shrubs;"

22. It can be seen from the above that it is possible in the State of Kerala that land which can be described as forest land can be held by a private person in the following contingencies:

(i) Lands falling within the boundaries of a Reserved Forest under the Kerala Forest Act, if rights are created by grant of patta, etc. under S. 7 of the Kerala Forest Act.

(ii) Protected forests falling under the scope of Chapter IV of the Kerala Forest Act of 1961.

(iii) Lands falling within the scope of S. 3(2) [Section 3(2). Nothing contained in sub-section (1) shall apply in respect of so much extent of land comprised in private forests held by an owner under his personal cultivation as is within the ceiling limit applicable to him under the Kerala Land Reforms Act, 1963 (1 of 1964) or any building or structure standing thereon or appurtenant thereto.

Explanation.- For the purposes of this subsection, "cultivation" includes cultivation of trees or plants of any species.] and 3(3) [Section 3(3). Nothing contained in sub-section (1) shall apply in respect of so much extent of private forests held by an owner under a valid registered document of title executed before the appointed day and intended for cultivation by him, which together with other lands held by him to which Chapter III of the Kerala Land Reforms Act, 1963, is applicable, does not exceed the extent of the ceiling are applicable to him under Section 82 of the said Act.] of the Kerala Private Forests (Vesting and Assignment) Act, 1971.

The expression ''held'' itself is a wide expression capable of taking within its sweep both the rights of title as well as the rights pertaining to possession; either as the owner or lessee, etc.

23. If a particular piece of land can be described as forest land held by a private person by definition under S. 2(b)(i) of the Kerala Forest (Vesting and Management of Ecologically Fragile Lands) Act, the same can be classified as ecologically fragile

land if the same is either contiguous or encircled by reserved forest or a vested forest or any other forest land owned by the Government. The expression "reserved forest" or "vested forest" occurring under S. 2(b)(i) are themselves defined under S. 2(h) and (j) of the Kerala Forest (Vesting and Management of Ecologically Fragile Lands) Act, 2003 as follows:

"(h) "reserved forests" means the forests reserved under S. 19 of the Kerala Forest Act, 1961 (4 of 1962) and includes forests notified under S. 4 of the said Act;

(j) "vested forests" means any forest vested in Government under S. 3 of the Kerala Private Forest (Vesting and Assignment) Act, 1971 (26 of 1971)."

24. The lands in dispute in these two appeals are not lands falling within any notified "Reserved Forest" under the Kerala Forest Act; nor are they demonstrated to be "Protected Forests" under the abovementioned Act. They are excluded from the purview of the expression "private forest" under the Kerala Private Forests (Vesting and Assignment) Act, 1971 on the ground that they are lands which are principally used for cultivation of cardamom immediately before the appointed day under the abovementioned Act, i.e. 10.5.1971, though they would have otherwise satisfied the definition of "private forests" under the abovementioned Act, a finding which is confirmed by the highest Court of this country. Therefore, these lands cannot be treated as ecologically fragile lands merely because they are lying contiguous to or encircled by a reserve forest or a vested forest.

25. The learned Additional Advocate General, however, argued that the expression "forest" is defined under S. 2(c) of the Ecologically Fragile Lands Act in very wide terms to mean, any land principally covered with naturally grown trees and undergrowth. The learned Additional Advocate General, therefore, submitted that as a matter of fact the lands in dispute are covered with naturally grown trees and undergrowth because of the fact that for the last about 30 years the same was not admittedly cultivated by any plantation. Such a consequence is a result of the fact that the lands were declared to be vested in the State under the provisions of the Kerala Private Forests (Vesting and Assignment) Act, 1971. Therefore, notwithstanding the fact that the respondent was deprived of the possession and right to cultivate the lands on a wrong interpretation of the Private Forests Act, the fact situation as on today is that the land is covered with naturally grown trees and undergrowth and, therefore, a "forest" which, as a consequence, becomes "ecologically fragile land" automatically in view of the definition of S. 2(b)(i) of the Ecologically Fragile Lands Act. He relied upon the decision of the Supreme Court in T.N. Godavarman Thirumulkpad Vs. Union of India and others, AIR 1997 SC 1228 : (1997) 10 JT 377 : (1996) 9 SCALE 269 : (1997) 2 SCC 267 : (1996) 9 SCR 982 Supp : (1997) 1 UJ 290 : (1997) AIRSCW 1263 : (1997) 2 Supreme 221 :

