IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 2ND DAY OF DECEMBER 2015/11TH AGRAHAYANA, 1937

CRL.A.No. 539 of 2009

AGAINST THE JUDGMENT IN ST 384/2001 of JUDICIAL FIRST CLASS MAGISTRATE COURT-II, KANJIRAPPALLY DATED 25-04-2007

APPELLANT/COMPLAINANT:

THE SECRETARY, ERUMELI
GRAMA PANCHAYATH, ERUMELY.

BY ADV. SRI.MOHAN JACOB GEORGE

RESPONDENTS/ACCCUSED & STATE:

1. STATE REPRESENTED BY ITS
PUBLIC PROSECUTOR, HIGH COURT OF KERALA.

2. K.K.SUKUMARAN, S/O.KESAVAN,
MULLACKAL HOUSE, CHITTAR, RANNY TALUK,
PATHANAMTHITTA DISTRICT.

R2 BY ADV. SRI.P.HARIDAS
R1 BY SMT. S. HYMA, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 02-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.539 OF 2009

Dated this the 2nd day of December, 2015.

J U D G M E N T

Aggrieved by the order dated 25.04.2007 in S.T No.384/2001 whereby the accused stood acquitted for the offence under Section 210 of the Kerala Panchayat Raj Act read with Rule 2 of Kerala Panchayat Raj Taxation and Appeal Rule 1996, Rule 24 and Section 27(2)(1) of Kerala Panchayat Raj Taxation Act, complainant before the court below has come up in appeal after obtaining leave of this Court.

2. The basic facts are not in dispute. Panchayath-the complainant, auctioned the right to collect sand from Kanamala, Mukenpetty, Thenmala, Azhutha rivers for the period from 07.04.2000 to 31.02.2001. In the auction, the respondent-accused also participated. He was the highest bidder and his bid amount was Rs.3,11,500/-. As per the terms of the tender conditions, he has to make an initial deposit and he has remitted the same and an amount of Rs.1,55,700/- was due to the

Panchayath on 31.10.2000. The accused failed to remit the amount till the filing of the complaint and an amount of Rs.1,65,066/- was due to the Panchayath including interest and other expenses. For the said amount, proceedings were initiated under Section 210 of the Panchayat Raj Act.

3. The complaint was taken on file and after following necessary procedures, summons was served on the accused who entered appearance. He was served with copy of the documents and the particulars of offence were read out to him, to which, he pleaded not guilty.

4. The evidence consists of the testimony of PW1 and the documents marked as Exts.P1 to P6.

5. The accused was questioned under Section 313 Cr.P.C wherein he denied all the incriminating circumstances brought out in evidence against him. In his defence, he had DWs 1 to 4 examined and Exts.D1 to D7 marked.

6. The court below, relying on the decision in ***Anandan*** *vs.* ***Dy. Director of Panchayats*** (2000 (1) KLT 1) read along with Section 3(26) of the General Clauses Act, held that the right to remove sand qualifies as 'profit a prendre' and therefore Ext.P2

agreement had to be necessarily registered. The court below went on to held that since Ext.P2 is an unregistered document, no right can be claimed on that basis. Finding that Ext.P2 is the very basis of the transaction based on which the claim is laid, accused was acquitted though passing reference was made with regard to other contentions raised by the accused.

7. Learned counsel appearing for the Panchayath, Sri.Mohan Jacob George, contended that the finding of the court below that the Panchayath should fail on account of non registration of Ext.P2 has no legal basis. Learned counsel pointed out that the question of 'profit a prendre' and such other rights do not arise for consideration in this proceedings. Even otherwise, according to the learned counsel, a reading of Ext.P2 will not reveal that it is a document which creates right as such but it only recognises the terms and conditions already settled between parties as per notification. The rights and liabilities of the parties herein crystallized on the acceptance of the bid of the respondent by the Panchayath and the terms of the notification is clear regarding rights and liabilities.

