

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON

MONDAY, THE 9TH DAY OF FEBRUARY 2015/20TH MAGHA, 1936

WP(C).No. 3435 of 2015 (D)

PETITIONER(S):

**ASHARAF, S/O.ABBAS, AGED 31 YEARS
KUNNUPARA HOUSE, THETIL P.O,
KASARGODE DISTRICT.**

BY ADV. SRI.S.SHAJAHAN (ADOOR)

RESPONDENT(S):

- 1. STATION HOUSE OFFICER
KASARGODE POLICE STATION,
KASARGODE DISTRICT 671 121.**
- 2. SUB DIVISIONAL MAGISTRATE
KASARGODE - 671 121.**
- 3. DISTRICT COLLECTOR
CIVIL STATION, KASARGODE. 671 121.**

BY GOVERNMENT PLEADER SRI.KC.VINCENT

**THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION
ON 09-02-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

PJ

WP(C).No. 3435 of 2015 (D)

APPENDIX

PETITIONER(S)' EXHIBITS

**EXT.P1 - A COPY OF THE SEIZURE MAHAZAR PREPARED BY THE FIRST
RESPONDENT DATED 29-1-2015**

RESPONDENT(S)' EXHIBITS

NIL.

/ TRUE COPY /

P.S. TO JUDGE

PJ

C.R.

P.R. RAMACHANDRA MENON, J.

W.P.(C) No.3435 of 2015

Dated this the 9th day of February, 2015

JUDGMENT

Petitioner is the owner of a lorry bearing Registration No.KL-14-J-137, which was seized by the first respondent on 29.01.2015, alleging illegal transportation of river sand.

2. The learned counsel for the petitioner points out that, river sand was being transported in the vehicle, on the strength of a valid pass issued by the concerned authority and the factual position is discernible from Ext.P1 Mahazar itself. It is in the said circumstances that, the seizure is stated as illegal and arbitrary and hence the challenge.

3. Heard the learned Government Pleader as well, who points out that the time of departure mentioned in the pass was at 8 am, whereas the seizure was effected just 20Kms. away from the concerned Kadavu at about 12.30 pm and that there is a delay of 4½ hours, which was never explained. There is absolutely no reason or explanation for the delay in the writ petition as well, and there was every reason for the Police to

doubt the transaction that the petitioner was engaged in multiple transactions/transportations on the strength of the very same pass. The learned Government Pleader further submits that, a crime has already been registered and the seizure has been reported to the concerned Judicial Magistrate having jurisdiction over the area, besides reporting the matter to the 2nd respondent.

4. Now, the question to be considered is with regard to the further course of action in connection with the confiscation/prosecution proceedings and also with regard to the granting of interim custody of the vehicle. The competent authority to finalise the confiscation proceedings, as per the statute, is none other than the 2nd respondent and there cannot be any dispute in this regard. With regard to granting of interim custody, the matter had come up for consideration before a Full Bench of this Court and as per the decision reported in **Shan C.T. v. State of Kerala [2010 (3) KHC 333 =2010(3)KLT 413]**, the Bench observed that, interim custody of the vehicle could be released subject to satisfaction of 30% of the value of the vehicle and on furnishing security for the balance amount, giving further direction to have the confiscation proceedings finalised, within

the time as stipulated therein. Paragraphs 12 and 13 of the said verdict read as follows:-

"12. Having regard to the facts and circumstances of the case, we are of the opinion that interim custody of the vehicle can be granted on condition that the owner of the vehicle deposits 30% of the value of the vehicle as determined by the appropriate authority under the Motor Vehicles Act in cash and a further condition that the owner of the vehicle should provide either a bank guarantee or immovable property security for the balance of the value of the vehicle. The amount so deposited and the security furnished would follow the final outcome of the confiscation proceedings.

13. We also deem it appropriate to direct that the proceedings under S.23 of the above mentioned Act confiscating the vehicle shall be concluded within six weeks from the date of seizure of the vehicle as far as possible, in which case the need to consider the interim custody of the vehicle may not normally arise. But if for any reason the authorities under the Act are not able to conclude the proceedings within the period of six weeks mentioned above, the interim custody of the vehicle shall be given to the owner on the conditions specified earlier. It is also made clear that to avoid any controversy and the allegations of undue delay on the part of either party to the proceedings, the competent authority shall put the owner on notice within a period of three days of the date of seizure and the owner or any other person interested in the vehicle shall file his objections to the confiscation within a week thereafter."