"The Forest Conservation Act, 1980 was enacted with a view to check further deforestation which ultimately results in ecological imbalance; and therefore, the

provisions made therein for the conservation of forests and for matters connected therewith, must apply to all forests irrespective of the nature of ownership or classification thereof. The word "forest" must be understood according to its dictionary meaning. This description covers all statutorily recognised forests, whether designated as reserved, protected or otherwise for the purpose of S. 2(i) of the Forest Conservation Act. The term "forest land", occurring in S. 2, will not only include "forest" as understood in the dictionary sense, but also any area recorded as forest in the Government record irrespective of the ownership."

and also the observation at para 35 of the decision in Bhavani Tea and Produce Co. Ltd. Vs. State of Kerala and Others, (1991) 1 JT 503 : (1991) 1 SCALE 319 : (1991) 2 SCC 463 : (1991) 1 SCR 550 that:

"We find force in the submission to this extent, but in view of the objects and purposes of the Vesting Act, it cannot be said that there could never be a case of such plantation land being converted to a forest by natural growth or otherwise. It must necessarily depend on facts".

However, on the question whether every case where plantation land is covered by forest growth would have the effect of automatically converting the land into a forest land within the meaning of the Private Forest Act, the Court held at para 37 as follows:-

"We are of the view that mere abandonment would not convert an area into a forest, unless the owner has decided to do so or the appropriate authority has notified it to be so. Mere visual test would not be enough. The decision of the owner could, of course, be expressed or implied."

In other words, there must be an intention on the part of the owner of plantation land to abandon the plantation and permit the land to become a forest land. He also relied on an observation made by a Division Bench of this Court in Puthukkudi Maliakkal Saiffuddin and Another Vs. Prakasan and Others, (2004) 1 KLJ 680 , which reads as follows:

"We are therefore of the view that State Government or the Forest Department have no power to handover evergreen forest to the applicant in order to get over the contempt of court proceeding."

We must state that it was a case where a person obtained delivery of a certain parcel of land from the forest officials on the ground that he was entitled to the same by virtue of an order passed by the Forest Tribunal under the Private Forest Act. The order of the Tribunal was confirmed in appeal by this Court. The property was delivered during the pendency of a contempt case filed by the claimant for the implementation of the orders of this Court. In a subsequent public interest proceeding the delivery of the property was questioned on the grounds that the claimant played fraud on the Court and suppressed the material facts in obtaining

the order of delivery of the land. The Court on an examination of the facts came to the conclusion that contention of the petitioners in the public interest litigation was well founded. It was in the above mentioned background the above extracted observation was made. The same, in our view, has no application to the present case.

26. On the other hand, the learned counsel for the respondents argued that it does not lie in the mouth of the State to submit that though the respondent is illegally deprived of the possession of the rights on the lands in question thereby deprived of the right to carry on the cultivation of the cardamom plantation, the lands in dispute acquire the character of "forest" by virtue of the fact that the land is covered with naturally grown trees and undergrowth. The learned counsel argued that acceptance of the submission of the State would amount to permitting the State to take advantage of an illegality committed by it under the guise of the Private Forests Act. He relied upon the decision of this Court reported in Mohammed v. State of Kerala (1986 KLT 681). The case arose under the Private Forests Act. The question was whether lands proved to be lands covered by rubber plantation prior to the commencement of the said Act, but the rubber plants were destroyed by fire just around the time of the Act can be treated as lands principally used for the cultivation of rubber and therefore exempt from the operation of the Act. It was held:-

"It is improper and inadvisable to conclude definitely that the lands involved in such instances cease to be rubber plantation as soon as the rubber trees cease to exist therein..... If measures are in contemplation to replant the area with rubber, the intermediate stage, when the land does not contain rubber plants, is not decisive in determining the nature of the use of the land. Merely because the duration of that intermediate stage is prolonged, no hard and fast inference shall be drawn that the idea of replantation of the land did not exist".

