
(2017) 02 KL CK 0085
In the High Court Of Kerala
Case No : 37652 of 2007 (G)

STATE OF KERALA & Anr.

APPELLANT

Vs

JAMES THOMAS, RESIDING AT NEDUMCHIRAYIL

RESPONDENT

Date of Decision : 16-02-2017

Acts Referred:

[Kerala Forest Act, 1962](#), Section 61, Section 61A, Section 61B, Section 61B(2), Section 61A(2)

Citation : (2017) 02 KL CK 0085

Hon'ble Judges : Devan Ramachandran

Bench : SINGLE BENCH

Advocate : SANDESH RAJA K, P.G.PARAMESWARA PANICKER, P.GOPAL

Judgement

1. Three decades and eight years ago, on 07.10.1979, a lorry owned by the petitioner was taken into custody by the forest officials alleging that it was being used to transport Anjili and Kambakom tress and logs cut out of it without authority and that therefore, it was involved in a forest offence. A mahazar for such seizure was recorded, which has been produced by the respondent as Exhibit R1.

2. The lorry was subsequently brought to the Office of the Divisional Forest Officer, Ranni, where a second mahazar was prepared by the Duty Guards, wherein the measurements of the timber and logs were recorded. This mahazar further records that the driver and cleaner of the lorry confessed that the timber and logs were loaded from the reserve forest by five other persons, who were not known to them. The driver and cleaner were, therefore, shown as accused in the mahazar.

3. It appears that the Beat Guards, Deputy Ranger, Assistant Wildlife Preservation Officer and Divisional Range Officer, Ranni immediately thereafter inspected the reserve forest area and they identified certain stumps of Anjili and Kambakom trees, which were suspected to be that of the trees that were being illicitly transported. They, therefore, prepared a third mahazar, a copy of which

has been produced as Exhibit R3, wherein, it is recorded that the trees were cut by a certain Mr. Joseph Mathew and his men - M/s. Sukumaran Papa, Kuruvilangattil Thomas, Baby Ittikkal, Nanu Janardhanan, Pampadi Thomas Kunjumon and Vazhappanadi Thomas Philip. All these persons have been shown as accused in this mahazar.

4. As part of the investigation, as is revealed by the records, statements were obtained from independent witnesses as also one of the accused mentioned in one of the mahazars. Exhibit R4 is the statement given by Mr. Joseph Antony, who was an independent witness in one of the mahazars and he deposed that he saw the aforementioned Joseph Mathew and others loading the timber and logs on to the lorry. Exhibit R5 is the statement given by Mr. Sasidharan, who again is an independent witness shown in one of the mahazars and he stated that he saw the aforementioned Joseph Mathew and his men cut the trees a month earlier and the trees so cut being taken through his property for loading. As regards Exhibit R6 is concerned, it is the statement of Mr. Nanu Janardhanan who is alleged to be one of the employees of Joseph Mathew and he deposed that he had also participated in cutting of the trees and that it was carried by him and others for loading on to the lorry.

5. Foundationalised on these documents, the Divisional Forest Officer, Ranni issued a notice dated 02.02.1980 to the original owner of the lorry, Mr. Gopinathan, asking him to show cause why action should not be taken under the provisions of the Kerala Forest Act, 1951 ("the Act" for brevity) to confiscate the vehicle that was detained. This document has been produced by the respondent as Exhibit R7 in this writ petition. It is obvious from this notice that it has been issued relying on the aforementioned three mahazars and the statements/depositions of the three people mentioned above. The materials on record would indicate that the aforementioned Gopinathan along with the respondent herein had caused a reply to the show cause notice asserting that the vehicle has been purchased by the respondent herein and also that they were not aware of any such illicit transport of timber or logs using their vehicle. The Divisional Forest Officer, Ranni, however, by order dated 21.07.1981 ordered confiscation of the lorry with timber and logs repelling all the contentions of the respondent herein.

