



**KERALA FOREST (VESTING AND MANGEMENT OF ECOLOGICAL FRAGILE
LANDS) ACT 2003:**
TRUE SCOPE AND CONTENT

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Western Ghats are to Kerala what Himalayas is to north India. Gangotri glacier is one of the most important glaciers in Himalaya. Gangotri glacier feeds river Ganga. Once Gangotri glacier disappears, the whole Ganga River will go dry. The glaciers in Himalaya are fast receding due to global warming. Forests in Western Ghats perform water shed function sustaining the life of 300 million people living in the peninsular Indian States that receive most of the water supply from rivers originating in the Western Ghats. Once the forest cover in the Western Ghats are destroyed the entire Indian peninsular state would go dry. Sustenance of Forest therefore does not need over emphasis from the point of view of global warming and from the point of its water shed function. The problems relating to forest, wild life, ecology and environment is therefore a very serious one not only for the present generation but also for the coming generations.

1. What is 'ecologically fragile land'

The concept originated in common law. It denotes the right of the people at large over the land of another. A person who uses another persons land over a long number of years uninterruptedly has easement right over the land by way of easement. It is called easement by prescription. The former has no title to the land. He right is only to use the land of the latter. The latter's title to his land does not prevent the use of his land by the former, by way of prescription. Right to way over the land of another is an example. Similarly, the right of the people in the ecologically fragile land though they do not have title to the land is an easementary right. It is called public trust easement. Originally the concept of public trust easement had applied in the matter of navigable waters like rivers. Originated in Roman Law the concept found its way to English Law and then to American Law. The concept is now followed in almost all democratic countries in the world and is now part of Customary International Law. Earlier English decisions generally assumed the public trust was limited to tidal waters and the lands exposed and covered by the daily tides. However, a departure was made in **Mark v. Whitney (6 Cal.3d 251)** by Californian Supreme Court holding that 'waterway usable for pleasure boating is nevertheless a navigable waterway and protected by the public trust. In **National Audubon Society et al Vs. The Superior Court of Alpine County (33 Cal.3d 419)** popularly known as Mono Lake case, the Californian Supreme Court



held that the concept of public trust easement extends to non navigable rights as well. These decisions were relied on by the Supreme Court of India in **M.C.Mehta v. Kamalnath ((1997) 1 SCC 388)**. The Supreme Court of India has explained that 'Public Trust Doctrine' primarily rests on the principle that resources like air, sea waters and forest have a such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership and that the doctrine enjoins the government to protect the natural resources.

In **Rural Litigation & Entitlement Kendra vs. State of U.P. (AIR 1989 SC 594)** our Supreme Court banned quarrying activities in the ecologically fragile Shivalik ranges of Himalaya. The ban was ordered in spite of the fact that the land belonged to private parties. Supreme Court of India held that people have a right to benefit from ecologically fragile land and the State has a duty to protect that right. In **S. Jagannath vs. Union of India (AIR 1997 SC 811)** our Supreme Court held that coastal areas of Andhra Pradesh and Tamil Nadu are ecologically fragile and banned shrimp farming by construction of pond and other infra structure for the reasons that it would degrade ecology, coastal environment and aesthetic uses of sea coasts. In all these cases the Supreme Court held that right to pollution free environment is a fundamental right of the people under Article 21 of the Constitution of India. The Supreme Court of India also read Article 48A of the Constitution of India which enjoins the Government to protect environment and ecology into Article 21 of the Constitution of India and held that right to environment, protection of ecology, forest and wildlife constitute a part of fundamental right of the people under Article 21 of the Constitution of India. This was based on the principle that right to life guaranteed under Article 21 of the Constitution is not mere life of animal existence but a dignified life with due human dignity. Right to breathe free air and to live in pollution free environment is a right to live with human dignity and there a fundamental right under Article 21 of the Constitution of India. The Supreme Court also held that every citizen in India has a fundamental duty under Article 51A to protect ecology and environment.