The learned counsel also argued that even under the scheme of the Ecologically Fragile Lands Act it is not intended to cover lands which are used principally for the cultivation of crops of long duration, such as tea, coffee, cardamom, etc., as can be seen from the definition of the expression "forest" under S. 2 of the said Act. In other words, the learned counsel argued that even if a particular piece of land satisfies the definition of "forest" otherwise, if it is used for a long period for cultivation of the abovementioned crops, they are not required to be treated as forest lands.

27. The ultimate problem is, if a particular piece of land is treated as an ecologically fragile land, the same stands transferred and vests in the Government free from all encumbrances and the right, title and interest of the owner or any other person thereon stand extinguished. Further, the Act provides for payment of compensation to the owner of the lands, if such land is treated to be "ecologically fragile land" falling under the definition of S. 2(b)(ii); whereas in the case of lands falling under S.

2(b)(i), no compensation is payable in view of an express declaration made under Sections 8(1) and (2) [8. Compensation of vesting.- (1) In respect of the land vested under sub-section (4) of Section 4, the owner thereof shall be eligible for compensation for the said land including the permanent improvements thereon.

(2) No compensation shall be payable for the vesting in the Government of any ecologically fragile land or for the extinguishment of the right, title and interest of the owner or any person thereon under sub-section (1) of Section 3.] of the Act.

28. The learned Additional Advocate General very strenuously argued, laying emphasis on the decision of the Supreme Court in T.N. Godavarman Thirumulkpad Vs. Union of India and others, AIR 1997 SC 1228 : (1997) 10 JT 377 : (1996) 9 SCALE 269 : (1997) 2 SCC 267 : (1996) 9 SCR 982 Supp : (1997) 1 UJ 290 : (1997) AIRSCW 1263 : (1997) 2 Supreme 221 that the Ecologically Fragile Lands Act is enacted in furtherance of a directive principle contained in Article 48A [Article 48A. Protection and improvement of environment and safeguarding of forests and wild life.- The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.] and also a fundamental duty under Article 51A clause (g) [Article 51A(g). Fundamental duties.- It shall be the duty of every citizen of India - (g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.] and, therefore, an interpretation which ultimately promotes the purpose of the Act, i.e., the protection of the environment, of which the protection and maintenance of ecologically fragile land is a part, should be preferred and an interpretation which defeats the purpose of the Act by excluding the lands in question from the purview of the Act should be rejected.

29. We reject the submission of the learned Additional Advocate General. There was no intention on the part of the respondent to abandon the cultivation of cardamom as was pointed out by the Supreme Court in para 37 of Bhavani Tea case (supra). The respondent was prevented by the State to continue the cultivation by denying possession to the respondent on a wrong interpretation of the Private Forests Act, 1971. We see substantial force in the submission made by the learned counsel for the respondent that on an appropriate interpretation of the various provisions of the Act, the State cannot be permitted to take advantage of a wrong committed by it in depriving the respondent of the legal rights to cultivate the lands in dispute by wrongly invoking Kerala Private Forests (Vesting and Assignment) Act. Such an interpretation, in our opinion, is not necessarily inconsistence with the purpose sought to be achieved by the Ecologically Fragile Lands Act. If the State is of the opinion that the land in question is such an ecologically fragile land as on today which is required to be protected, it is still open to the State to notify the land to be ecologically fragile land under R. 4 of the said Act subject, of course, following the appropriate procedure stipulated under the Act."

14. The facts of the case and the principles laid down by the Division Bench show that the case decided by the Division Bench is exactly on similar facts and therefore, the principles laid down by the Division Bench should, in all respects, apply to the case of the appellant. Therefore, if this judgment is followed, the appellant should succeed in this appeal.

15. However, learned Special Government Pleader submitted that an appeal filed by the State against this judgment of the Division Bench is pending before the Apex Court. According to the learned Govt. Pleader, the Apex Court has ordered that pending disposal of the appeal, status quo shall be maintained and therefore, the judgment should not be treated as a binding precedent. Here itself, we clarify that we are unable to agree with the learned Government Pleader. Law is settled that a judgment rendered by a Division Bench of this Court is binding on the other Division Benches. The fact that an appeal is pending or that the judgment has been stayed by the appellate court does not, in any manner, affect or dilute the binding nature of the judgment. Judicial discipline demands that when decision of a co-ordinate Bench of this Court is brought to the notice of this Bench, it is to be respected and followed. This principle is subject to the right of this Court to take a different view or to doubt the correctness of the decision. In such a situation, the course permissible is to refer the question or the case to a larger Bench. The interim order of stay passed by the appellate court would only relieve the parties concerned from their obligation to comply with the judgment. (See in this connection the Division Bench judgment of this Court in Abdu Rahiman Vs. District Collector, (2009) 4 ILR (Ker) 513 : (2009) 4 KLT 485 . Therefore, we cannot ignore the judgment in Kumari Varma''s case (supra) accepting the submission of the learned Special Government Pleader.

