IN THE COURT OF THE DISTRICT JUDGE, KOZHIKODE.

Present:- Sri.A. Sankaran Nair, B.A., LL.M.,

1st Addl. District Judge,

Monday, the 31st day of October, 2016.

O.A No. 03/2013

Between:

1.	K.N. Venkateswaran, Aged 48 years S/o late K.V. Narayanan Iyer T.C. 23/805 'Sivaprasad' Valiyasala Street Trivandrum.	}Applicants
2	Unni Franciz, aged 27 years S/o T.K. Francis, Thalappillil house B street, Manantoddy,Wayanad District 670645	}
3	Tonny Francis, Aged 24 years S/o T.K. Francis, Thalappillil house B street, Manantoddy,Wayanad District 670645	}

And

1	The Govt. of Kerala represented by the Chief Secretary to the Government of Kerala, Thiruvananthapuram.	}Respondents
2	The custodian of Ecologically Fragile Land vested in Government(The Principal Chief Conservator of Forests,) Forest Head Quarters, Vazhuthakkad Thiruvananthapuram	}

This Application coming on the 25th day of October, 2016 for final hearing before me in the presence of Sri. Leo Bhagianath, Advocate for the petitioner and of Sri. A. Anoop Special Government Pleader for the respondents and having stood over to this day for consideration the court passed the following:

ORDER

This is an application filed under section 10(1) of the Kerala Forest(vesting and management of ecologically fragile lands) Act-2003(hereinafter referred to as '**the Act-2003**'), and Rule 7 of the Kerala Forest(land and management of ecologically fragile lands) Tribunal Rules-2006(hereinafter referred to as '**the Rules-2007**').

1. The applicants' case in brief is as follows: The applicants purchased the application schedule property by virtue of document Nos.2625/2008, 2626/2008, 2393/2008, 2394/2008, 2395/2008, and 2396/2008 of SRO, Vellamunda. The property is under the personal cultivation of the applicants. They have cultivated coffee, pepper, vanila, jack, mango etc; in the property. The cultivation was there much prior to 02-6-2000-the appointed day. The total extent of the land is 10.36 acres. It is not an ecologically fragile land vested in government. There is also a residential building in the property, and a pond nearby. The land is principally covered with coffee, pepper, vanila, and other fruit-bearing trees. Originally, the property belonged to one Pathu, Kunhamina, Kadeesa, Imbrayi Haji, Muhammed Haji, Palliyal Moidu Haji, Ali Haji, and Avulla Haji. They assigned the property to Narayanan Nambiar,

Rukmini Amma, Ramachandran Nambiar, Bharathi Amma, Lakshmikutty Amma, Raghavan Nambiar, Krishnan Nambiar, Kunhunni Marar, Narayana Menon, and Somasekhara Menon by virtue of document Nos.264/1966, 416/1966, and 417/1968 of SRO, Mananthavady. Thereafter, Narayanan Nambiar and others assigned their right over the property to Puthiyaveettil Bharathi Amma, Raghavan Nambiar, Narayana Menon, and Somasekhara Menon as per release deed No.1735/1968 of SRO, Mananthavadi. Thereafter, Bharathi Amma and others assigned their right over the property to Antonykutty as per janmam assignment deed No.2048/1968 of SRO, Mananthavady. Later, Antonykutty obtained release of the property from the custodian of vested forests, Palakkad as per reference No.VFC/74/23(136) dated 21-8-1978. Thereafter, Antonykutty assigned the property to Imbichi Ammad as per assignment deed No.2961/1978 of SRO, Mananthavady. Later, Imbichi Ammad assigned the property to Abdul Majeed and Hassan Koya as per registered janmam assignment deed No.163/1990 of SRO, Vellamunda. Abdul Majeed assigned the property to Pulikuzhiyil Abdul Majeed as per assignment deed No.73/1995 of SRO, Vellamunda. Hassan Koya and Abdul Majeed assigned part of the property to Mariyam, Mini, and Sajanas as per document No.530/2002 of SRO-Kalpetta, and another part to Vineesh as per document No.531/2002 of SRO, Kalpetta. Vineesh assigned the property to Marakkar Haji as per document No.1587/2005 of SRO, Vellamunda. Mariyam, Mini, and Sajanas assigned the property to Sajeevan as per assignment deed No.920/2004 of SRO, Vellamunda. Mariyam, Mini, and Sajanas assigned part of the property to Amjith Khan as per assignment deed No.919/2004 of SRO, Vellamunda and another portion to Shaji as per document No.921/2004 of SRO, Vellamunda. Amjith Khan assigned the property to Joshi.K.C. as per janmam assignment deed No.1200/2004 of SRO, Vellamunda. Thereafter, Marakkar Haji, Sajeevan, Joshi.K.C., and Shaji.P.K. assigned the property to Dileep as per janmam assignment deed No.190/2006 of SRO, Vellamunda. It was thereafter, the applicants purchased the property as per the documents mentioned earlier.