In **T.N.G. Tirumulpad v. Union of India ((2002) 10 SCC 606)** the Supreme Court of India categorically held that 'public at large is the beneficiary of ecologically fragile land'. Supreme Court used the word 'ecologically fragile land' to denote a land which supports natural resources, that is a potential of the land to sustain natural resources like bio-diversity. Supreme Court also held that state has a duty to protect the right of the people to benefit from ecologically fragile land under 'Public Trust Doctrine'.

How to protect the right of the people to benefit from ecologically fragile land ?

In **Geogia v. Tennessee Copper (206 US 230 (1907))** the American Supreme Court held that police power of the State could be used to prevent noxious use of the property, that is use of property akin to public nuisance. That was a case where company was emitting toxic substance damaging the nearby forest. The Court said



that nuisance could be abated by the Government using its police power. In *Lucas v. South California Coastal Commission* (505 US 1003(1992)) the American Supreme Court held that state can regulate productive use of land to prevent environmental degradation and resultant public injury. That was a case where South California Coastal Commission had banned construction of building near to coastal areas. Those who had purchased small plots of land with the intention of construction of house had been prevented by the regulation from constructing any building in their private land. Court rejected the argument that the regulation preventing them from using the land for construction of house for which purpose they had purchased the land amounted to total prohibition amounting to take over the land. Court also said that Government could regulate user of ecologically fragile land for the benefit of the people. The construction of building would destroy the sand dunes resulting in ecological degradation which, it is the duty of the Government to prevent under "Public Trust Doctrine" and also held the duty include the duty to preserve the pristine aesthetical value of landscapes and lands having scenic beauty under right to 'scenic easement' of the people.

In India our Supreme Court read the right of the people to benefit from ecologically fragile land into fundamental right under Article 21 of the Constitution of India and held that the State has a duty to prevent user of the land to protect ecology and environment under Article 48A of the Constitution of India. The Court also held that the people of the country also have a fundamental duty under Article 51A of the Constitution of India to protect environment and ecology and therefore could not contend that regulation of user of ecologically fragile land could not be resorted since they have absolute right to use their land in whatever manner they wanted. The right of the people to be benefited out of ecologically fragile land is protected under Article 21 of the Constitution of India and the duty and power of the Government to protect such land flows from Articles 48A and 51 A of the Constitution of India.

Customary International Law and Ecological Fragile Land.

The law relating to ecological fragile land arises also from Customary International Law. The rule relating to customary international law is derived from the consistent conduct of states acting on the belief that the law is required to act that way. During the seventh decade of twentieth century onwards global community started realizing the importance of preserving environment and ecology and from the new born realization the various environmental common law has emerged. In other words, it is now widely recognized that problems relating to environmental pollution and ecological degradation is not a problem relating to any particular country but the problem of the world as a whole. A common agenda was therefore necessary to contain the problems caused by pollution. Global warming, disappearance of glaciers, degradation of forests etc. caused widespread disaster repercussions of which are far reaching and cut across state boundaries. The elements of customary international law could be described as follows :



1. wide spread repetition by states of similar international act over time;
2. act must occur out of sense of obligation
3. act must be taken by a significant number of states and not rejected by a significant number of States.

Most of these rules are now codified and are now international agreements and conventions. The most important international conventions regarding ecologically fragile lands are:

1. Ramsar Convention on Wet Lands
2. Convention on Biological Diversity
3. Man Biodiversity Programme
4. Convention Concerning the Protection of the World Cultural & Natural Heritage
5. UNESCO's Man & Biosphere (MAB) Programme

India is a signatory to these conventions and programme and is duty bound to implement the provisions of these conventions. Moreover, most of these conventions have been read into our domestic law by the our Supreme Court. For example, the Supreme Court in **T.N.G. Tirumulpad v. Union of India ((2002) 10 SCC 606)** has held that Convention on Bio Diversity is now part of our domestic law. It can thus be seen that the States have a duty to implement the international conventions not only under the Customary International Law but also under the Jud made law of the Supreme Court which in view of Article 141 of the Constitution of India is law of the land.