16. The learned Govt. Pleader then relied on the Division Bench judgment in W.P. (C) No. 18134 of 2006 and connected cases. Those were cases in which the constitutional validity of Act 21 of 2005 was challenged before this Court. In para 37 of the judgment, the Division Bench formulated the issues that arose for consideration thus:

"37. From the pleadings of the parties on record and the submissions advanced by learned counsel for parties, the following are the principal issues which arise for consideration in this batch of Writ Petitions.

I. Whether State Legislature has legislative competence to enact the 2003 Act or whether it was only the Parliament competent to enact law in the nature of the 2003 Act under the residuary power under entry No. 97 of List 1 of the VI Schedule of the Constitution of India?

II. Whether the State Legislature has any authority to enact the 2003 Act whereas the said Act has been enacted for implementing decision made at International conference/International Treaty and whether the 2003 Act violates Art. 253 of the Constitution?

III. Whether the 2003 Act is void as per Article 254 of the Constitution of India as the Act violates several Parliamentary enactments?

IV. Whether the Act is protected by Article 31A of the Constitution of India from challenge on the ground that it is inconsistent with, or takes away on abridge any of the rights conferred by Article 14 or Article 19 of the Constitution of India?

V. Whether the 2003 Act can be held to be an Act for giving effect to the directive principles of State policy under Article 39(b) of the Constitution?

VI. Whether the Presidential assent dated 24.4.2005 can be treated to be an assent under Article 31A and Article 31C whereas no specific assent was prayed for or granted by the President?

VII. Whether the Act is violative of Article 14 of the Constitution of India as the Act provides for two types of vesting of lands and compensation is provided only under Section 4 and no compensation is provided for land vested under Section 3 of the Act and whether there is any rational classification under Secs. 3 and 4 of the 2003 Act?

VIII. Whether Sec. 3(1) in so far as it overrides judgments/orders of Forest Tribunal and High Court rendered in the context of the 1971 Act are void and inoperative since authority to override the judgments is not possessed by the Legislature and whether judgments/orders of Forest Tribunal and High Court rendered in the context of the 1971 Act declaring properties of petitioners as plantation are irrelevant while considering the issue as to whether land of the petitioners are Ecologically fragile land or not?

IX. Whether the 2007 Rules framed under the 2003 Act are ultra vires to the Act and void?

X. What is the relevant date for determining the eligibility of a land to be declared as ecologically fragile land under the 2003 Act?

XI. Whether the Notifications issued under the four ordinances as noted above became inoperative after lapse of the ordinances and whether it was necessary to scrutinize such Notifications issued under the Ordinances by the Custodian as required by Sec. 19 of the 2003 Act?

XII. Whether Custodian in exercise of his power under Sec. 19(3)(b) has power to review an order passed by him under Sec. 19(3)(b)?

XIII. Reliefs?"

17. In so far as this case is concerned, issue No. 8 alone is relevant. This issue has been dealt with in paragraph 104 onwards of the judgment. In paras 104 to 114, the Division Bench has referred to various judgments of the Supreme Court and concluded that a legislature cannot directly overrule a judgment of the Court but

can enact a legislation in a manner to make a judgment ineffective by altering the very basis of the judgment.