8. It was then contended that the claim made by the

respondent-accused that he was unable to remove sand as a result of the ban imposed by Ext.D1 document is baseless. That is a communication in fact addressed to the Panchayath and calling upon the Panchayath to justify its action regarding the auction. The Panchayath had duly replied that the prohibition made mention of in Ext.D1 does not apply at all and there was no restriction or prohibition for the accused to remove sand from the area concerned. It is therefore contended that the accused cannot claim that there was total prohibition and that there was violation of the contract thereby exempting him from paying the balance amount. If, due to his own latches or default, he did not remove sand as per the terms of auction notification, that is not a reason for him to escape from paying the balance amount. Learned counsel also pointed out that on a reading of the evidence adduced by the accused, he seems to have no case that the procedure required has not been followed. The court below was therefore not justified in acquitting the accused especially on the ground that Ext.P2 being an unregistered document, no claim can be made on that basis.

9. Learned counsel appearing for the respondent-accused,

Sri.P. Haridas, tried to sustain the finding of the court below. According to the learned counsel, the right to take sand qualifies as 'profit a prendre' creating an interest in immovable property and if that be so, the agreement needs compulsory registration going by Section 17 of Registration Act. For the said purpose, learned counsel relied on the decisions in ***Anandan*** *vs.* ***Dy. Director of Panchayats*** (2000 (1) KLT 1) and in ***Bihar Eastern Gangetic Fishermen Cooperative Society Ltd.*** *vs.* ***Sipahi Singh and others*** (1977 KHC 685). Taking the aid of Ext.D1 it was contended that though the document was addressed to the Panchayath, a copy of that document was sent to him thereby cautioning him that he is precluded from removing sand in view of the prohibition contained therein. There is no subsequent communication in that regard either lifting the ban which the accused claimed, was imposed on him nor was he informed that there was no restriction for removing sand. The Panchayath who is the recipient of Ext.D1 and who very well knew that copy of the document was addressed to the accused also did not bother to inform that there was no ban for removing sand. It was under these circumstances that he was compelled to refrain from removing sand as per the contract and suffer the consequences.

10. Learned counsel appearing for the respondent-accused also contended that even assuming Ext.P2 need not be registered and assuming that there was no ban as contended by him, still the complainant cannot succeed due to the irregularities committed in following the procedures laid down in the Panchayath Raj Act which are conditions precedent for invoking the prosecution under Section 210 of the Act, according to the learned counsel. Learned counsel referred to the provisions of the Act which deal with such matters and the procedure to be followed before the prosecution can be launched. Reference was made to Section 210 of the Panchayath Raj Act and Rules 14, 15 and 16 of the relevant Rules and it was contended that the procedures mentioned therein have not been followed and the statutory time required for making payment has also not been granted to him. These are conditions precedent to be complied with for launching prosecution and failure to follow these procedures vitiates the proceedings.

11. After having heard the learned counsel on both sides, the first question that needs to be considered is regarding the

necessity for registration of Ext.P2 document.

12. The trial court has treated the right to carry away sand as one falling within the ambit of 'profit a prendre' and the court went on to hold that the right is created by virtue of Ext.P2 document and therefore, relying on the decisions made mention of, it has to be registered. The question is if the court below was justified in holding so.

13. The case on hand stands on an entirely different footing. The Panchayath, as usual, for the relevant period, auctioned the right to collect sand. The auction conditions were laid down making it clear successful bidder had to comply with certain conditions. When a person who participates in such an auction, he will be deemed to have accepted all the conditions. Once his bid is accepted by the Panchayath, agreement comes into force and the transaction becomes complete. Even if formal agreement has to be executed, it is only a memorandum of mutual rights and liabilities already determined and does not have the effect of creating a right or interest. It is not by virtue of Ext.P2 deed that the accused gets the right to collect sand. Therefore, Ext.P2 cannot be viewed as a document which creates

rights for the first time thereby requiring registration. A reading of Ext.P2 will clearly reveal that it is not intended to create rights but only to ensure compliance of certain conditions of a transaction which have already been entered into. Therefore, this Court is unable to accept the finding of the court below that the prosecution should fail for want of registration of Ext.P2 document.

14. There was much debate regarding the consequence of Ext.D1 document. While the learned counsel appearing for the appellant contended that it was a communication addressed to the Panchayath and there is no express bar or prohibition disabling the accused from collecting sand, learned counsel appearing for the accused contended otherwise. According to the learned counsel for the accused, that document contains a threat of action for violation of the stipulation therein if he ventured to collect sand from the area. Learned counsel pointed out that he will be doing so at his peril. Learned counsel referred to the relevant provisions of the Forest Act also which prevents the persons from entering the forest without permission. Learned counsel also pointed out that he had summoned the register

through DW1 and proved that no pass has been issued with regard to the area in question.

