

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

WEDNESDAY, THE 8TH DAY OF APRIL 2015/18TH CHAITHRA, 1937

WP(C).No. 5615 of 2009 (V)

PETITIONER:

**SHAJI ANDREWS, AGED 41 YEARS,S/O.ANTHRAYOS,
RESIDING AT THEKKEKARAMAKKAPALLIL HOUSE
PUTHENCHANTHA.P.O, VAKATHANAM VILLAGE
CHANGANASSERY TALUK, KOTTAYAM DISTRICT.**

**BY ADVS.SRI.MANJU ANTONEY
SRI.K.JAYAKUMAR(CHERTHALA)
SRI.BABY PAUL (CHEMBAKASSERIL)**

RESPONDENT(S):

- 1. THE STATE OF KERALA, REPRESENTED BY
CHIEF SECRETARY TO GOVERNMENT, SECRETARIAT
THIRUVANANTHAPURAM.**
- 2. DISTRICT COLLECTOR, COLLECTORATE KOTTAYAM
INCLUDING REPRESENTING DISTRICT EXPERT COMMITTEE,
KOTTAYAM UNDER THE ACT 18 OF 2001 AND RULES MADE
THEREUNDER.**
- 3. DEPUTY SUPERINTENDENT OF POLICE,KOTTAYAM
OFFICE AT COLLECTORATE, KOTTAYAM.**
- 4. SUB INSPECTOR OF POLICE, KOTTAYAM EAST
POLICE STATION, KOTTAYAM.**
- 5. UNION OF INDIA, REPRESENTED BY SECRETARY
TO GOVERNMENT, MINISTRY AND DEPARTMENT OF LAW
NEW DELHI.**
- 6. MINERAL REVENUE INSPECTOR, DEPARTMENT OF
MINING AND GEOLOGY, DISTRICT OFFICE, KOTTAYAM
KOTTAYAM DISTRICT.**

**R5 BY SRI.P.PARAMESWARAN NAIR,ASST.SOLICITOR
R5 BY SRI.N.NAGARESH, ASSISTANT SOLICITOR GENERAL
BY GOVERNMENT PLEADER SRI. P.V. ELIAS**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 08-04-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

APPENDIX

PETITIONERS EXHIBITS:

EXHIBIT P1: COPY OF THE RELEVANT PAGES OF THE R.C. BOOK OF THE PETITIONER'S VEHICLE, EICHER 1090, BEARING NO.KL- 5 L 9722.

EXHIBIT P1(A): COPY OF THE INSURANCE CERTIFICATE DATED 23.5.2006 OF THE VEHICLE.

EXHIBIT P1(B): COPY OF THE PERMIT DATED 3.6.2002 OF THE VEHICLE.

EXHIBIT P2: COPY OF THE PASS DATED 9.10.2006 BEARING NO.977, ISSUED IN THE NAME OF THE DRIVER OF THE PETITIONER'S VEHICLE PURUSHOTHAMAN.

EXHIBIT P3: COPY OF THE PASS DATED 7.10.2006 BEARING NO.946.

EXHIBIT P3(A): COPY OF THE PASS DATED 8.6.2006 BEARING NO.51.

EXHIBIT P4: COPY OF THE BILL OF THE REPAIRING OF THE PETITIONER'S VEHICLE DATED 9.10.2006, ISSUED BY THE NATIONAL MOTOR WORKS, KOTTAYAM.

EXHIBIT P5: COPY OF THE MAHAZAR DATED 9.10.2006 PREPARED BY THE 4TH RESPONDENT.

EXHIBIT P6: COPY OF THE REPRESENTATION/OBJECTION DATED 13.10.2006 FILED BY THE PETITIONER TO THE 2ND RESPONDENT DISTRICT COLLECTOR.

EXHIBIT P7: COPY OF THE NEWS ITEMS DATED 26.10.2006 IN RASTRADEEPIKA EVENING DAILY.

