

(2015) 02 KL CK 0150
In the High Court Of Kerala
Case No : Criminal M.C. No. 294 of 2015

Kumkuma Priya R.Y.

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 12-02-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 102, 451, 457
Kerala Protection of River Banks and Regulation of Removal of Sand Act, 2001 —
Section 23

Citation : (2015) CriLJ 4107 : (2015) 3 KHC 195 : (2015) 2 KLJ 561 : (2015) 2 KLT 438

Hon'ble Judges : P. Ubaid, J

Bench : Single Bench

Advocate : C.P. Peethambaran and Mini V.A., for the Appellant; S. Hyma, Public Prosecutor, Advocates for the Respondent

Final Decision : Allowed

Judgement

P. Ubaid, J.

1. The petitioner's vehicle No. TN/60/5055 is involved in a crime registered under the Kerala Protection of River Banks and Regulation of Removal of Sand Act (the Sand Act). The Sub Inspector of Police, Payyanur seized the said vehicle when river sand was being transported in the said vehicle illegally. On seizure the vehicle was produced by the Sub Inspector before the Sub Divisional Magistrate, Thalassery. It is not known whether the fact of seizure was reported to the Judicial First Class Magistrate Court having jurisdiction over that area. Any way the petitioner herein made an application before the Sub Divisional Magistrate for interim custody of the vehicle. The Sub Divisional Magistrate allowed the application on conditions. One condition is that the petitioner shall deposit 30% of the value of the vehicle assessed by the committee headed by the District Collector, and the other condition is that petitioner shall furnish bank guarantee for the other 70% of the value. The said order passed by the Sub Divisional

Magistrate, Thalassery on 26.12.2014, in proceedings G2-15342/2013 is under challenge herein. The petitioner challenges the said order on two grounds. One is that the Sub Divisional Magistrate has in fact no power to order interim custody, and the other is that if at all such a power is there, the condition imposed by the Sub Divisional Magistrate is really unreasonable and onerous.

2. The learned counsel for the petitioner raised a serious question that Sub Divisional Magistrate has no power under the law to order interim custody of the vehicle seized under the Sand Act, and such power can be exercised only by the Judicial First Class Magistrate having jurisdiction over the area, under Section 451 Cr.P.C. The matter is covered by Section 23A of the Sand Act. This provision will indicate that the power of the Sub Divisional Magistrate as regards the property is seized under the Sand Act is only to order confiscation under Sub-Section 4. Sub-Section 1 of Section 23A provides that where any property is seized under Section 23, the officer seizing such property shall, within 48 hours of such seizure, make a report of such seizure before the Judicial Magistrate having jurisdiction and also before the Sub Divisional Magistrate having jurisdiction over the area, whether prosecution proceedings have been initiated or not. The last part of Sub-Section 1 provides that if seizure is made by any officer other than a police officer the fact of seizure shall be reported to the Station House Officer of the Police Station having jurisdiction over the area, and on getting such report the police officer shall take steps under Section 102 of the Code of Criminal Procedure. Thus the provision is very clear that when the fact of seizure is reported to the Police Station under Section 23A(1) of the Sand Act, or even when such seizure is made by the police officer having powers under the law, the police officer will have to take necessary steps under Section 102 Cr.P.C. This means that the fact of seizure will have to be reported to the Judicial Magistrate having jurisdiction, and if possible the property should be produced before the Judicial Magistrate. The law nowhere provides that the property shall be produced before the Sub Divisional Magistrate.

3. Sub-Section 2 to Section 23A of the Sand Act provides that where a report of seizure is received under Sub-Section 1 by a Judicial Magistrate having jurisdiction, steps there on, not contrary to the provisions of the Sand Act, shall be taken by the Judicial Magistrate as per the provisions of the Code of Criminal Procedure. It is further provided that if there is a claim for the property for interim custody, the Judicial Magistrate can release the property to the right person on appropriate conditions, and if there is no such claim, or if the claim is not satisfactory, the property shall be subject to confiscation under Sub-Section 4. Thus it is very clear power to release the property in interim custody under Section 451 Cr.P.C. or under Section 457 Cr.P.C., as regards any property other than sand, is vested in the Judicial First Class Magistrate Court having jurisdiction, and not the Sub Divisional Magistrate, though there is provision that seizure shall be reported to the Sub Divisional Magistrate also. The purpose of such a provision, that seizure shall be reported to Sub Divisional Magistrate also, is only to enable the Sub Divisional Magistrate to initiate confiscation proceedings

under Sub-Section 4. He cannot in any circumstance release the property, or grant interim custody under Section 451 Cr.P.C. because such powers can be exercised only by a Judicial Magistrate.

