

(2000) 02 KL CK 0047
In the High Court Of Kerala
Case No : W.A. No. 1574 of 1999

State of Kerala and Another

APPELLANT

Vs

K. Thankaraj

RESPONDENT

Date of Decision : 07-02-2000

Acts Referred:

Kerala Forest Act, 1961 — Section 2, 52, 61

Citation : AIR 2000 Ker 202 : (2000) 2 ILR (Ker) 288 : (2000) KLJ 435

Hon'ble Judges : S. Sankarasubban, J;A.R. Lakshmanan, J

Bench : Division Bench

Advocate : S. James Vincent, Spl. Govt. Pleader Forests, for the Appellant; P.V. Ramesh Shankar, for the Respondent

Final Decision : Dismissed

Judgement

Ar. Lakshmanan, J.—The Conservator of Forests, Kollam, who filed the Original Petition No. 2029/1993 to quash Exhibit P2 judgment passed by the District Court, Thiruvananthapuram in C. M. A. No. 75/1991 dated 20-8-1992. Is the appellant in this Writ Appeal. The writ petition was dismissed by P. V. Narayanan Namblar, J., holding that the Ivory is not liable for confiscation since Ivory is not a "forest produce" u/s 2(f) of the Kerala Forest Act, hereinafter referred to as "the Act". Being aggrieved, the Writ Appeal has been filed.

2. We have heard Mr. Section James Vincent, learned Special Government Pleader (Forests) and Mr. P. V. Ramesh Shankar for the respondent.

3. The Forest Range Officer (Vigilance), Forest Head Quarters, Trivandrum and party on 10-7-1990 seized 6.495 kgs. of Ivory in various designs from the premises of the respondent, K. Thankaraj. The seizure was preceded by a search of the premises and the seizures were produced before the Authorised Officer, viz., the Divisional Forest Officer, Trivandrum for proceeding u/s 61A of the Act. The Authorised Officer issued a show-cause notice to the respondent and in reply, it is stated that he is a licensed dealer in Ivory. He furnished copies of

stock register and other records, which he was bound to keep as per the rules. It is his contention that the articles seized were made of the Ivory lawfully purchased by him and incorporated in his stock register. After enquiry, the Authorised Officer passed orders, No. G3/5081/90 dated 17-4-1991 confiscating the seizures, which proceeding has been marked as Exhibit P1.

4. The respondent challenged the order of confiscation u/s 61D of the Act in C. M. A. 75/1991 before the District Judge, Trivandrum, who, by judgment dated 20-8-1992 (Exhibit P2), allowed the appeal and set aside the confiscation order, which is challenged in the Original Petition filed by the Conservator of Forests as unsustainable. It is submitted that the District Judge decided the issue in favour of the respondent on an impression that Ivory having not been included in the definition of "forest produce" in Section 2(f) of the Act. It cannot be treated as a Government property. The District Judge held that the presumption available u/s 69 of the Act is, hence, not attracted. It is also argued before the learned Judge that Section 2(f) of the Act is an inclusive one, whereas Section 61A is very clear that notwithstanding anything contained in the foregoing provisions of Chapter VIII, where the forest offence is believed to have been committed in respect of timber, charcoal, firewood or ivory, which is the property of the Government, they are liable to be seized and confiscated and in view of Section 61A, it is submitted that the reasoning of the learned District Judge that Ivory is not a "forest produce" is not sustainable.

5. The Original Petition was contested by the respondent. It was submitted that the order of confiscation was made u/s 61A(2) of the Act and the same was done by casting the burden on the respondent to prove that the seized ivory is not a "forest produce" and for this purpose, the Divisional Forest Officer relied on Section 69 of the Act and drew a presumption that the ownership of the seized Ivory rests with the Government, which is wholly illegal and unjust.

6. Before the learned single Judge a judgment reported in *State of Kerala v. Gopalan* (1988) 2 K LT 955 (K. Sreedharan, J. was cited by the respondent. It is held in the above decision that though Section 61A of the Act takes in its fold "Ivory" as one of the items liable for confiscation, the presumption u/s 69 of the Act will not be available to the Government as it is not a "forest produce" defined in Section 2(f) of the Act. Accepting the principle laid down in the above judgment, P. V. Narayanan Nambiar J., dismissed the Original Petition filed by the Conservator of Forests holding that Exhibit P1 order was purely basing on the presumption and according to the Authorised Officer, the onus of proof was on the respondent and he has to prove that it is not a "forest produce" and that in the absence of the presumption available to the Government, it is upon them to prove that it is a forest produce and the respondent is not liable to prove otherwise. The learned Judge has also adopted exactly the same reasoning as in the decision stated in *State of Kerala v. Gopalan* (supra).