6. And then, the long route of litigation began and continued on and on and until now.

7. The respondent commenced the litigation by challenging the confiscation order dated 21.07.1981 by filing C.M.A.No.56/1981 before the District Court, Kollam. This was dismissed by judgment dated 19.02.1983. This judgment was challenged by the respondent by filing O.P. No.3086/1983 before this Court, which led to a judgment dated 30.08.1988 delivered by a Division Bench, a copy of this has been produced as Exhibit R11 in this case. This judgment is of vital importance in the further life of this litigation as I will presently state. In Exhibit P11, the Division Bench found that since the confiscation proceedings under the

Act is a quasi-judicial one, the authorities could not have relied upon the statements of the witnesses and to have used it against the respondent unless he was afforded an opportunity of cross-examining such witnesses. It was also ordered by the Division Bench that the respondent should have been given an opportunity of examining their own witnesses, namely M/s.K.J.Varghese, Thomas Thomas, K.K.Sukumaran and Thomas Raju. This Court has, in Exhibit P11, concluded unequivocally that this denial of opportunity to the respondent had resulted in the order of confiscation being vitiated. The Division Bench, therefore, quashed the order of confiscation and the order of the District Judge, which had earlier confirmed it and remitted the matter to the Divisional Forest Officer for a fresh enquiry by affording the respondent an opportunity to cross-examine the three persons whose statements have been relied upon for the purpose of ordering confiscation. The respondent was also directed to be afforded an opportunity to examine his own witnesses named afore.

8. Thus ended the first round and then began the second.

9. The Divisional Forest Officer started a fresh enquiry. However, the deponents of the statements relied upon by the forest authorities were not offered for cross-examination. The respondent was allowed to examine Mr.K.J.Varghese on his side who deposed, as is discernible from Exhibit R12, that he had taken the lorry on monthly rent and that it was never used to carry any illicit timber or logs. His deposition is to the effect that on 07.10.1979 he had produced a receipt, "a vila chit", issued by the owner of the timber, to show that the timber was actually purchased from a certain Thomas Thomas. His further deposition was to the effect that the vila chit he had produced before the Divisional Forest Officer was refused to be accepted and returned to him and that, therefore, he had placed it on record along with Exhibit R10 affidavit sworn to by him. According to him, the vila chit would establish beyond doubt that the trees belonged to Thomas Thomas and that it was not procured illicitly from the forest.

10. Notwithstanding all these, the Divisional Forest Officer again issued a confiscation order on 19.09.1989. This order was also confirmed by the District Court, Kollam in the appeal filed by the respondent, namely C.M.A.No. 48/1989. These orders were thereafter assailed by the respondent before this Court in O.P.No.5514/1991. The judgment of this Court in the said original petition is produced as Exhibit R14 by the respondent. Once again, this Court set aside the confiscation order and the order of the District Court and remitted the matter to the Forest Authorities for fresh inquiry holding that the respondent was not given an opportunity to cross-examine the witnesses of the department and that the necessary and imperative documents were not made available to him for cross-examination. This Court, as is luculent from Exhibit R14 judgment, also permitted the respondent to adduce further documentary or oral evidence and to summon any witness on whose deposition the various statements and mahazars had been recorded.

11. This is the end of the second round and now the third round began.

12. The Divisional Forest Officer began fresh enquiry. This time one of the witnesses in the first mahazar was examined. He deposed in terms of the mahazar but conceded that he was not aware that the Anjili and Kambakom trees were available in a free hold land and that he had not measured the said articles at the time of seizure. Interestingly, after the closure of this examination, the Divisional Forest Officer again ordered confiscation by Exhibit P1 order holding that in spite of the directions contained in the earlier judgments of this Court, it is not possible to produce the independent witnesses for examination; that the vila chit produced before the Divisional Forest Officer on 23.06.1980 was not sufficient to prove the legitimacy of the timber, that it has to be presumed that the entire timber was taken from the forest based on Exhibits R1 to R3 mahzars; that the driver and cleaner, in their statements, had said that they had insisted on a pass indicating that they were aware that the timber was illicit; that Mr.K.J.Varghese who had taken the lorry on rent, is the agent and the person in charge of the vehicle, who had full knowledge of the illegal activity and that the respondent or other persons in charge of the vehicle had not taken all necessary and reasonable precaution to ensure that a forest offence was not committed.