Convention on Bio Diversity.

Convention on Biological Diversity 1992 mandates the contracting parties to conserve biological diversity by *in situ* and *ex situ* conservation. '*In situ*' conservation has been defined as the conservation of ecosystems and natural habitats and the maintenance and recovery of populations of species in their natural surroundings. '*Ex situ*' conservation is defined as conservation of biological components outside their natural habitat. Article 8 of the Convention mandates every contracting party to establish protected areas or areas where special measures needs to be taken to conserve biological diversity and to rehabilitate and restore degraded ecosystems and promote the recovery of threatened species inter alia, through the development and implementation of plans or other management strategies (emphasis supplied). Article 8 of the Convention also mandates the contracting parties to 'develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations.

'*Ex situ*' conservation under Article 9 of the Convention mandates the contracting parties to adopt measures for the ex situ conservation of components of



biological diversity and to adopt measures for the recovery and rehabilitation of threatened species and for their reintroduction into their natural habitats under appropriate conditions.

Indian being a contracting party has a duty under the Customary International Law and also under the law laid down by the Supreme Court which is the law of the land to implement the provisions of the Convention on Biological Diversity and provide for 'in situ' and 'ex situ' conservation of bio diversity.

Convention Concerning the Protection of the World Cultural & Natural Heritage 1972

India is a signatory to this convention and has a duty to carry out the provisions of the Convention. The purpose of the convention is to protect and preserve Natural and Cultural Heritages. 'Natural Heritage' has been defined under this Convention as 'natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view' and 'geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation'. Western Ghat is considered one such natural heritage and has been included in the tentative list of World Heritage Sites. All world heritages are global assets belonging to the people of the world at large.

Under Article 4 of this Convention every contracting party 'has a duty to ensure the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritages situated in its territory and should do all it can to this end. The Government has therefore a duty to protect Western Ghats and conserve and preserve its bio diversity under customary international law.

UNESCO'S Man & Biosphere (MAB) Programme

Bio Sphere reserves are areas of territorial and coastal ecosystems which are internationally recognized within the frame work of UNESCO's Man & Biosphere (MAB) Programme. These reserves are required to meet a minimal set of criteria and adhere to a minimal set of conditions before being admitted to the World Network Biosphere Reserves designated by UNESCO for inclusion in the World net work of Biosphere Reserves. The world's major ecosystem types and landscapes are represented in this Network, which is devoted to conserving biological diversity, promoting research and monitoring as well as seeking to provide models of sustainable development in the service of mankind. These reserves are rich in biological and cultural diversity and encompass unique features of exceptionally pristine nature. The goal is to facilitate conservation of representative landscapes and their immense biological diversity and cultural heritage, foster economic and human development which is culturally and ecologically sustainable and to provide support for research, monitoring, education and information exchange. The scheme



is pioneering effort at pursuing the increasingly difficult yet urgent task of conserving ecological diversity under mounting pressures.

Agasthyamalai Biosphere Reserve is one of such Biosphere Reserve included in the World Net Work of Biosphere Reserves. Agasthyamalai Biosphere Reserve consists of three zones, namely, Core Zone, Buffer Zone and Transition Zone. The total area of the Biosphere is 3500.36 square kilometers of which 1828 square kilometers is in Kerala and the balance is in Tamil Nadu. The break up of 1828 square kilometers in Kerala is as follows:

- Core Zone: 352 square kilometers
- Buffer Zone: 691 square kilometers
- Transition Zone 785 square kilometers

The International Union for Nature and Natural Resources has issued guidelines with regard to the protected areas management providing various categories for the purpose of protection and maintenance of biological diversity. Following the guidelines, the Government of India has formulated protected area management categories as follows:

1. **Core Zone** : The Core Zone of the Biosphere Reserve will be kept free from all human pressures external to the system.
2. **Buffer Zone** : The manipulation activities, which may be permitted in the buffer zone, will be in conformity with general guidelines for management of the Biosphere Reserve.
3. **Transition Zone** : The State Governments will further demarcate the heavily populated/disturbed areas of buffer zone to be designated as transitional/restoration zone for priority intervention to restore/improve the general condition in accordance with the guidelines.
4. **Legal Status** : The Constitution of Biosphere reserve by itself will not in any way change the status of legal ownership of a land and forests nor affect the rights of tribal and local people in any way.