EXHIBIT P8: COPY OF THE PASS DATED 17.1.2006.

EXHIBIT P9: COPY OF THE ORDER DATED 12.1.2007 PASSED BY THE 2ND RESPONDENT DISTRICT COLLECTOR.

EXHIBIT P10: COPY OF THE JUDGMENT DATED 25.7.2008 PASSED BY THIS HONOURABLE COURT IN W.P.(C).28553/2006.

EXHIBIT P12: COPY OF THE RECEIPT DATED 6.11.2006 OF RS.35,000/-.

EXHIBIT P13: COPY OF THE REGISTRATION PARTICULARS OF PETITIONER'S VEHICLE DATED 6.11.2006 ISSUED BY JOINT R.T.O. CHANGANACHERRY.

EXHIBIT P14: COPY OF THE ORDER DATED 13.11.2006 ISSUED BY 2ND RESPONDENT FOR RELEASE OF PETITIONER'S VEHICLE.

EXHIBIT P15: COPY OF THE NOTICE DATED 1.11.2006 ISSUED BY CENTRAL BANK OF INDIA TO THE PETITIONER FOR REVENUE RECOVERY PROCEEDINGS.

EXHIBIT P16: COPY OF THE ORDER DATED 30.1.2009 PASSED BY THE 2ND RESPONDENT DISTRICT COLLECTOR.

EXHIBIT P17: COPY OF THE INTERIM STAY ORDER DATED 19.6.2007 PASSED BY THIS HON'BLE COURT IN I.A. NO.7023/07 IN W.P.(C) NO.28553/2006.

RESPONDENTS EXHIBITS: NIL

TRUE COPY

SKV

P.A. TO JUDGE

' C.R.'

C.K.ABDUL REHIM, J.

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W.P.(C).No.5615 OF 2009

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Dated this the 8th day of April, 2015

JUDGMENT

Ext.P16 order passed by the 2nd respondent confiscating a vehicle belonging to the petitioner under Section 23 of the Kerala Protection of River Banks and Regulation of Removal of Sand Act, 2001 (hereinafter referred to as the Act for short) and Rule 27(3) of the Kerala Protection of River Banks and Regulation of Removal of Sand Rules, 2002 (hereinafter referred to as the Rules for short) is under challenge in this writ petition.

2. The vehicle in question was seized by the 4th respondent on 9.10.2006 at about 5.20 p.m. alleging transportation of 'River Sand' in violation of the Act and Rules. The vehicle was entrusted to the 2nd respondent for taking further steps. The petitioner preferred Ext.P6 objections before the 2nd respondent. Initially an order of confiscation was issued by the 2nd respondent as per Ext.P9, on 12.1.2007, directing payment of a sum of

Rs.1,98,000/- towards value of the vehicle and another sum of Rs.1,98,000/- towards fine. The above said order was challenged by the petitioner in an earlier writ petition. In Ext. P10 judgment this court had set aside the order in view of the decision reported in ***Sanjayan v Tahsildar [2007 (4) KLT 597]*** settling that the District Collector has no power under the Act to impose fine on the owner of the vehicle. Thereafter the matter was considered afresh by the 2nd respondent and the order impugned in the writ petition was issued ordering confiscation of the vehicle and directing payment of a sum of Rs.1,98,000/- towards value of the vehicle and Rs.25,000/- towards fine, under Rule 27(3).

3. In the meanwhile, interim custody of the vehicle was given to the petitioner based on an interim order passed by this court in the earlier writ petition, subject to condition of remittance of an amount of Rs.35,000/- and on furnishing an undertaking that the petitioner will not alienate or part with possession of the vehicle.