2. The applicants had been enjoying the property by doing agricultural operations, paying revenue, tax etc;. Later onwards, the revenue authorities refused to collect tax stating that the property has been notified as ecologically fragile land as per Notification No.EFL-10-1304/2011 dated 22-10-2011. They received notice from the respondents regarding the vesting on 12-02-2013. The applicants filed a petition before the forest officials to exclude their property from the notification. The forest officials directed the applicants to file an application before this Tribunal. The notification was not placed before the advisory committee constituted under section 15 of the Act-2003. The notification is also invalid as the same was not published in seven offices and two newspapers as envisaged in the Rules-2007. So, the prayer is for a declaration that the application schedule property is not an ecologically fragile land vested in government and to set aside the impugned Notification.

3. The respondents appeared before this Tribunal and filed a joint-written statement raising the following contentions: The application is not maintainable. An extent of 4.1949 hectares of land comprised in survey No.579 of Vellamunda village was notified as ecologically fragile land under section 3(1) of the Act-2003 as per Notification No.EFL 10-1304/2011 dated 22-10-2011. The notification was published in Kerala Gazette No.45 dated 15-11-2011. The application schedule property is a thickly wooded area having abundant growth of various forest species of trees and it is a habitat of wild

animals, birds, and reptiles. There was not even a single planted tree or cultivated crop in the property as on 02-6-2000. It is an ecologically fragile land. The contention of the applicants that there are coffee, pepper, vanila etc; in the property is not correct. The property is surrounded by forests in all the four sides. It predominantly supports natural vegetation. The applicants are not entitled to get the reliefs of declaration and set aside the notification.

4. Now the points for consideration in this case are as follows:

(i). Whether the 2nd respondent is justified in notifying the application schedule property as ecologically fragile land vested in government by issuing Notification No.EFL 10-1304/2011 dated 22-10-2011?.

(ii). Whether the respondents have violated section 3(2) of the Act-2003?.

(iii). Whether the applicants are entitled to get the said Notification No.EFL.10-1304/2011 dated 22-10-2011 set aside and get a declaration as prayed for?.

(iv). What order as to reliefs and costs?.

5. The evidence in this case consists of the proof-affidavit, oral testimony of PW1, and Exhibits A1 to A22 on the side of the applicants, and the proof-affidavit, oral testimony of RW1, and Exhibits B1 to B6 on the side of the respondents. The reports of the commissioner, plans prepared by the surveyor, and the report of the expert have been marked as Exhibits C1 to C5.

6. Heard both sides.

7. **Point No.(i)** :- The application schedule property was notified as ecologically fragile land vested in government by the 2nd respondent as per Notification No.EFL 10-1304/2011 dated 22-10-2011. The case of the

applicants is that it is not an ecologically fragile land vested in government which predominantly supports cultivation such as coffee, pepper, vanila etc;. The respondents would deny the contention. According to the applicants, they obtained the property as per Exts.A1 to A6 title deeds. The execution of Exts.A1 to A6 is not disputed. The title of previous owners also not disputed. Further, the title of the property is not very much in issue in this proceeding. The question is only whether the application schedule property is an ecologically fragile land or not?.

