Legal Concepts supporting the need for Ecologically Fragile Lands Act – A Discussion : Sri. Ranjith Thampan, Additional Advocate General, High Court of Kerala

Material for preparing Counter Affidavit in Case challenging the EFL Act

1. The creation of two categories of land which are being acquired in two different ways is not violating Article 14 because there is a distinction between the two categories of land. The first category is land which is ecologically fragile on account of it being forest land which is contiguous to forests. No compensation is being provided for the vesting of lands under Section 3(a) of the Act because no permanent improvements have been made by the petitioner to these lands and there is no requirement to pay compensation for the natural growth and vegetation that is present in these lands. Compensation is however provided for the lands being vested under Section 4(1) because these lands have been subject to permanent improvements and are not forest lands. Therefore, there exists a clear and subtle difference between the two categories of land that are being treated differently and therefore, no violation of Article 14 can be made out.

2. Majority of the lands that are to be vested under S. 3(a) of the Act have already been notified and the list of such lands has been published in the gazette. This clearly shows that the fear of the petitioners that the power under S.3 will be used arbitrarily is groundless. An advisory committee consisting of highly qualified technical officers and including representatives of NGOs has been constituted in order to recommend the lands that are to be taken over under S.4 of the Act. Clear guidelines have been laid down in the statute as regards the grounds for declaring lands as ecologically fragile under S.4(2). Lands will be taken over only on the basis of the recommendation made by this Committee. The factual basis of such a recommendation can also be challenged before the Tribunal that has been set up under the Act.

3. It is necessary to keep in mind a few facts both at the state and national level in order to understand the context in which the Act has been enacted. The total extent of the forest area in the State of Kerala is 9336 Sq. Km. as per the Survey of India Report 1993; the forest area as per Government records is 11221 Sq. Km. However, the effective forest area in the state is only 9400 Sq. Km. Therefore, the percentage of effective forest area to the land area is only 24.12% as compared to the ideal percentage of 33%. This is inclusive of the plantation raised in the forests. The plantation industry has actually wreaked havoc on the

fragile ecology of the Western Ghats as these crops have been planted after felling forests. This has also denuded the fertility of soil and will accelerate water and soil run-off in the area further hurting the fragile ecology of the region. It is also to be noted that many ecologically fragile areas in the State are under private ownership or under illegal possession. The resulting overexploitation and unsound management of resources therein has led to irreversible degradation of social, economic and ecological stability of the state. It is in this context that the Government has passed the Ecologically Fragile Lands Act to bring the ecologically fragile lands under the ownership of the State and to ensure proper management of such lands with a view to maintain ecological balance and to conserve bio-diversity for the welfare of the society and of the nation at large.

4. The Constitution imposes upon the State a duty to protect the ecology. This is reflected in Article 48 of the Constitution where the State is asked to take all measures to protect the environment as a Directive Principle of State Policy. The Constitution also imposes a Fundamental Duty upon every citizen to protect the environment in Article 51-A. the passing of the Ecologically Fragile Lands Act by the Kerala Legislative Assembly is only an attempt by the Government of Kerala to fulfill the duty imposed on it by recent judgments of the Supreme Court of India as well as an attempt to fulfill the Constitutional obligations imposed on it by the Constitution of India.

5. This legislation is also an attempt to fulfill the contents of the National Forest Policy 1952, as well as the revised National Forest Policy, 1988. The National Forest Policy 1952 calls for the nationalization of forests and forest resources as one of the major goals to be pursued by the State in its attempt to protect the forest wealth of our nation. In pursuance of this, the Government of Kerala had enacted the Private Forests Vesting Act of 1971. The revised National Forest Policy of 1988 lays great emphasis on the protection of the ecologically sensitive areas. Section 2.1 states as one of the basic objectives the maintenance of environmental stability through preservation and, where necessary, restoration of the ecological balance that has been adversely disturbed by serious depletion of the forests of the country. Section 3.1 calls upon the Government to protect and preserve all the existing forests and forest lands.

6. India is a signatory to various international conventions that enjoin upon the country a duty to protect and preserve the environment and the ecology. These conventions include the RAMSAR Convention on Biological Diversity, 1971 and the World Charter for Nature, 1982. As a signatory to the Convention for Biological diversity, our nation has a responsibility to conserve the biological resources for the sustained economics and social development of the society and for the maintenance of ecological stability. Article 14 of the World Charter for Nature enjoins upon the signatories that the principles of natural

conservation should be reflected in the law and practice of each signatory state. It is also important to note that the International Union for Conservation of Nature and Natural Resources has identified the Western Ghats as one of the most important Biodiversity Hotspots in the world and therefore, their protection becomes a matter of even more importance. The impunged Act is therefore a step in the right direction as far as fulfilling the international commitments of our nation is concerned. Article 2 of the Stockholm Declaration on Human Environment casts a duty upon all governments to preserve and protect the environment. Principle 11 of the Rio declaration on Environment and Development 1992 casts a duty upon all governments to enact effective environmental legislation.

7. The Committee on Identifying Parameters of Designing Ecologically Areas in India in its report has stated that all the areas which are designated as ecologically sensitive deserve to be protected without any additional factor or consideration being brought in. This protection has been declared to be both feasible under law and desirable under ecological considerations.

8. The Committee under the chairmanship of Dr. Pronab Sen has identified several ecological fragile areas in Kerala which are in urgent need or protection. These include the 'Frontier Forests' of the Agasthyamalai hills; the Shola Forest of the Southern Western Ghats which have been characterized as an area with intrinsically low resilience; the tropical hill valley forests of the Wayanad forest division has been declared to be a specialized ecosystem as has been the *Myristicia* swamp forests of Travancore; the Western Ghats has also been found to be a home of the endangered plant species *Meteoromyrius Wynadensis* of the family Myrtaceae and have also been found to have certain endemic species like *Adhaatoda beddomei* a plant species belonging to family Acanthaceae and *Macaca silenus* (Nilgiri Langur) of family Cercopitahecidae which are not found anywhere else in the world. It is with an objective of protecting this treasure house of ecological wealth that the Ecologically Fragile Lands Act has been passed by the state government.