4. Petitioner raised contentions disputing the factual aspects with respect to the alleged illegal transportation of 'River Sand', at the time of seizure of the vehicle. It is contended that the transportation was on the strength of a valid pass, and therefore there was no violation of the Act and Rules. Ext.P2 'Cash Memorandum' is produced in support of the above contention. According to the petitioner the delay in transportation occurred only because the vehicle had broken down enroute and it got repaired from a workshop situated at Kottayam. Ext.P4 bill for purchase of spare parts was also produced in support of the above contention.

5. On a perusal of Ext.P5 mahazar it is evident that there was no documents available with the vehicle at the time of seizure. According to the petitioner Ext.P2 'Cash Memorandum' was shown to the authorities at the time of seizure, but the same was not accepted. But there is nothing to indicate that such a document was produced even before the 2nd respondent at the time of

adjudication on the question of confiscation. The petitioner attributed failure on the part of the 2nd respondent in considering Ext.P2, which according to him was produced at the time of adjudication. It is pertinent to note that Ext.P2 'Cash Memorandum' produced by the petitioner is in a Form prescribed under the Kerala Minor Minerals Concession Rules. No details regarding the person who had issued the same is discernible from the document. Moreover Ext.P2 is not an authenticated document for transportation of 'River Sand' envisaged under the Act and the Rules. Specific allegation contained in Ext.P5 Mahazar is that the sand was loaded from a 'Kadavu' at 'Meenamthara'. Whereas contention of the petitioner is that the sand in question was transported from Vaikom to Vakathanam. The petitioner had failed in substantiating the above facts before the adjudicating authority. Therefore the factual findings arrived by the 2nd respondent in the order impugned cannot be interfered with by this court in this writ petition, merely based on Ext.P2 document, which can only be presumed as one

procured subsequent to the seizure.

6. Learned counsel for the petitioner raised challenges against the impugned order on legal grounds relying on various decisions of this court. It is contended that the 2nd respondent has no authority to impose any fine under Rule 27(3). In **Sanjayan's Case** (cited supra) a Division Bench of this court had found that the power for imposition of fine rests only with the court and the power conferred on the revenue authorities under the KMMC Rules or under the Act or the Rules are only to the extent of compounding the offence. It is categorically held that, imposition of fine by the District Collector is without jurisdiction. Considering the legal position remaining settled, it is to be accepted that the imposition of fine to the tune of Rs.25,000/- contained in Ext.P16 order is unsustainable.

7. One of the reliefs sought for in the writ petition is to strike down Section 23 of the Act and Rule 27 and 28 of the Rules, based on the grounds that it violates fundamental rights of the petitioner guaranteed under

Articles 14, 19(1)(g), (21), (22) and 300 A of the constitution. Learned counsel pointed out that the power to take cognizance of any offence under Section 20 of the Act, vest only with the court, as per Section 25. Therefore with respect to any contravention of the Act or Rules penal proceedings alleging offence punishable under Section 20 can be initiated only before the Magistrate Court. Unless a criminal case is registered and the person concerned is prosecuted for an offence under Section 20 of the Act, there cannot be a seizure of the vehicle, much less a confiscation of such vehicle, is the contention. Learned counsel had placed reliance in support of the above contention on the decision of a learned Judge of this court in ***Ahammed Kutty v State of Kerala [2008 (1) KLT 1068]***. It is found therein that, provisions of the Kerala Abkari Act and the Kerala Forest Act etc: specifically stipulates that, whether any prosecution is instituted or not for any offences punishable under those statutes, confiscation of the vehicles is possible. But unlike such statutes, confiscation under the 'Sand Act' is

depending upon the prosecution launched before the court.

8. Contention of the petitioner is that, confiscation without institution of any prosecution will result in an unreasonable and paradoxical situation and it will infringe fundamental rights guaranteed under Articles 14, 19(1) (g) and 21. It is argued that the authority is bound to initiate prosecution under Section 25 and should wait for its result, for deciding the question of confiscation. It is pointed out that on a hypothetical thinking of the situation, it will be highly illegal, ironical and unjustifiable if the prosecution ends up in an acquittal after the confiscation is ordered in a particular case.