15. There may be some substance in the contention raised by the learned counsel for the appellant that Ext.D1 really questions the act of the Panchayath though it does not in fact prohibit as such the accused from collecting sand. But its consequence cannot be easily ignored. The author of the communication has sent a copy to the accused also. It was done to put him on guard and his apprehension that he is prevented from collecting sand from the area cannot be said to be without basis. He could not take the risk of avoiding that communication especially when statutory right is claimed by the author of the communication.

16. It is here that the evidence of PW1 assumes importance. A reading of his deposition would indicate that he has no idea about what had happened. He would say that amount was due from the accused as per the auction in which the accused bid and came out as successful bidder. The amount due was Rs.1,65,066/-. Through him, Exts.P1 to P6 were marked. In cross examination, he stated that even though 'P Form' was not

necessary for transporting sand during the relevant period, he was confronted with Ext.D1 and then asked whether it amounts to a restriction for removing sand to which he replied that 'Ext.D1 പ്രകാരം മണൽ ലേലം ചെയ്തയാൾക്ക് കൊണ്ടുപോകാൻ അധികാരമില്ല”. The damage so done during cross examination was sought to be cured in the re-examination and much success was not achieved by the prosecuting agency. In re-cross, he stated that the Panchayath had addressed the Forest Department to lift the prohibition and records are available with the Panchayath. He also stated that as long as prohibition stood, if sand is removed, consequence may follow.

17. It is true that the Panchayath later on passed a resolution holding that the inhibition pointed out by the author of Ext.D1 does not exist. But as to what had happened thereafter, there is no evidence at all. At any rate, there is nothing to show that the resolution was made known to the accused and that he could remove sand from the area. If, as a matter of fact, he believed that if he acted in violation of Ext.D1, he might face prosecution, he cannot be found fault with. To that extent, court below may be right. Even assuming that Ext.D1 does not in fact

prohibit the accused from removing sand from the area concerned, even assuming that he defaulted payment of the amount, even though it was due to his own latches in not removing sand, still procedural irregularities stand in the way of the prosecution agency. Section 210 of the Kerala Panchayath Raj Act reads as follows:

> "210. Recovery of arrears of tax, cess etc.- Any arrear of cess, rate, surcharge or tax imposed or fees levied under this Act shall be recoverable as an arrear of public revenue under the law relating to the recovery of arrears of public revenue for the time being in force:
>
> Provided that the Secretary of a Village Panchayat may directly recover by distraint, under his warrant, and sale of movable properties of the defaulter subject to such rules as may be prescribed:
>
> Provided further that, if for any reason the distraint or a sufficient distraint of a defaulter's property is impracticable, the Secretary may prosecute the defaulter before a Magistrate".

18. The above section speaks about distraint warrant to be issued to recover the amount and sale of movable property of defaulter. It goes on further to say that if, for any reason, the distraint or a sufficient distraint of a defaulter's property is

impracticable, prosecution may be launched. Therefore, two conditions are essential for prosecution; 1) distraint warrant should be issued against the accused and 2) it should be incapable of yielding the result. These two conditions have to be necessarily proved by the prosecuting agency.

19. It will not be out of place here to refer to Rules 14 and 15 of Kerala Panchayath Raj (Taxation, Levy and Appeal) Rules, 1996 which read as follows:

> "14. Notice to be served before enforcing provisions of distraint.-(1) The Secretary shall, where any tax due from any person has not been remitted on or before the due date, serve upon such person a demand notice requiring him to pay the tax together with notice fee of two rupees and the cost of service of the notice if sent by registered post, within fifteen days from the date of service of notice, before taking the proceedings under Section 210 of the Act.
>
> (2) Notice under sub-rule (1) shall be signed by the Secretary and shall contain the following matters,-
>
> (a) a statement regarding the period for which the tax is imposed, and description regarding the occupation, property or institution on which the tax is imposed;

(b) the amount of tax, fee of demand notice and cost of notice is sent by registered post;

© the date from which tax is due; and

(d) statement of the liability incurred on account of the default in remitting money.