8. To support the case of the applicants, on their side, PW1 has been examined. In the proof affidavit filed by PW1, he would reiterate the case of the applicants. The applicants have got a case that there was a proceeding before the 2nd respondent. As per the proceeding, the custodian ordered to restore the application schedule property to its previous owner Antonykutty on 21-8-1978. This fact is admitted in paragraph 11 of the written statement filed by the respondents. Ext.A18 is the copy of the order passed by the custodian. Item No.14 in Ext.A18 is with respect to the application schedule property. As seen from item No.14 of Ext.A18, a property measuring 10½ acres of land comprised in resurvey 578, 579, 588, and 590 of Vellamunda village has been exempted from vesting in the government as per the provisions of the Kerala Private Forests(vesting and assignment) Act-1971(hereinafter referred to as **'the Act-1971'**). The stand taken by the respondents is that the exemption of the property from the provisions of Act-1971 will not stand in the way of the 2nd respondent notifying the land as ecologically fragile land. The argument of the learned counsel for the applicants is that once the land is exempted from the provisions of the Act-1971, it cannot be notified by invoking the provisions of the Act-2003. To canvass his argument, the learned counsel for the applicants

would rely upon the Judgment of the Honourable High Court of Kerala in State of Kerala v. Kumari Varma reported in 2011(1) KHC 502(Equal citation: 2011(1) KLT 1008). It was observed in this decision that once the property is exempted from the purview of the Act-1971, the government is not justified in notifying the very same land invoking the provision of section 3(2) of the Act-2003. The learned counsel for the applicants also placed reliance on the Judgment of the Honourable High Court of Kerala in Kunhiraman.T.V. and others v. Custodian of vested forests and others reported in 2014(3) KHC 782. It was observed in this decision that once a property was exempted from the purview of the Act-1971, it cannot be notified under section 3(2) of the Act-2003. In this context, it is also relevant to note the recent Judgment of the Honourable High Court of Kerala in Planters' Forum v. State of Kerala reported in 2015(2) KLT 783. It was held in this decision as follows:

> *"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.".*

In my view, these decisions squarely apply to the facts of the present case. Admittedly, the application schedule property was exempted from the purview of Act-1971 as per Ext.A18 order passed by the custodian. That being so, the custodian is not justified in issuing the impugned notification under section 3(2) of the Act-2003.

9. It was argued by the learned counsel for the applicants that even if the property was not exempted from the provisions of Act-1971, the custodian is not justified in notifying the land as ecologically fragile one. The argument of the learned counsel is that as on the appointed day i.e; 02-6-2000, the application schedule property was a garden raising crops like coffee, pepper, vanila etc;. To report about the nature of the property, a commission was taken out. The commissioner filed Exts.C1 report, C2 plan, C4 additional report, and C5 sketch. An expert was deputed to assist the commissioner. The expert so deputed filed Ext.C3 report. In Ext.C1 report, the commissioner would say that in the application schedule property measuring 10.36 acres comprised in survey No.579, he could find more than hundred coffee plants, two areca plants, two coconut plants, lemon-grass, and also an old tiled house and basement of an old building. In Ext.C3 report, the expert also would say that she could find about hundred coffee plants of fruiting age, pepper-wines on trees like Murikku and Pezhu. An objection was filed by the respondents against the report filed by the commissioner. The objection is that the observation made by the commissioner regarding pepper-wines and coffee plants is not correct. According to the respondents, the coffee trees found in the property are of spontaneous growth and were not planted by anybody. In the proof affidavit filed by PW1, it is specifically stated that those plants were planted by the predecessor of the applicants, and were maintained by the applicants. Though one witness was examined on the side of the respondents as RW1, his evidence is of no use to the respondents in this respect. He would admit that he saw the property for the first time in the year 2016. So, he cannot have any information regarding the lie of the property as on the appointed day

i.e; 02-6-2000. So, between the evidence adduced by the applicants and the respondents, the evidence of the applicants is convincing. That being so, the case of the applicants that coffee plants were there in the property as on the appointed day appears to be more probable.