9. It is apposite to have a scanning of the relevant provisions. Section 23 of the Act provides that, whoever transports sand without complying with provisions of the Act shall be liable to be punished and the vehicle used for transportation is liable to be confiscated by the Police or revenue officials. The term 'confiscation' was substituted in the provision for the word 'seizure', through

amendment brought in with effect from 7.1.2008. But a Division Bench of this court in the decision in ***Abdul Samad v State of Kerala [2007 (4) KLT 473]*** observed that there is apparent difference in the wordings of the statute contained in the Malayalam and English versions. Section 23 in the Malayalam text passed by the Legislature contained the word 'confiscation'. Therefore, after elaborate consideration of the context and the object sought to be achieved by the legislation, it was held that the court must adopt a construction which shall suppress mischief and advance the remedy. It is observed that, when power is given to seize the vehicle involved in an offence, there should be purpose for the same. If the Police or revenue officials have got any power to seize the vehicle, there should be something to be done after the seizure. If mere seizure of the vehicle is conceded and nothing further can be done, the seizure will become meaningless or purposeless. Referring to Rule 27(3) and Rule 28 it was observed that the District Collector can sell the vehicle by auction if the amounts due to the 'River

Management Fund', which is equal to the price fixed by the District Collector, is not paid. The power to sell or release the seized vehicle on certain conditions would show that the power is only for confiscation and nothing else.

10. The discrepancy between the Malayalam and English versions of the statute was also dealt in ***Sanjayan's case*** (cited supra). There also it is observed that power of confiscation is conferred by virtue of Section 23 of the Act read with Rule 27, on the District Collector. Presumably it is on the basis of the above said judgments a correction in the English version was effected by way of amendment during the year 2008. Hence it is to be accepted that under Section 23 of the Act read with Rule 27(3) there existed power on the District Collector to order confiscation of the vehicle.

11. Contentions based on ***Ahammed Kutty's Case*** (cited supra) is regarding the pre-requisite for initiating prosecution. It is to be dealt with based on settled legal precedents. In a Division Bench decision of this court in

Moosakoya v State of Kerala [2008 (1) KLT 538] it is held that Rules 27 and 28 would clearly lay down the procedure to be adopted by the Police Officer or the Revenue Officer who seizes the vehicle for illegal transportation of sand. After the seizure what is to be done with the vehicle and the procedure to be adopted by the officers are clearly laid down in Rules 27 and 28. Therefore the seizure is to be effected under provisions contained in the Sand Act and Rules and not under Section 102 of Cr.PC. It is held that the District Collector is bound to return the seized vehicle, if the amount fixed as the value of the vehicle is paid either by the owner or by the person in possession of the vehicle. Therefore, on a plain reading of the Sand Act and Rules it would show that in the matter of seizure no report need to be filed before the Magistrate. A special procedure is laid down in view of Section 23 of the Act read with Rules 27 and 28. It is further held in the said decision that, even if a crime is registered in respect of a cognizable offence under the Act the matter cannot be proceeded with and the offender

cannot be punished, because as per Section 25 of the Act no court shall take cognizance of any offence except upon a complaint in writing made by the person authorized in that behalf by the Government or by the District Collector or by a Geologist of the Department of Mining and Geology. Therefore the Police Officer cannot file a final report after investigation of the case as contemplated under Section 173(2) of Cr.PC. Hence it is held that, there is no question arising with respect to filing of an FIR or with respect to complying with Section 102 of Cr.P.C. On the other hand Section 23 of the Act read with Rule 27 and 28 prescribes the procedure to be adopted with regard to the seizure of the vehicle. In the above said case, the Division Bench, after up-holding powers vested on the District Collector under Section 23 and Rules 27 and 28, had confirmed an order passed by the Magistrate refusing to grant interim custody of the vehicle. It was observed that such power is vested only with the District Collector.