13. The respondent, obviously, had no other option but to challenge it before the District Court by filing C.M.A. No.48/1989 in which Exhibit P2 judgment was issued, but this time resulting in an order setting aside the confiscation order. The court below has found in its judgment that there is no evidence to show that the seized trees or logs are illicit and that the entire confiscation order, namely Exhibit P1, is founded on hearsay information and not on direct evidence at all. The court below, therefore, concluded that there was nothing in Exhibit P1 to link the owner of the vehicle, namely the respondent, with the incident even assuming that a forest offence had been committed and therefore, found that the confiscation was illegal. The court below held that the order of confiscation to be bad also following the ratio of this Court in *State of Kerala v. Ancy Philip* (2006 (1) KLT 699), as per which the Forest Officers were obligated to produce the seized timber before the Magistrate and that only on such production the confiscation order could have been issued.

14. The State of Kerala has filed this writ petition challenging the order of the court below.

15. Before analysing the validity of Exhibit P2 judgment of the court below, I must take away from the field of one of the issues found in favour of the respondent. The court below found that the confiscation was bad because the ratio of this Court in *Ancy Philip* (supra) was not followed. This cannot stand scrutiny of law any more because the judgment of this Court in *Ancy Philip* (supra) was overruled by the Hon"ble Supreme Court in its judgment reported in *State of Kerala v. Ancy Philip* (2008 (3) KLT 477 (SC)). The Hon"ble Supreme court held as under: "In the instant case, the forest officials had allegedly seized 41 rosewood timber and 54 rosewood billets. The High Court has relied on S.54 of the Act which refers "disposal of the property according to law", would

necessarily mean that the disposal of the property confiscated under the provisions of S.61A has to be under the orders of Magistrate. It is true that in addition to the criminal prosecution, the appellants are entitled to proceed against timber under S.61A of the Act, but timber can also be disposed of after obtaining necessary orders from the Magistrate concerned under S.54 of the Act. However, the Single Judge and the Division Bench had misinterpreted the above provision, namely, S.54 and held that disposal can only be done after physical production of timber before the Magistrate and after obtaining necessary orders. This is a perverse finding. The same was not warranted by the provisions of law, as the prosecution has to produce the relevant records showing such seizure and the officer, who has seized those articles, has to satisfy that an offence has been committed by the accused. As rightly pointed out, the High Court did not consider the effect of non-obstante clause in S.61A as well as the legal presumption available under S.69 of the Act. Likewise, the interpretation of S.54 is not acceptable. We accept the stand taken by the State and set aside the order of the High Court and the Special Magistrate is permitted to proceed with the trial of the accused in accordance with law."

That having said, only by way of an interesting anecdote I say that even before the Hon'ble Supreme Court had dealt with this issue a learned Single Judge Justice K.S.Radhakrishnan (as His Lordship was then) had in *Sasidharan v. Forest Range Officer* (1999 (2) KLT 836), concluded that failure on the part of the Forest Officer to produce the seized vehicle before the Magistrate cannot take away the power of the authorised officer to confiscate the same. I say this because, this is the same view that has been taken by the Hon'ble Supreme Court in *Ancy Philip* (supra) decided by them almost ten years later. This is an interesting bit of information and nothing more. So I leave it there.

16. So with the law as having been declared by the Hon'ble Supreme Court, the finding in Exhibit P2 that the confiscation is bad for violation of the principles contained in the judgment of this Court in *Ancy Philip* (supra) cannot continue to stand and therefore, to that extent, the appeal of the State is justified.

17. However, there are other issues of far more and vital importance, which will have to be examined, before any conclusion as to the validity of Exhibit P2 can be affirmatively arrived at.