It can thus be seen that under the Customary International Law and the regulations framed by the Central Government, user of the land even in the hands of private individuals could be restricted by regulating the user.

The Kerala Forest (Vesting & Management of Ecologically Fragile Land) Act, 2003

On 27th July 2000, the Governor of Kerala promulgated The Kerala Forest (Vesting & Management of Ecologically Fragile Lands) Ordinance, 2000 providing that ecologically fragile land shall vest in the Government. The Ordinance was repopulated on 27.1.2001 with effect from 2nd June 2000 and was subsequently replaced by The Kerala Forest (Vesting & Management of Ecologically Fragile Land) Act, 2003



Interpretation of the Act

We have already seen that ecologically fragile land is a concept which had always been there much before the EFL Ordinance and the EFL Act. The object and reasons for the EFL Act is very much important to understand the purpose of the Act. The object and reasons supporting the Kerala Forest (Vesting & Management of Ecologically Fragile Land) Bill introduced in the Kerala legislature reads as follows:

“International Union for Conservation of Nature and Natural Resources (IUCN) has declared the Western Ghats as one of the Biodiversity Hotspots in the World. As a signatory to the Convention of Biological Diversity (CBD) our nation has the responsibility to conserve the biological resources for the sustained economic and social development of the society and for the maintenance of ecological stability. The Honorable Supreme Court of India has ordered that natural resources such as forests, rivers etc. shall be conserved as Public Trust for the welfare of the society at large. The Apex Court while laying down the principle and guidelines of the 'Public Trust Doctrine' has stipulated that resources like air, sea, waters and the forest have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The Honourable Supreme Court has further ordered that the 'Public Trust Doctrine' as laid down by it shall be part of the law of the land, that the State Government and the statutory authorities must anticipate, prevent and attack the causes of environmental degradation, and that, where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. It has been observed that many ecologically fragile areas in the State are under the private ownership. Over-exploitation and unsound management on the resources therein would lead to irreversible degradation of social, economic and ecological stability of the State. As a precautionary and preventive measure, the Government considers it necessary to enact a legislation to bring the ecologically fragile areas under the ownership of the State and to ensure their conservation for the welfare of the society and of the nation at large.”

It can thus be seen that EFL Act is meant to given effect to the provisions of Convention on Biodiversity and also given effect to various Supreme Court decisions with regard to preservation and conservation of forest, biodiversity, wildlife and environment. The object and reason appended to the Bill specifically refers to 'Public Trust Doctrine' and 'Precautionary Principles'.

EFL Act has therefore to be read in consonance and in harmony with the various international conventions and the Supreme Court decisions referred above. The question therefore what is the result when we so interpret the provisions of the Act having regard to various principles laid down in the International Conventions which the Supreme Court has read into our domestic law and the law laid down by the Supreme Court. For that purpose we have to use the tool of purposive interpretation. The Supreme Court in **K.P Varghese vs. ITO (AIR 1982 SC 1922)** explained the concept of purposive interpretation as follows :

1. What was the common law before making of the Act;



2. What was the mischief and defect for which the common law did not provide
3. the reason for the remedy; and then construe the provisions in such way that the mischief is suppressed and the remedy is advanced.

Obviously, prior to the EFL Act, there was a common law, international law and judge made law, which provided for regulation of the user of ecologically fragile land but did not provide for take over of the land for the purpose of in situ conservation. It is evident from the preamble of the Act and the Object and Reasons appended to the Bill that the provision for take over is to provide for in situ conservation.