12. In view of the legal position remaining settled in ***Abdul Samad's Case*** (cited supra) as well as in ***Moosakoya's Case*** (cited supra) the observations made by the learned Judge in ***Ahammed Kutty's Case*** (cited supra) need to be considered as *per incurium*. Notwithstanding the above two decisions of the Division Benches, the learned Single Judge had taken a view that the jurisdiction vests with the Magistrate. Hence this court is of the considered opinion that the decision in ***Ahammed Kutty's Case*** cannot be held as binding law and cannot be followed in the light of the earlier decisions in ***Abdul Samad's Case and Moosakoya's Case***.

13. Learned counsel appearing for the petitioner contended that, even assuming that power is conferred on the District Collector by virtue of Section 23 and Rules 27 and 28, it is highly unreasonable and paradoxical to proceed with steps for confiscation unless prosecution is launched by person authorised under Section 25 and unless the guilt of an offence under Section 20 is proved before the Magistrate's Court, with respect to usage of the

vehicle for committing such offence. It is evident that the legislature in its wisdom had chosen to confer power on the District Collector to deal with the vehicle which is seized either by the Police Officers or by the Revenue authorities, independently of the fact whether any prosecution is launched or not. In other words, there is a statutory conferment of power in that respect. As observed in ***Abdul Samad's Case*** (cited supra) such power of confiscation is conferred on various authorities under many other identical statutes, notwithstanding registration of any criminal case or launching of prosecution. The statutory provisions in the Act and the Rules is clear and unambiguous. It does not warrant any interpretation by the court, as the literal meaning does not suffer from any ambiguity. There exists no lacuna in the legislation in this regard. The court cannot read into the provision in order to supply any meaning other than the literal meaning which remains unambiguous. Therefore no interpretation as canvassed by the petitioner can be ventured in this context. Further, the procedure

contemplated with respect to confiscation of the vehicle or the power conferred on the District Collector cannot be termed as unreasonable or arbitrary and as one resulting in violation of any fundamental rights. The statute provides an independent adjudication with respect to confiscation of the vehicle. A different authority than the officer who is seizing the vehicle is conferred with the power. It is provided in Rule 27(3) that while exercising the power of confiscation, the District Collector is bound to consider objections if any submitted by the owner or possessor of the vehicle. Hence an independent procedure of adjudication with respect to the liability for confiscation is provided and the owner or possessor of the vehicle is provided with opportunity to contest the matter. Compliance of principles of natural justice is ensured in the said provision. When the legislature intended confiscation of any vehicles which is involved in contravening the Act and Rules, independent of the fact whether the offence is proved or not through trial in a criminal court, it cannot be held that the power of

confiscation conferred on the authority is unsustainable. Therefore challenge against validity of Section 23 and Rule 27(3) cannot succeed.

14. Lastly, Learned counsel for the petitioner raised yet another contention that the impugned order is unsustainable in toto because it had imposed fine of Rs.25,000/-, despite specific findings contained in Ext.P10 judgment, in which the earlier order was quashed holding that the District Collector has no power to impose fine. As already found in earlier part of this judgment, the impugned order is unsustainable to the extent it imposed fine of Rs.25,000. But merely because of such a reason it cannot be held that the remaining part of the order with respect to confiscation would become illegal or invalid. Therefore the order need not be quashed in toto.

15. In the result the writ petition is allowed in part. Ext.P16 order is quashed to the extent it imposed fine on the petitioner to the extent of Rs.25,000/-. But the order directing the petitioner to make payment of Rs.1,98,000/- towards value of the vehicle is hereby

upheld as unsustainable.

16. It will be left open to the petitioner to make payment of the balance amount after deducting the amount of Rs.35,000/- already paid. If the petitioner fails to make payment of the balance amount within a period of two months from today, the 2nd respondent will be at liberty to proceed further as contemplated under the Rules.

Sd/-

C.K.ABDUL REHIM, JUDGE

SKV