18. Thereafter, the Division Bench considered the question whether Section 3(1) of Act 21 of 2005 overrides the judgment rendered by the Forest Tribunal, High Court and Supreme Court in the context of Act 26 of 1971. This question was answered in paragraphs 115 to 118 of the judgment and they, being relevant, are extracted below for reference:

"115. Whether Section 3(1) of the Act overrides the judgment given by Forest Tribunal, High Court and Supreme Court in the context of 1971 Act is a question to be answered. The 1971 Act was in force with effect from 10.05.1971, i.e. the vesting of ownership and possession of all private forests in the State was with effect from 10.05.1971. Private Forest is defined in Section 2(f) and Section 3(2) of the Act which exempts the land comprised in private forests held by an owner under his personal cultivation and is within the ceiling limit applicable with effect from 10.05.1971. When vesting of private forests took place on 10.05.1971 by virtue of operation of law, the judgments of Forest Tribunal, High Court and Supreme Court obviously determined the issue of vesting of private forests as on 10.05.1971. The 2003 Act has been enforced with effect from 02.06.2000 and vesting of Ecologically Fragile Lands in the State shall be deemed to have been taken place on 02.06.2000. Thus the Ecologically Fragile Land as defined in the 2003 Act under Section 2(b) read with Section 2(c) is of a particular category of land. There cannot be any assumption that the land which had already been vested with the State has again to be vested in the State on 02.06.2000. The relevant date for vesting of Ecologically Fragile Land under Section 3 being entirely different from vesting of private forest under the 1971 Act or exemption from private forest as on 10.05.1971 are two distinct and different happenings and events. The non obstante clause in Section 3(1) is to give overriding effect to Section 3(1) despite any judgment/decree or order of Tribunal. The judgments rendered in the context of the 1971 Act were on a different operation of law and the definition of Ecologically Fragile Land being different from private forest under the 1971 Act, Section 3(1) of the 2003 Act can in no manner be faulted. The judgment and decree or order which is referred to in Section 3(1) of the 2003 Act are obviously the judgment and decree or order which were rendered prior to 02.06.2000. The 2003 Act envisaged definition on the concept i.e. Ecologically Fragile Land, and gave the overriding effect to override the judgment or order is fully covered within the valid legislation and Section 3(1) cannot be treated to be a legislation overriding the judgment rendered on the 1971 Act.

116. The second part of the issue is as to whether judgment/order of Forest Tribunal, High Court and Supreme Court in the context of 1971 Act declaring the properties of the petitioners as plantation are relevant or not. It is relevant to note that the scope of non obstante clause in a Statute has been examined by the Apex Court in several cases. In State of Tamil Nadu v. Arooran Sugars Ltd. (supra) the

Supreme Court has laid down in paragraph 16 as quoted above. When Section 3(1) gives an overriding effect, overriding the judgment/decree or order of Court or Tribunal, the determination of Forest Tribunal, High Court or Supreme Court in the context of 1971 Act can in no way affect the vesting of Ecologically Fragile Land within the meaning of 2003 Act with effect from 02.06.2000. The binding effect of judgment of any issue relevant for vesting of Ecologically Fragile Land has been taken away expressly by Section 3(1). Although the judgments rendered in the context of 1971 Act are not binding but whether such judgment can be held to be relevant for any purpose is also to be examined. The judgments rendered by Forest Tribunal, High Court or Supreme Court are relevant under Section 42 of Indian Evidence Act. Section 42 of the Evidence Act which is relevant for the purpose of this case is quoted as below:

"42. Relevancy and effect of judgments, orders or decrees, other than those mentioned in Section 41.- Judgment, orders or decrees other than those relevant to the enquiry; but such judgments, orders or decrees other than those mentioned in Section 41 are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state."

109. In view of the definition of Forest as contained in Section 2(c) and the Ecologically Fragile Land as contained in Section 2(b) of the 2003 Act which exclude the land which is principally covered with naturally grown trees and undergrowth and includes any forests statutorily recognised and declared as reserved forest, protected forest or otherwise, but does not include any land which is used principally for the cultivation of crops of long duration such as tea, coffee, rubber, pepper, cardamom, coconut, arecanut or cashew or any other sites of residential buildings and surroundings essential for the convenient use of such buildings. Thus the lands which are used principally for the cultivation shall not be Ecologically Fragile Land and the issue whether they are principally used for cultivation of crops is relevant and is to be enquired into. Thus the judgments which were rendered by Forest Tribunal, High Court and Supreme Court under the 1971 Act are clearly relevant judgments within the meaning of Section 42 of the Indian Evidence Act and can be looked into as a piece of evidence for determining the issue. We are thus of the view that any enquiry or decision under Section 19 or Section 9(3) and 10(b), the judgments delivered in the context of plantation for personal cultivation etc are relevant and can be relied for in appropriate cases.