Section 3 of the EFL Act provides for automatic vesting of ecologically fragile land. By operation of law. Ecologically fragile land as defined under Section 2(b) as

- i) any portion of forest land 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 official Gazette under Section 4.

It is significant to note that the word 'forest land' is not defined in the EFL Act. However, the Supreme Court in **T.N.G Tirumulpad vs. Union of India ((1997) 2 SCC 267)** and in **T.N.G Tirumulpad vs. Union of India ((2006) 1 SCC 1)** interpreting Section 2 of the Forest Conservation Act 1982 held that forest for the purpose of the Act would include

- area recorded as forest in the Government records
- areas which were forest and had denuded, degraded or cleared.

Any area which were forest and had been cleared, denuded or degraded would also be forest land for the purpose of Section 2(b). In order to find out whether any land had automatically vested under Section 3 of the Act only the following facts are relevant.

1. Is the land in question a forest land, in the sense that it was a forest and had subsequently been denuded, degraded or cleared;
2. Is the land in question lying contiguously or encircled by a natural forest
3. Does the land in question support natural vegetation?

If all these criteria are satisfied the land is a forest land which vests under Section 3 automatically.

The definition of Forest in Section 3 (c) is meant only for providing bench mark to find out which kind of forest which encircles or give contiguity to the forest



land will decide the question as to whether the forest land will automatically vest in the government or not. For example a forest land lying contiguously with or encircled by a plantation forest though may be a reserved forest will not vest automatically in the Government in as much as the intention is to provide for in situ conservation and only forest land lying contiguous to or encircled by natural forest will vest automatically in the Government. Any other interpretation would necessarily lead to absurdity because if the intention of the legislature is that only natural forest in the hands of private persons would vest in the government, there will not be any land in Kerala available for such vesting because all such private natural forests had already been vested in the Government automatically by virtue of the provisions of Kerala Private Forest Vesting and Assignment Act 1971. The intention of the legislature could not be that only natural forest in the hands of private persons would be vesting in the Government. What the act provides for is vesting of 'forest land' automatically and 'land' if necessary for in situ conservation on declaration by the Government. The intention of the Act is to make available to the Government forest land and land for in situ conservation. These land are vested only for the purpose of conservation of natural resources as per management plan to be formulated in accordance with Section 16 of the Act. All ecologically fragile land which satisfies the criteria mentioned in Section 2(b) whether state owned or owned by private persons can only be used for in situ conservation as per the Management Plan under Section 16 of the Act. Any other interpretation would be absurd and would be defeating the purpose of the Act.

There is one more reason for adopting this interpretation. Originally in the Ordinance and also in the Bill introduced in the Legislature there was a provision in Section 3 in the form of sub-section 2 which provided that nothing in sub-section 1 with regard to vesting of the land in the government shall apply in respect of any land cultivated with coffee or cardamom held by an owner under valid registration for the plantation raised after obtaining due permission from legally competent authorities. This provision has been omitted in the Act. The intention of the Legislature is therefore clear. The legislature deliberately did not want any exemption to be granted to any cultivated land from the operation of Section 3.

Merchiston Land.

Merchiston land comes within the core area of Agsthyanmaralai Bio Sphere Reserve. Even according to the showing of the person who claims ownership and possession of the said land it is covered by 'pandaravaka tenure' The land was originally a forest tract and is encircled by virgin reserve forest. It is part of a deemed reserved forest as per the notification issued by Divan of Travancore under Section Regulation II of 1068. The said Regulation provided for clear felling of forest track for cultivation with permission of the Circar. There is no evidence of dereservation of the land occupied by Merchiston Estate. A permission for clear felling will not vest any right over the surface soil in the person who was permitted to clear fell and cultivate the forest land. Obviously, the land which is part of Merchiston Estate is a



forest land. It is encircled by a virgin reserve forest and supports natural vegetation. The ownership and possession of the land in which Merchiston Estate is situated therefore automatically vests in the Government under Section 3 of the Act.