7. In this case, we are concerned with three Sections, viz., Sections 2(f), 52 and 61A.

"Section 2(f) -- "forest produce" includes --

(i) the following whether found in or brought from, a forest or not, that is to say,-- timber, charcoal, wood oil, gum, resin, natural varnish, brak lac, fibres and roots of sandalwood and rosewood; and

(ii) the following when found in, or brought from, a forest, that is to say,--

(a) trees and leaves, flowers and fruits, and all other parts or produce not hereinbefore mentioned, of trees;

(b) plants not being trees (including grass, creepers, reeds and moss) and all parts or produce of such plants; and

(c) silk cocoons, honey and wax;

(d) peat, surface oil, rock and minerals (including limestone, laterite), mineral oils and all products of mines or quarries".

"Section 52 -- Seizure of property liable to confiscation :-- (1) When there is reason to believe that a forest offence has been committed in respect of any timber or other forest produce, such timber or produce, together with all tools, ropes, chains, boats, vehicles and cattle used in committing any such offence may be seized by any Forest Officer or Police Officer.

Explanation :-- The terms "boats" and "vehicles" in this section, (Section 53, Section 55, Section 61A and Section 61B) shall include all the articles and machinery kept in it whether fixed to the same or not.

(2) Every officer seizing any property under Sub-section (1) shall place on such property or the receptacle, if any, in which, it is contained a mark indicating that the same has been so seized and shall, as soon as may be make a report of such seizure to the Magistrate having jurisdiction to try the offence on account of which the seizure has been made;

Provided that, when the timber or forest produce with respect to which such offence is believed to have been committed is the property of the Government and the offender is unknown, it shall be sufficient if the Forest Officer makes, as soon as may be, a report of the circumstances to his official superior".

Section 52 deals with power of Forest Officer or Police Officer to seize timber or other forest produce in respect of which there is reason to believe that a forest offence has been committed with tools etc. Under this Section, the Forest Officer has only the power to seize the forest produce and report the fact of offence to the Magistrate and the Forest Department has no right to pass an order of confiscation, which can be passed only as regards the goods of the persons convicted. Thus, it is seen that no forest offence can be said to have been committed in relation to any forest produce unless it is definitely established that produce belonged to the Government.

"Section 61A -- Confiscation by Forest Officers in certain cases : --

Notwithstanding anything contained in the foregoing provisions of this chapter, where a forest offence is believed to have been committed in respect of timber, charcoal, firewood or ivory which is the property of the Government, the officer seizing the property under Sub-section (1) of Section 52 shall, without any unreasonable delay, produce it, together with all tools, ropes, chains, boats, vehicles and cattle used in committing such offence, before an officer authorised by the Government in this behalf by notification in the Gazette, not being below the rank of an Assistant Conservator of Forests (hereinafter referred to as the authorised officer).

(2) Where an authorised officer seizes under Sub-section (1) of Section 52 any timber, charcoal, firewood or ivory which is the property of the Government, or where any such property is produced before an authorised officer under Sub-section (1) of this Section and he is satisfied that a forest offence has been committed in respect of such property, such authorised officer may, whether or not a prosecution is instituted for commission of such forest offence, order confiscation of the property so seized together with all tools, ropes, chains, boats, vehicles and cattle used in committing such offence".

Section 61A was inserted to prevent the illicit removal of timber, ivory, etc. belonging to the government from the forests. This Section confers power of confiscation on Forest Officers authorised by Government in certain cases. Articles seized u/s 52(1) have to be produced by the Officer before the authorised officer appointed by the Government, who shall not be below the rank of an Assistant Conservator of Forests. The Authorised Officer can confiscate the articles together with tools, vehicles, etc. used in committing the offence whether a prosecution has been launched or not.

8. Mr. James Vincent, learned Special Government Pleader (Forests) argued that the learned single Judge ought not have placed reliance on the decision reported in *State of Kerala v. Gopalan* (1988 (2) KLT 955) (supra) and that the conclusion of the learned single Judge that if the presumption u/s 69 of the Act cannot be applied to ivory, which is not a "forest produce" u/s 2(f), the Forest officials would have to adduce clear and clinching evidence to bring out their stand that the produce belongs to the Central or State Government is incorrect. It is further submitted that the above decision is not correctly decided and requires reconsideration.