5. Later, an issue came up for consideration before this Court, as to whether prosecution proceedings are mandatorily to be pursued in cases involving offences under the Kerala Protection of River Banks and Regulation of Removal of Sand Act. The said aspect was considered, pursuant to the reference made by a

learned Single Judge. The law was declared by a Division Bench, as per the verdict passed in **Sujith V State of Kerala (2012 (2) KLT 547)**, wherein it was observed that, prosecution in respect of the offence under the Kerala Protection of River Banks and Regulation of Removal of Sand Act was mandatorily to be pursued and that the matter was required to be reported to the concerned Judicial Magistrate having jurisdiction over the area, by filing proper complaint by the authorised Officers. The operative portion of the said verdict as contained in paragraph 13 reads as follows:

"13. Therefore, in exercise of jurisdiction under Art.226 of the Constitution of India, it is hereby ordered that the revenue and police authorities, while effecting seizure, shall ensure that any revenue official effecting the seizure, notifies such seizure, also to a police official, over and above the requirement in S.22 of the Act and the Rules. That police official may effect seizure of those goods and report such seizure to the jurisdictional Magistrate in accordance with law and any police officer effecting seizure shall, apart from reporting any such seizure to the jurisdictional Magistrate, also place a report of such seizure before the concerned revenue authority so that action can follow through the criminal court and through the revenue authority in terms of the laws. Following the aforesaid, it is further ordered that in all pending cases, the competent police officer shall effect seizure and report the same to the jurisdictional Magistrate, if not already done and the competent revenue authority shall make appropriate complaint to the jurisdictional Magistrate at the earliest. This would also enable the owners of the goods or vehicles to apply for

*interim custody in terms of S.451 or 457 CrI.P.C., as the case may be. **In ordering release, the Judicial Magistrate shall be guided by the terms laid down by the Full Bench of this Court in Shan V. State of Kerala [2010 (3) KLT 413 (F.B.)].** The appropriate authorities shall also file complaints for initiating prosecution in all cases, where offences under the Act are disclosed. These directions shall apply in dealing with sand and vehicles, seized by the police or revenue authority under the provisions of the Act or the Code of Criminal Procedure, over and above the directions in **Moosakoya** (supra) and **Shoukathali** (supra), until appropriate legislative provisions are brought in, which event, we hope, shall come at the earliest."*

6. It is seen that the statute was accordingly amended by the State by incorporating Section 23A with effect from 25.11.2012 in the following form:

"23A. Confiscation of sand, vehicles, etc.- (1) Where any property is seized under Section 23, the officer seizing such property shall seal all such properties for indicating that the same is seized and shall, whether prosecution proceedings have been initiated or not, within forty eight hours of such seizure make a report of such seizure before the **Judicial Magistrate and before the Sub Divisional Magistrate** having jurisdiction over the area from where the said properties are seized and the fact of such seizure shall be informed to the Station House Officer of the Police Station, having jurisdiction over the area. Where information regarding such seizure of property is received, the Police Officer concerned shall take steps under Section 102 of the Code of Criminal Procedure, 1973 (Central Act 2 of 1974).

(2) Where a report under sub-section (1) is received before the **Judicial Magistrate** having jurisdiction, steps thereon, not contrary to the other provisions of this Act, shall be taken as per the provisions of the Code of Criminal Procedure, 1973 (Central Act 2 of 1974) and, if no claim is raised regarding the articles

seized or where the Court is satisfied that the application to release them is not satisfactory, they shall be subjected to confiscation under sub-section (4):

Provided that the release of the properties seized to any person, for its safe custody, to any person or its disposal, **shall be on sufficient security** and such release or disposal shall only be till the completion of the confiscation proceedings under this Act:

Provided further that the sand seized shall not, for any reason, be released to any person and the same shall be subjected to confiscation under sub-section (4).

(3) Where a report under sub-section (1) is received before a **Sub-Divisional Magistrate**, a notice requiring to furnish in writing within the stipulated time as stated in the notice, the reasons, if any, for not confiscating the property seized under Section 23, shall be issued to the owner of, or the person having control of, the vehicle, tool, implements, loading equipment, or other article.

(4) Where the owner of the properties seized or the person having control of the same does not furnish explanation or the explanation given is not satisfactory, and the **Sub-Divisional Magistrate** is satisfied that the properties seized under Section 23 are to be confiscated, he shall, by an order, confiscate the same and the fact shall be informed in writing to its owner or the person having its control:

Provided that the owner of the properties seized or the person having its control shall be given the liberty to reclaim it, except sand, by remitting an amount equal to the value of the confiscated articles, as fixed by the Collector, in lieu of the properties confiscated:

Provided further that the sand confiscated shall not for any reason, be released by releasing the value.