10. The applicants have also got a case that there is a building in the property. Both the commissioner and the expert have mentioned about the existence of a building and also a basement in the property. The existence of the building speaks very much against the case of the respondents that the application schedule property is an ecologically fragile land vested in government. In this context, the learned counsel for the applicants have relied upon the definition of the word 'forest' in the Act-2003. Section 2(c) of the Act defines 'forest' as ***"any land principally covered with naturally grown trees and undergrowth and includes any forest statutorily recognized 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 site of residential buildings and surroundings essential for the convenient use of such buildings.".*** So, the application schedule property wherein there is a building and basement of another building cannot be treated as an ecologically fragile land vested in government. In this context, it is also relevant to note the Judgment of the Honourable High Court of Kerala in Kumari Varma's case supra. It was observed in the said decision that the custodian is not justified in notifying any land as ecologically fragile if it is not a forest land.

11. The applicants have also got a case that there is a pond in the property and they are doing fish farming therein. To prove that the applicants

were doing fish farming in the pond, they have produced Ext.A19 copy of the proceedings of the Chief Executive Officer of Wayanad Malsya Karshaka Vikasana Agency. The name of the 2nd applicant is shown against serial No.36 in Ext.A19. The existence of the pond is also not disputed. The case of the respondents is that the pond was naturally formed and no fish farming is being conducted. The evidence of PW1 coupled with Ext.A19 document supports the case of the applicants.

12. It is true that on the boundaries of the application schedule property, there are vested forests. Only for the reason that the application schedule property is encircled or adjoining to the government forest, the custodian is not justified in notifying the land as ecologically fragile. 'Ecologically fragile lands' are defined in section 2(b) clause (i) of Act 21 of 2005 as follows: It means ***"Any forestland 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 forestland owned by the Government and predominantly supporting natural vegetation.".***

13. From the above definitions of 'forest' and 'ecologically fragile land', what can be discerned is that to declare a land as 'ecologically fragile land', and notify under section 3(2) of the Act-2003, the following conditions have to be complied with:

(a) it should be a forest land;

(b) the land or any portion thereof should be lying contiguous or encircled by a reserved forest, or vested forest, or any other forest, and owned by the government;

(c) the land should predominantly support natural vegetation.

14. It has come in evidence that on the three boundaries of the application schedule property, there is vested forest. So, one of the conditions is satisfied. It has already been found that in the application schedule property, there are coffee plants, pepper-wines etc;. Of course, the commissioner and the expert appointed in this case would say that there are wild trees in the property. The case of the applicants is that wild trees are maintained in the property as shade trees for coffee plants and therefore, the existence of wild trees cannot be taken advantage of by the respondents to notify the land as ecologically fragile land. In Ext.C3 report, the expert would say that there are trees like Chembakam, Veetti, Nelli, Chadachi, Nhaval, Kunni, Edanna etc; in the property. In the light of the explanation given by PW1 that these trees are maintained in the property for providing shade to the coffee plants, the case of the respondents that the land predominantly supports natural vegetation cannot be accepted. So, I find that the 2nd respondent is not justified in notifying the application schedule property as ecologically fragile land vested in government. This point is so found.

15. **Point No.(ii)** :- According to the applicants, the impugned notification was not placed before the advisory committee constituted under section 15 of the Act-2003 and thereby violated the mandatory provision. In the written statement filed by the respondents, they have no case that they had placed the notification before the advisory committee. Further, when specific question was put to RW1-the witness examined on the side of the respondents, he would pretend ignorance before this Tribunal that the notification was not placed before the advisory committee as required under section 3(2) of the Act-2003.

16. The applicants have also got a case that the notification was not published in seven offices and two newspapers. When specific question was put to RW1 in the cross-examination, he would say that Ext.B1 notification was exhibited in seven offices and published in two newspapers. But it is important to note here that no evidence has been produced before this Tribunal in this regard. So, the case of the respondents cannot be accepted. So, I find that the respondents have violated the provision contained in section 3(2) of the Act-2003. This point is answered in favour of the applicants.

17. **Points (iii) and (iv)** :- In view of the findings on points (i) and (ii) as above, the applicants are entitled to get a declaration that the application schedule property is not an ecologically fragile land vested in government and the impugned notification set aside. These points are answered accordingly.