Sustainable Development

The argument that the Act stands against development is not sustainable. The Act is intended for sustainable development. It is necessary to sustain and preserve biodiversity to provide for sustainable development. Western Ghat is one of the 8 hottest hot spots in the world. The bio diversity of Western Ghat region is very rich. Presently only 1/3 of the Western Ghat is covered with forest. Even this area is highly fragmented leading to rapid degradation. Once the remaining area is also cleared the entire southern peninsula of India will go dry. The economic loss that could be caused thereby is too high to be now measured. In 1997 a team of international scientists and economists calculated the value of the ecosystem services provided by the tropical forests in the world especially tropical rain forests. They estimated the cost to be 33 trillion U.S. Dollars. This amount is twice the Gross Domestic Product of all the countries of the world put together. The head quarter of global diversity is tropical rain forest. Tropical rain forest covers only 6% of the total land surface on earth. A major part of the tropical rain forest is in Western Ghat. Western Ghat is habitat for 2000 varieties of medicinal plants of which 50 are in the red list. One hundred and twenty four medicinal species have been identified which require conservation. 80% percent of the modern medicine, including life saving medicine, is produced from medicinal plants. The Economic loss that would be caused due to destruction of forest and wild life would be disastrous to the community. Since the remaining forest cover in Western Ghat is highly fragmented immediate steps have to be taken for providing wild life corridors connecting the fragments to arrest further degradation and to sustain the remaining forest cover. All these are possible only if lands are taken for in situ conservation.

Sustainable Development is possible only if the biodiversity and wildlife is protected. Wild life can be protected only if the natural forest cover is protected. In other words, as Supreme Court held in **State of Gujarat vs. Mirzapur Jam-at ((2005) 8 SCC 534)** Environment, forest and wild life are inter related are interdependent. They protect each other.

As per the Rio Declaration on Environment and Development, 1982, to which India is a signatory, right to development must be fulfilled so as to equally meet developmental and environmental needs of present and future generation. The concept is called inter generational equity. Supreme Court has explained the concept in **T.N.G Tirumulpad vs. Union of India ((2006) 1 SCC 1)**. Natural resources are to be preserved for the future generation also. As per Principle 4 of the Rio Declaration on Environment and Development, 1982, in order to achieve sustainable development environmental protection shall constitute an integral part of the development. In order to achieve sustainable development without causing any



irreversible or serious damage to environment, Rio Declaration on Environment and Development, 1982 formulated Precautionary Principle which has been described by the Supreme Court in Vellore Citizens Forum v. Union of India (1996(5) SCC 647) as follows :

- i) where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as reason for postponing cost effective measures to prevent environmental degradation;
- ii) the authorities should anticipate, prevent and attack environmental degradation;
- iii) onus of proof is on the actor or developer to show that his action is environmentally benign.

NATIONAL FOREST POLICY AND PROTECTION MEASURES

National Forest Policy is not a mere document but a statutory instrument. Supreme Court has said so in **T.N.G Tirumulpad vs. Union of India ((2006) 1 SCC 1)**. As such every provision in the National Forest Policy 1988 has to be implemented as if it is a statutory provision. National Forest Policy 1988 provides, inter alia, as follows :

- Restoration of 2/3 forest cover in hilly areas
- Provisions for green belts in urban area
- Provision for corridors linking protected areas in order to maintain continuity between artificially separated subsection of migrant life.
- Inculcation of direct interest in the forest in the people by giving them adequate education.

These are all mandatory provisions which the Government could undertake even without a statutory provision. Since tea estates and such other estates provide for mini habitat and wild life corridor, the use of these estates could be regulated by preventing the owners of these estates from using the estate for any other purpose, including construction of huge building and compound walls. It is also necessary to preserve the nature and lie of these lands from the point of aesthetic value and wild life preservation. User of land has to be especially regulated in buffer zones and transition zones.

In short, what is needed is a thorough understanding of the provisions and the will to implement it.