(5) The amount received under sub-section (4) shall, subject to the provisions of Section 23D, be remitted to the River Management Fund.

(6) The sand confiscated under sub-section (4) shall be sold to Nirmithi Kendra or to 'Kalavara' at such rate, as may be fixed by the Public Works Department from time to time and such amount shall be remitted to the River Management Fund.

(7) The confiscation under this section shall be in

addition to the penalty provided for the offence under this Act.”

7. **Sub section 2** of Section 23(A) deals with the course of action to be pursued by a **Judicial Magistrate**, when the report is received under Sub section (1). The said provision enables the Judicial Magistrate to release the interim custody of the vehicle, on being satisfied with the circumstances, which **shall be on sufficient security** subject to the confiscation under Sub section (4). The provision, particularly Sub Section (1) of Section 23A, mandates the concerned Officer, who is effecting the seizure to report the same to the Judicial Magistrate and also before the Sub Divisional Magistrate having jurisdiction over the area.

8. **Sub section (3)** of Section 23A deals with the course of action, to be followed by the **Sub Divisional Magistrate**. This evidently is in respect of the confiscation proceedings. On receipt of the report under Sub section 1 of Section 23A, notice has to be issued to the party concerned, with regard to the proposed steps for confiscation. Based on the explanation, if any, to be submitted by the party, the proceedings have to be finalised by the Sub Divisional Magistrate, as stated in Sub Section 4 of

Section 23A. In other words, the power of confiscation conferred upon the Sub Divisional Magistrate under the statute is not available with the Judicial Magistrate, who is only to deal with the prosecution proceedings, with power to release the interim custody of the vehicle, till the confiscation proceedings are finalised.

9. An issue had come up for consideration before this Court, challenging the condition imposed by a Judicial Magistrate, whereby 30% of the value of the vehicle was directed to be deposited and the balance to be satisfied by way of Bank guarantee or immovable property. The consequence of the amendment brought about was also the subject matter of consideration. It was pointed out from the part of the Public Prosecutor that, the amendment by virtue of Section 23A did not change the existing position, with regard to the course of action, to be pursued by the 'Confiscating Authority'. The net result of the amendment was only to pursue the prosecution proceedings, for which necessary base/foundation was put up as per the amendment; simultaneously giving power to the Judicial Magistrate to release interim custody of the vehicle on sufficient

security, till the confiscation proceedings are finalised under Sub section 4 of Section 23A. Considering the particular facts and circumstances of the said case, it was observed by a learned Judge of this Court as per the decision reported in **Aboobacker v. State of Kerala (2014 (3) KLT 26)** that the condition imposed by the learned Magistrate was rather harsh and accordingly, the same was varied by causing the vehicle to be released on satisfaction of 15% of the value and on execution of a simple bond. After going through the relevant provisions of law, this Court finds that the power and procedure, as it existed earlier, have not undergone any substantial change, but for making the position clarified with regard to the prosecution proceedings to be pursued, also conferring authority upon the Judicial Magistrate to deal with the interim custody of the vehicle till the confiscation proceedings are finalised by the Sub Divisional Magistrate.

10. Now, the question to be considered is, whether the Sub Divisional Magistrate is still having any power to grant interim custody. By virtue of the amendment, the power which was originally vested upon the Sub Divisional Magistrate, to have the

confiscation proceedings to be initiated and finalised, has not been taken away, reduced or mitigated in any manner. The said authority remains to be the authority to deal with the confiscation proceedings. In so far as the power is vested upon Sub Divisional Magistrate to confiscate the vehicle, it is corollary to say that, on conclusion of the proceedings, if the Sub Divisional Magistrate is satisfied that the insinuating circumstances have not been made out, he can release the vehicle as well. If the said authority is having the power to confiscate or release the vehicle, as the case may be, it can't but be held that the authority is vested with incidental power to grant interim custody as well, subject to appropriate condition to be imposed.

11. With regard to the power of the Judicial Magistrate to grant interim custody, the provision, particularly the 'proviso' to Sub Section 2 of Section 23A, says that, **it shall be on sufficient security** and only till completion of the confiscation proceedings. The provision is quite categorical to the effect that, sufficiency of the security is an important aspect to be considered by the Judicial Magistrate, while releasing the vehicle. Sufficiency of security to grant interim custody of a vehicle/object which is

liable to be confiscated, if proved, stands on a different pedestal than the sufficiency of security in the case of a vehicle/object which is connected with other offences, where it may have a bearing as part of evidence/connecting link. This is more so, when we consider the object of the statute (Kerala Protection of River Banks and Regulation of Removal of Sand Act, 2013), which as evident from the 'pre amble', is to

"protect river banks and river beds from large scale dredging of river sand and to protect their biophysical environment system and regulate the removal of river sand and for matters connected therewith or incidental thereto."