In the result, this application is allowed and it is hereby declared that the application schedule property covered by the impugned Notification No.EFL.10-1304/11 dated 22-10-2011 is **'not an ecologically fragile land vested in government'** under section 3(1) of the Act-2003(Act 21 of 2005), and the said notification is hereby set aside. No costs.

(Dictated to the Confidential Assistant, typed by him directly, corrected by me, and pronounced in open Court on this the 31st day of October-2016).

THE TRIBUNAL(ADDITIONAL DISTRICT JUDGE-I)
KOZHIKODE.

Petitioner's Witness

P.W.1 : Unni Francis.

Petitioner's Exhibits:

A1	26-9-2008	:	Attested copy opf Janmam Assignment deed (Document No. 2394/2008)
A2	-do-	:	Attested copy of janmam assignment deed (Document No. 2395/2008)
A3	-do-	:	Attested copy of janmam assignment deed (Document No 2396/2008)
A4	25-10-2008	:	Janmam assignment deed (Document No 2625/2008)
A5	25-10-2008	:	Janmam assignment deed (Document No 2626/2008)
A6	26-9-2008	:	Janmam assignment deed (Document No 2393/2008)
A7	12-2-2009	:	Ownership certificate issued from Vellamunda Village Office (No. 131/09/Vo)
A8	12-2-2009	:	Ownership certificate issued from Vellamunda Village Office (No. 132/09/Vo)
A9	19-2-2009	:	Photo copy of ownership certificate issued from Vellamunda Village Office (No. 156/09/Vo)
A10	26-4-2011	::	Tax receipt (8385993) from Vellamunda Village Office
A11	29-4-2011	::	Tax receipt (8385994) from Vellamunda Village Office
A12	26-4-2011	:	Tax receipt (8385995) from Vellamunda Village Office
A13	-do-	:	Tax receipt (8385996) from Vellamunda Village Office
A14	-d0-	:	Tax receipt (8385997) from Vellamunda Village Office
A15	-do-		Tax receipt (8385998) from Vellamunda Village Office
A16	14-11-2012		Photo copy of letter to the Village Officer Vellemunda Village
A17	Nil	:	Photo copy of letter from the Village Officer Vellemunda Village
A18	26-4-1995		Photo copy of order passed by the custodian
A19	30-7-2013	:	Copy of the proceedings of the Chief Executive Officer of Wayanad Malsya Karshaka Vikasana Agency
A20	24-11-2012		Photo copy of Indian Income Tax Return Verification form of Unni Francis for the year 2012-13
A21	25-7-2011	:	Photo copy of Indian Income Tax Return Verification form of Unni Francis for the year 2011-12
A22	13-3-2008	:	Photo copy of Indian Income Tax Return Verification form of Unni Francis for the year 2007-2008

<u>Respondent's Witness</u> :

RW1 : P.Ravi, Range Forest Officer, Mananthavady

Respondent's Exhibits		:	
B1	22-10-2011	:	Attested copy of Notification(No. EFL 10-1304/11) published by forests and Wild Life Department, Government of Kerala
B2	22-10-2011	:	Attested copy of Kerala Gazate notification (No. EFL 10-1304/11
B3	Nil	:	GPS Sketch of the schedule property
B4	Nil	:	Photographs(2 Nos)
B4(a)	Nil	:	Photographs(2 Nos)
B4(b)	Nil	::	Photographs(2 Nos)
B4(c)	Nil	:	Photographs(2 Nos)
B4(d)	Nil	:	Photographs(2 Nos)
B4(e)	Nil		Compact Disc.
B5	Nil	:	Attested copy of list of Flora
B6	Nil	:	Attested copy of list of Fauna.
Court Exhibits		:	
C1	17-7-2014	:	Report submitted by the Advocate commissioner in the matter
C2	9-6-2016	:	Plan prepared by Surveyor Mananthavady
C3	26-5-2014	:	Report submitted by the expert appointed in the matter
C4	9-6-2016	:	Additional report submitted by the Advocate commissioner in the matter
C5	Nil	:	Sketch.

TRIBUNAL FOR EFL CASES/
1ST ADDL. DISTRICT JUDGE.

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Fair/copy of order in O.A3/2013
dated: 31-10-2016.