117. Learned counsel for the petitioners have placed heavy reliance on the Division Bench Judgment in State of Kerala Vs. Kumari Varma, (2011) 1 KLT 1008 of which one of us (P.R. Ramachandra Menon, J.) was also a party. In the aforesaid case, father of the petitioner held vast extent of land approximately 2776.76 Acres. In proceedings under the Kerala Land Reforms Act, 1963 he was directed to surrender 1232.26 Acres as excess land. The 1971 Act was enacted vesting ownership and possession

of private forest in the State. Notification under Rule 2A of the 1974 Rules read with Sec. 6 of the 1971 Act was issued declaring 348 Acres to be private forest. Matter was taken to the Forest Tribunal by filing O.A. No. 90 of 1979. After certain litigations, the matter was taken before the High Court in appeal in M.F.A. No. 658 of 1990. The High Court remanded the matter to the Tribunal for fresh consideration. The Tribunal passed an order declaring an extent of 100.05 Acres as area covered by cardamom plantation. Appeal preferred by the State of Kerala against the said order was dismissed. The matter was further carried to the Supreme Court by both parties. The Supreme Court dismissed the appeal vide its order dated 04.08.2006 in Kumari Varma Vs. State of Kerala and Another, AIR 2006 SC 3048 : (2006) 7 JT 223 : (2006) 7 SCALE 561 : (2006) 6 SCC 505 : (2006) AIRSCW 4200 : (2006) 6 Supreme 254 . During the pendency of the aforesaid Notification the land was notified under the 2003 Act. Notification was published on 15.05.2001 under the Ordinances extinguishing the right and possession of the owner. Two Writ Petitions were filed challenging the Notification. The Writ Petitions were allowed by a learned Single Judge of this Court, against which order Writ Appeals were filed. A Division Bench of this Court dismissed the Writ Appeals vide its judgment dated 3.2.2011. One of the arguments raised before the Division Bench was that when it was held by the Forest Tribunal under the 1971 Act that 100.05 Acres is Cardamom Plantation, the said land cannot be notified under the 2003 Act. Argument of the learned Advocate General was that during the period from 1971 to 2003 the land acquired the nature of forest and hence it cannot be cleared under the 2003 Act was not accepted. The Division Bench Kumari Varma''s case (supra) has laid down the following in paragraph 29, which is quoted below:

"29. We reject the submission of the learned Additional Advocate General. There was no intention on the part of the respondent to abandon the cultivation of cardamom as was pointed out by the Supreme court in para 37 of Bhavani Tea case (supra). The respondent was prevented by the State to continue the cultivation by denying possession to the respondent on a wrong interpretation of the Private Forests Act, 1971. We see substantial force in the submission made by the learned counsel for the respondent that on an appropriate interpretation of the various provisions of the Act, the State cannot be permitted to take advantage of a wrong committed by it in depriving the respondent of the legal rights to cultivate the lands in dispute by wrongly invoking Kerala Private forests (Vesting and Assignment) Act. Such an interpretation, in our opinion, is not necessarily inconsistence with the purpose sought to be achieved by the Ecologically Fragile Lands Act. If the State is of the opinion that the land in question is such an ecologically fragile land as on today which is required to be protected, it is still open to the state to notify the land to be ecologically fragile land under R. 4 of the said Act subject, of course, following the appropriate procedure stipulated under the Act."

118. Learned Senior Counsel for the State stated that against the above Division Bench judgment of this Court the State has filed an Special Leave Petition, in which

the Supreme Court has passed an interim order directing the parties to maintain status quo, hence the judgment of the Division Bench has not become final.

We have already held that although the judgments delivered under 1971 Act by virtue of Section 3(1) are not binding but their relevancy as an evidence cannot be impeached. The judgments rendered under 1971 Act can be looked into and each case has to be decided in accordance with own merits."