12. A peep into similar legislations, object of which is more to protect the natural resources and to prevent illicit extraction, may be beneficial. Section 20 of the Kerala Conservation of Paddy Land and Wet Land Act, 2008 enables the District Collector to confiscate the vehicle/vessel etc. seized under the Act. 'Proviso' to Section 20(1) enables to spare the vehicle, in lieu of confiscation, on payment of a sum equal to '**one and a half times**' the value of the seized article, as may be determined by the District Collector. Similarly, Section 61A of the Kerala Forest Act, 1961 enables the competent authority to confiscate the

vehicle/article/object involved in a forest offence. Observations made by the Apex Court with reference to the provisions of the Karnataka Forest Act, 1963 in **State of Karnataka Vs. K. Krishnan (JT 2000 (9) SC 356)** as to granting of interim custody are very relevant. It has been observed in paragraph 7 of the said verdict (rendered by the Bench consisting of their Lordships K.T Thomas and R.P. Sethi JJ) as follows:

"The liberal approach in the matter would perpetuate the commission of more offences with respect to the forest and its produce which, if not protected, is surely to affect the mother-earth and the atmosphere surrounding it. The Courts cannot shut their eyes and ignore their obligations indicated in the Act enacted for the purposes of protecting and safeguarding both the forests and their produce. The forests are not only the natural wealth of the country but also protector of human life by providing a clean and unpolluted atmosphere. We are of the considered view that when any vehicle is seized on the allegation that it was used for committing a forest offence, the same shall not normally be returned to a party till the culmination of all the proceedings in respect of such offence, including confiscatory proceedings, if any. Nonetheless, if for any exceptional reasons a Court is inclined to release the vehicle during such pendency, furnishing a bank guarantee should be the minimum condition. No party shall be under the impression that release of vehicle would be possible on easier terms, when such vehicle is alleged to have been involved in commission of a forest offence. Any such easy release would tempt the forest offenders to repeat commission of such offences. Its casualty will be the forests as the same cannot be replenished for years to come."

The above observations are quite relevant and attracted in the instant case as well, where the statute is more concerned with the protection of River banks and River beds from large scale dredging of River sand and to protect their biophysical environment system. As it stands so, this Court respectfully disagrees with the course ordered in **2014 (1) KLT 26** (cited supra). Since the field is squarely covered by the decision rendered by a Full Bench of this Court (**2010(3) KLT 413** [cited supra]) and since the amendment to Section 23A of the Act has not tilted the balance in any manner, this Court, being bound by the Full Bench, does not find it necessary to refer the matter to a Division Bench.

13. Sufficiency of the security as in the instant case will naturally depend upon the **value of the vehicle** and how the value has to be assessed, has already been made clear by this Court on many an occasion, by getting the same duly assessed by the authorities of the Motor Vehicle Department. The Full Bench of this Court in **2010 (3) KLT 413** (cited supra) laid down that the interim custody of the vehicle involving an offence

under the Kerala Protection of River Banks and Regulation of Removal of Sand Act could be released, only subject to satisfaction of 30% of the value of the vehicle and on furnishing security for the balance amount as specified. The law laid down by the Full Bench stands as it is. The amendment of the statute, particularly by virtue of Section 23A, has not resulted any change or consequence with regard to the position as mentioned above, nor has the effect been watered down in any manner. In so far as the law declared by the Full Bench of this Court stands intact and not varied, no Magistrate or other Officers under the Act can act contrary to it. As such, the interim custody can be released only on satisfaction of 30% of the value of the vehicle and on furnishing security for the balance amount as ordered by the Full Bench.

14. In the above circumstances, the petitioner is set at liberty to approach either the 2nd respondent or the Judicial Magistrate having jurisdiction over the area (by virtue of the enabling provision under the proviso to Sub section (2) of Section 23A for getting interim custody, till finalisation of the confiscation proceedings. On filing petitions as above, it will be open for the

concerned Magistrate to deal with the same and to pass appropriate orders in the light of the above observations within 'two weeks'. The adjudication proceedings shall be finalised by the 2nd respondent, in accordance with law, as expeditiously as possible, at the earliest, at any rate, within 'six weeks' from the date of receipt of a copy of this judgment. It also goes without saying that the it will be for the concerned Judicial Magistrate to proceed with further steps in connection with the prosecution proceedings, in accordance with law.

The writ petition is disposed of.

**P.R. RAMACHANDRA MENON,
JUDGE**

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