9. The passing of the EFL Act is also in tune with the recent pronouncements of the Supreme Court in the field of ecology. In its landmark decision in M.C. Mehta v. Kamalnath – 1997 (1) SCC 388, the Hon'ble Supreme Court of Indian has ordered that natural resources such as forests, rivers etc shall be conserved as public trust for the welfare of the society at large. This has come to be known as "Public Trust" doctrine. This doctrine is based on a principle of Ancient Roman Law that certain common properties such as forests, rivers, seashore and the air were held by the Government in trusteeship for the free and unimpeded use of the general public. The doctrine stipulates that the said resources are a gift of nature and therefore should be made available to everyone irrespective of status in life. The doctrine enjoins upon the

Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. According to Professor Sax of the University of Michigan in his article[1] the Public Trust Doctrine imposes three duties on the government: first, the property subject to the trust must not only be used for a public purposes but it must be held available for use by the general public; second, the property may not be sold, even for fair cash equivalent; and third, the property must be maintained for particular types of use. The Court also declared that ***"the aesthetic use and the pristine glory of our natural resources, the environment and the eco-systems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith for the public good and in the public interest to encroach upon the said resources."***

10. The Court while incorporating the Public Trust Doctrine into Indian law has also taken note of emerging trends in other countries especially the United States. The courts in the United States have increasingly adopted the use of the 'Public Trust' doctrine to protect the natural environment from the hands of commercial predators. In the case of National Audubon Society v. Superior Court of Alpine Country[2], the Supreme Court of California relied upon the 'Public Trust' doctrine to prevent the use of the waters of streams running into a lake for the commercial production of electricity. In the case of Phillips Petroleum[3], a law by the State of Mississippi taking over the state's tidal lands was upheld by the United States Supreme Court. Thus it is clear that the 'Public Trust' doctrine is increasingly being used throughout the world as a tool to enable the state to fulfill its duty of protecting the environment in a better manner. The passing of the Ecologically Fragile Lands Act by the Kerala Legislative Assembly is thus in consonance with the Supreme Court's verdict on the point as well as in agreement with international practice as regards the protection of the environment and represents an attempt by the legislature to protect the state's fragile ecology before it is irreparably destroyed.

11. The Supreme Court in recent judgments has reaffirmed the importance and place of the 'Public Trust' doctrine as regards environmental protection in India. The cases of Intellectual Forum v. State of Andhra Pradesh[4] and Suseetha v. State of Tamil Nadu[5] point to this. The Supreme Court also has held in the case of Godavarman Thirumalpad v. UOI[6] that the Constitution

[1] "Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention", *Michigam Law Review*, Vol 68, Part I.
[2] 33 Cal 3d 419.
[3] 108 SCt 791 (1988).
[4] 2006 (3) SCC 549.
[5] 2006 (6) SCC 543.
[6] 2006 (1) SCC 1.

imposes a duty upon the state to protect the environment. The Supreme Court has also stated that the State has a duty to protect the environment and to forge its policy to maintain the ecological balance and a hygienic environment in the case of M.C.Mehta v. UOI[7]. The Hon'ble High Court has also laid down the guidelines to be followed by Governments in order to protect the fragile ecology of our nation and has held that the principle of sustainable development and the precautionary principle as laid down in the Convention on Biological Diversity in the case of Godavarman Thirumalpad v. UOI[8]. The principle that has been used by the Court is that the state is the trustee of the natural resources and has a fiduciary relationship with the people and has to be loyal to the interests of the citizens.

12. The impunged act does not violate Article 19(1)(g) of the Constitution of India because Article 19(6) allows for the imposition of reasonable restrictions and a restriction for the protection of the environment and to follow the judgment of the Supreme Court surely falls within the category of reasonable restrictions.

13. Article 21 provides for the protection of life and liberty of persons and the impunged Act does not affect this right of the petitioners in any manner whatsoever.

14. Article 300A protects the deprivation of property of a person except by means of a valid law. The impunged Act has been passed by the Kerala Legislative Assembly and has received the assent of the President of India and is therefore a valid law. Therefore, the right of the petitioners under Article 300A have not been violated.

15. The Legislature has got the competence to pass the Act under Entry 17A of the Seventh schedule which reads as 'forest.' The Act covers a different subject matter from those covered in the Wildlife Protection Act 1972 and the Forest Conservation Act, 1980 and therefore, repugnancy does not arise.

16. The contention that this is a piece of colourable legislation designed to frustrate the judicial verdict in certain cases nullifying the vesting of lands as per the Kerala Private Forest (Vesting) Act is also not true because the purposes of the two acts are entirely different. The first Act was to provide for the redistribution of forest land for agricultural purposes during a period of acute food shortage in the country while this Act is to provide for the protection of ecologically fragile lands in the state by ensuring that the ecologically fragile lands are not disturbed and are given the status of the reserved forests. The impunged Act also cannot be treated as colourable legislation because the State

[7] 2004 (6) SCC 588.
[8] 2002 (10) SCC 606.

has legislative competence to pass the Act and as per the judgment of the Supreme Court in the case of K.C.Gajapati Narayan Deo v. State of Orissa[9], a legislation can be called colourable legislation only if it is trying to achieve something which is beyond the competence of the state legislature. In this case, it is only trying to achieve the protection of the ecologically fragile lands, which is within the competence of the state legislature.

[9] AIR 1953 SC 375