19. These paragraphs of the judgment show that though the Division Bench made reference to the judgment in Kumari Varma''s case, the Bench did not apply the principles laid down in Kumari Varma''s case and grant relief on that basis. Though the pendency of SLP has been taken note of in the judgment, that was not relied on as a reason to decline relief to the parties. Apparently, because of the large number of cases considered together and the different factual issues involved, their Lordships have recorded that they are not adjudicating any individual claim on merits and left such claims to be examined in appropriate proceedings. It is evident from the judgment that the Division Bench did not doubt the correctness of the principles laid down in Kumari Varma''s judgment but, on the other hand, has, for the above reason, only declined to adjudicate the individual claims and left those issues to be adjudicated in appropriate proceedings. Therefore, this judgment of the Division Bench does not in any manner dilute or reduce the precedent value or binding force of the judgment in Kumari Varma''s case nor did the Bench doubt the correctness of the principles in Kumari Varma''s judgment. We also found that nothing has been stated in the judgment of the Division Bench which runs counter to the principles laid down in Kumari Varma''s case for us to doubt the correctness of either of the two judgments.

20. However, placing reliance on the judgment of the Full Bench of this Court in Raman Gopi and another Vs. Kunjuraman Uthaman, (2011) 4 ILR (Ker) 155 , learned Special Government Pleader contended that in case of conflicting views taken in the decision of two Benches of equal strength, the decision later in point of time will prevail over the earlier one. We do not think this principle is of any relevance because, for this principle to apply, we should first be satisfied that there is a conflict in the views expressed in the two Division Bench judgments referred to above. Not only that we do not find any such conflict, we also do not appreciate this contention now raised by the learned Special Govt. Pleader because, if, according to him, Kumari Varma had laid down any principle which required to be reconsidered, the Government being a party to both cases, should have canvassed the same before the Division Bench which decided W.P. (C) No. 18134 of 2006 and connected cases and requested for a reconsideration of the principles in Kumari Varma. The judgment of the Division Bench in W.P. (C) No. 18134 of 2006 and connected case does not show that any such contention was even raised by the State. In such circumstances, it is uncharitable for the State to now contend that the judgment of the Division Bench in W.P. (C) No. 18134 of 2006 has laid down some principle which

is contrary to Kumari Varma''s case and therefore, the latter judgment should be followed.

21. We have already found that facts of the case of the appellant are entirely similar to the facts considered in Kumari Varma''s case. We fully endorse the principles laid down by the Bench in that judgment and we also do not see anything in the judgment in W.P. (C) No. 18134/2006 and connected cases, which is contrary to the view taken in Kumari Varma and the Bench has also not doubted the correctness of Kumari Varma. As in the case of Kumari Varma, here also, as on 10.05.1971, 440 acres was found to be plantation and remaining 90 acres were found to be used for ancillary purposes. This factual finding recorded by the Forest Tribunal has become final and binding on the State which was also a party to the litigation under Act 26 of 1971. As held by the Apex Court in C.R. Neelakandan and Another Vs. Union of India (UOI) and Others, AIR 2014 SC 2407 : (2014) AIRSCW 3178 : (2014) 6 JT 260 : (2014) 6 SCALE 380 what has been found as a fact by judicial determination cannot be declared otherwise even by a legislation. By an illegal declaration that as on 10.05.1971 the plantation was a private forest, the owners were prevented from managing and maintaining the plantation. After the termination of the litigation, the land was restored to its owners only on 07.06.1997, as is evident from Ext. P10 certificate. Respondents do not even claim to have maintained the plantation during the intervening 26 years when it was in the custody and control of the State. Therefore, the natural growth that has occurred in the land during this period cannot be made use of now by the State to contend that the plantation has become a forest as on 2.6.2001, the appointed day under Act 21 of 2005. Respondents also do not have a case that the land has become a forest during the period 7.6.1997 when it was restored to the owners and 2.6.2000, the appointed day under Act 21 of 2005 and therefore, is an ecologically fragile land as defined in Act 21 of 2005. In such circumstances, we are absolutely certain that such a land cannot, in the light of the facts noticed and the principles laid down by this Court in Kumari Varma''s case, be notified as an ecologically fragile land as defined under Act 21 of 2005 to vest under Section 3 thereof.

22. In the aforesaid circumstances, the appellant is entitled to succeed. The judgment of the learned Single Judge is set aside and the writ petition is allowed as prayed for. The property of the appellant and the other co-owners notified as per Annexure R5(b) will be restored to its owners within 2 months of receipt of a copy of this judgment.

Writ appeal is allowed as above.