4. Sub-Section 3 of Section 23A of the Sand Act provides that on getting a report of seizure under Sub-Section 1 the Sub Divisional Magistrate shall give a notice in writing to the concerned person, requiring him to show cause why the property should not be confiscated. Sub-Section 4 provides that where the owner of the property seized, or the person having control of the same, does not furnish explanation, or does not show cause as provided under Sub-Section 3, or where the explanation given is not satisfactory, and the Sub Divisional Magistrate is satisfied that the property seized under Section 23 is liable to be confiscated, the Sub Divisional Magistrate shall, by an order, confiscate the same, and the fact shall be informed in writing to the owner. The proviso to Sub-Section 4 provides that the owner of the property will have an option to remit an amount equal to the value of the confiscated article, in lieu of confiscation, and once that value is deposited by him, the property can be released to the owner. This is the only circumstance where the Sub Divisional Magistrate can release property under the Sand Act.

5. The second proviso to Sub-Section 2 to Section 23A provides that release of the properties to any person for safe custody, or disposal of the property, shall be on sufficient security, and such release or disposal shall only be till the completion of the confiscation proceedings under the Act. Confiscation proceedings as provided under Sub-Section 4, will have to be initiated and finalised by the Sub Divisional Magistrate. So any order passed by the Judicial Magistrate regarding interim custody under Section 451 or under Section 457 Cr.P.C. will be subject to the orders of confiscation made by the Sub Divisional Magistrate under Sub-Section 4. Even when deciding to confiscate the property the owner of the property will have to be given an option to deposit the value of the vehicle as fixed by the District Collector, in lieu of confiscation.

6. Thus on an analysis of the provisions contained in Section 23A of the Sand Act I find that the right authority to release properties seized under Section 23 of the Sand Act, is infact the Judicial First Class Magistrate having jurisdiction over the area, and not the Sub Divisional Magistrate. It is very clear that the power of Sub Divisional Magistrate is only to decide on confiscation. Once he gets the report of seizure under Sub-Section 1, the Sub Divisional Magistrate will have to initiate confiscation proceedings, he will have to give proper notice as required under Sub-Section 3, to the person concerned, and under Sub-Section 4 he is authorised to take appropriate decision regarding confiscation.

7. As observed earlier, the last part of Sub-Section 1 to Section 23A of the Sand Act is very clear that once a property is seized under Section 23, the procedure under Section 102 Cr.P.C. will have to be followed. This means that the property, if possible, will have to be produced before the Judicial First Class Magistrate having jurisdiction, in compliance of the provisions under Section 102 Cr.P.C. This

provision in the last part of Sub-Section 1 will have to be read along with Sub-Section 2 which provides that the question of releasing properties in interim custody shall be decided by the said Judicial First Class Magistrate having jurisdiction. Section 23A does not anywhere provide that Sub Divisional Magistrate can take decision regarding interim custody of the property seized under Section 23A of the Sand Act. Of course any decision taken by the judicial authority regarding interim custody, will always be subject to the confiscation orders passed by the Sub Divisional Magistrate under Sub-Section 4. Thus confiscation is within the exclusive powers of Sub Divisional Magistrate, whereas releasing properties in interim custody under Section 451 Cr.P.C. or under Section 457 Cr.P.C. is the exclusive jurisdiction of the Judicial Magistrate having jurisdiction over the area.

8. In view of the findings above, the impugned order passed by the Sub Divisional Magistrate will have to be set aside. The Station House Officer will have to report the seizure before the Learned Magistrate having jurisdiction, and the property also will have to be produced before the learned Magistrate in compliance of the provisions under Section 102 Cr.P.C. Once the property is produced and seizure is reported, the petitioner can very well approach the learned Magistrate having jurisdiction with necessary application for interim custody. Of course it is not known whether the Sub Divisional Magistrate has initiated confiscation proceedings, or what exactly is the stage of the proceedings now.

In the result, this petition is allowed. The impugned order passed by the Sub Divisional Magistrate, Thalassery will stand set aside. The Station House Officer will take necessary steps to report the fact of seizure to the Judicial First Class Magistrate having jurisdiction, and produce the property before the Judicial Magistrate. The petitioner can make a fresh application before the Judicial First Class Magistrate for interim custody of the vehicle, and appropriate decision will be taken by the learned Magistrate, of course subject to confiscation orders to be passed by the Sub Divisional Magistrate under Sub-Section 4 of Section 23A of the Sand Act. The learned Director General of Prosecutions will communicate this order with copy, if possible, to all the District Collectors, and Sub Divisional Magistrates in the State.