20. Rule 15 reads thus:

"15. Recovery by distraint.- If the amount due on account of any tax together with the fee of demand notice and the cost of service of the notice is not paid within fifteen days from the date of service of the notice and if the person from whom the tax is due has not shown cause to the satisfaction of the Secretary as to why it should not be remitted, the Secretary may, by distraint under warrant and by sale of the movable property of the defaulter, recover the amount due on account of the tax together with demand notice fee, cost of service of notice, warrant fee including the distraint fee together with such further sum that is sufficient for a meeting the actual expenses for the safe custody and sale of the property so distrained:

Provided that movable property described in the proviso to Section 60 of the Code of Civil Procedure, 1908, shall not be distrained.

(2) The warrant under sub-rule (1) shall be in Form No.1 appended to these rules and for each such warrant a fee of five rupees shall be levied".

21. As per Rule 14, when amount is due from a person and he has not remitted the same on or before the due date, a demand notice calling upon him to pay the amount within 15 days from the date of service of notice, shall be issued to him. Sub Rule (2) stipulates the contents of the notice. Rules 15 says that even after service of notice under Rule 14, amount is not paid within 15 days thereof, Secretary of the Panchayath may issue distraint warrant. As already stated, these are safeguards in favour of the accused which cannot be bypassed. The statutory provisions have to be complied with before prosecution proceedings are launched.

22. One may have now look at the evidence in the case. The relevant documents in this context are Exts.P5 and P6. Ext.P5 is a receipt produced by the Panchayath to show that notice under Rule 14 has been sent to the accused. Ext.P6 is an intimation given to the accused before the prosecution proceedings are launched. The relevant portion which is of significance in Ext.P6 reads as follows:

> "നിങ്ങൾ ഈ പഞ്ചായത്തിൽ അടക്കേണ്ടതായ താഴെ പട്ടികയിൽ പറയുന്ന നികുതി സംഖ്യ ഈ നോട്ടീസ് ലഭിച്ചു

3 ദിവസത്തിനകം ഈ ആഫീസിൽ അടക്കേണ്ടതാണെന്ന്
അറിയിക്കുന്നു".

23. One may at once recall Rules 14 and 15 already referred to. Rules 14 and 15 leave one in no doubt that while issuing notice calling upon the defaulter to pay the amount, at least 15 days time will have to be given to him. Obviously, Ext.P6 is not in terms of the Rules. Further, even though PW1 has stated that distraint warrant could not be effected, there is no evidence regarding the same before court. PW1 would go on to say that distraint warrant was attempted to be effected through one Kamalakshi Amma, U.D Clerk of the Panchayath. But she was unable to get results and there was an endorsement to that effect. Except for the ipse dixit of PW1, there is absolutely no evidence to justify the above claim made by PW1. If, as a matter of fact, there was an attempt to put in effect distraint warrant issued by the Secretary and there was failure to effect the same, necessarily there would have been an endorsement on the warrant. In the absence of evidence to that effect, it cannot be said that the requirement necessary to launch prosecution has been satisfied. Being a penal provision,

requirements will have to be met before prosecution is launched.

24. At the risk of repetition, one may notice that before prosecution is actually launched, certain procedural requirements are to be complied with and it cannot be doubted that they are mandatory in nature. Even though PW1 in his oral evidence would say that all the requirements have been complied with, in the absence of documentary evidence in that regard, it will not be safe to place reliance on the oral testimony of PW1.

25. To add to this is the omnibus questioning under Section 313 Cr.P.C. Even assuming that it could be pardoned, the fact remains that the essential requirements to launch prosecution are not proved to have been complied with in this case. If that be so, even if the reasoning given by the court below for acquittal may not as such be justifiable, for other reasons, this Court finds that the complainant has to fail.

26. For the above reasons, this Court finds no reason to interfere with the order of the court below.

A very disturbing fact has come to the notice of this Court. Most of the documents are photostat copies. Probably, the register, book etc. may be necessary for daily use and that may have to be returned. Care has not been taken to have certified copies substituted before originals are returned. An undertaking to produce the original as and when directed to do so must be obtained.

This appeal is without merits and it is accordingly dismissed.

Sd/-

P.BHAVADASAN
JUDGE

smp

// True Copy //

P.A to Judge.