9. We have already extracted the relevant provisions of the Act. We have gone through the judgment passed by the learned District Judge of Trivandrum in *C. M. A. 75/1991* and the judgment of *P. V. Narayanan Nambiar, J.* In the original petition. We are of the opinion that the whole approach by the Divisional Forest Officer under Exhibit P1 is not correct. The seized Ivory articles were produced before the Forest Officer by the Range Officer. The Range Officer conducted investigation in this case. The respondent appeared before the said Officer and filed statement advancing claim to the seized Ivory articles stating that he is a valid wild life licence holder doing carving and business of imported ivory and

also produced wild life licence, bills, transit passes, stock statements, etc. The Range Officer who investigated into the case filed final investigation report to the effect that the seized Ivory articles were carved out of the raw imported ivory purchased by the respondent, which purchases are covered by transit passes numbers 36 and 40 of 1989-90 issued by the Deputy Conservator of Forests, Thane and he recommended for the release of the seized articles to the respondent. Another notice was issued to the respondent in regard to the unexplained excess work to show cause against confiscation. To the said notice also, the respondent filed written statement. The Authorised Officer thereupon proceeded to hold that in the absence of proof furnished by the respondent to the effect that the seized Ivory articles is not property belonging to the Government, it is liable to confiscation u/s 61A of the Act as property of Government as according to him the seized Ivory is forest produce and consequently by operation of Section 69 of the Act. the presumption is that the said property is property of Government. He, therefore, directed confiscation of the seized items u/s 61A of the Act, vide order dated 17-4-1991. The learned District Judge also held that there is no dispute that presumption u/s 69 of the Act applies only to "forest produce" as defined by the Act. He also held that in the instant case there is no evidence worth the name to substantiate the case that the seized Ivory pieces belonged to the Government and that therefore the Authorised Officer is wrong in having ordered confiscation of the items of Ivory drawing presumption regarding ownership invoking Section 69 of the Act.

10. The learned District Judge, in our opinion, is right. The order of the learned single Judge cannot also be assailed on any ground. On going through Exhibit P1, it is seen that no such evidence was adduced by the Forest Officials and that Exhibit P1 order was purely basing on the presumption that the onus of proof was on the respondent and he has to prove that it is not a "forest produce". The learned Judge has also adopted the same reasoning in the decision reported in *State of Kerala v. Gopalan* (1988 (2) Ker LT 955) (supra). Section 69 of the Act says that when in any proceedings taken under this Act or in consequence of anything done under this Act, a question arises as to whether any forest produce is the property of the Central or State Government, such produce shall be presumed to be the property of the Central or State Government, as the case may be until the contrary is proved. If the presumption u/s 69 of the Act cannot be applied to Ivory, which is not defined as a "forest produce" u/s 2(f), the Forest Officials would have to by clear and clinching evidence bring out that the produce belongs to the Central or State Government. The order Exhibit P1 is also vitiated by errors of law and facts and liable to be set aside in the appeal, which led to Exhibit P2 Judgment, and that the presumption of ownership with the Government raised by the Divisional Forest Officer on the basis of Section 61 of the Act is baseless. The definition of "forest produce" in the Act, as already noticed, does not take "Ivory" within its purview as has been held by this Court in the decision reported in *State of Kerala v. Gopalan* (supra). The said decision was rendered on 3-11-1988 dismissing the Original Petition filed by the State of

Kerala and the said decision has become final. The order under Exhibit P1 was passed on 17-4-1991 and, therefore, in our opinion, the District Judge was right in reversing the said order after noticing the abovesaid decision of this Court. We are also in full agreement with the principles laid down in the decision reported in *State of Kerala v. Gopalan* (supra). The very same ruling was also accepted by P. V. Narayanan Nambiar, J. In the judgment impugned in this appeal. Hence, it cannot be said that Exhibit P2 judgment of the District Judge, Trivandrum and the judgment of the learned single Judge impugned in this appeal are in any way incorrect and illegal and no interference is called for in this appeal.

In the result, the Writ Appeal is dismissed. No costs. The articles ordered to be confiscated shall be released to the respondent on proper acknowledgment within one month from the date of receipt of a copy of this Judgment, if not already released.