18. The law relating to confiscation of vehicle involved in forest offences are embedded on two provisions of the Act, namely Sections 61A and 61B. Since the examination of any of the issues in this case would indubitably lead to the analysis of those statutory provisions, it will be, at least for ease of reference, desirable to read them in full and I, therefore, extract these two sections as under: "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, boars, 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 subsection (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 subsection (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 the commission of such forest offence, order confiscation of the property so seized together with all tools, ropes, chains, boars, vehicles and cattle used in committing such offence.

61B. Issue of show cause notice before confiscation under Section 61A.- (1) No order confiscating any timber, charcoal, firewood, ivory, tools, ropes, chains, boats, vehicles or cattle shall be made under Section 61A unless the person from whom the same is seized-

(a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate such timber, charcoal, firewood, ivory, tools, ropes, chains, boats, vehicles or cattle;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation; and

(c) is given a reasonable opportunity of being heard in the matter.

(2) Without prejudice to the provisions of sub-section (1) no order confiscating any tool, rope, chain, boat, vehicle or cattle shall be made under Section 61A if the owner of the tool, rope, chain, boat, vehicle or cattle proves to the satisfaction of the authorised officer that it was used in carrying the timber, charcoal, firewood or ivory without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the tool, rope, chain, boat, vehicle or cattle and that each of them had taken all reasonable and necessary precautions against such use."

19. The law relating to the confiscation of vehicles are no longer *res nova*. It has been settled conclusively and irrefragably by several judgments of this Court.

20. The first of such judgments is delivered by a learned Single Judge in *State of Kerala v. Pushpan* (1984 KLT 257). The learned single, after an analysis of all these provisions, entered his opinion that the onus is on the owner of the vehicle to prove that the vehicle was used for transporting illicit timber without his knowledge and without his connivance and that he had taken all precautions against such use. The learned single Judge had concluded thus on the specific underpinning of the provisions of Section 61B(2) of the Act. His Lordship then

thereafter recorded the singular purport of these sections in the following words: "The owner did not discharge this burden. Forest cannot be denuded and forest wealth cannot be dissipated. Pretended ignorance cannot cover resourceful attempts and protect sharp practices. Lenient view in such case is bound to affect public interest and will indirectly set this as an accepted pattern for illicit transport of forest produce."

21. Two years later, Justice Sukumaran indited his strong opinion in these issues while delivering judgment in *Baby v. The Forest Range Officer* (1986 (2) ILR Kerala 57). His Lordship's opinion makes compelling reading and is, therefore, extracted as under: "The background in which legislation regarding forest had been made, and had been improved from time to time, both by the Parliament and by the State Legislatures, has to be viewed in the larger background. When the legislature has taken note of the colossal depredation of the forest wealth, and when it is scientifically established that such wanton waste of forest-cover would take the country perilously near desertification and a total disturbance" of the ecology and environment, the Court should be slow to give a narrow interpretation to such well-meant statutory provisions."

22. The above two judgments were noticed by a Division Bench of this Court in *State of Kerala v. Mathew* (1995 (2) KLT 772), wherein their Lordships formulated three postulates, the combination of which alone could exonerate the owner of the vehicle. The first among them being that the owner or its agent be established to be unaware of the illicit use, second that he had taken all reasonable and necessary precautions against such use and the third that the person in charge of the vehicle also be established to have taken reasonable and necessary precaution against such use. The judgment authored by Justice K.T.Thomas (as His Lordship then was) declared that it is only if the owner succeeds in satisfying all the three postulates, that he could obtain the benefit of the restriction against confiscation. To ensure that the innate spirit of the judgment is not lost in my interpretation, I extract the relevant portion as under: "Sec.61-B contains two sub-sections. The first subsection says that no order of confiscation shall be made without giving notice to the person from whom it was seized informing him of the grounds for confiscation and affording him an opportunity of making representation. Sub-section (2) contains a further restriction against confiscation. It says that no order of confiscation shall be made if the owner of the vehicle proves that it was used in carrying the timber "without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the vehicle and that each of them had taken all reasonable and necessary precautions against such use".

The restriction against confiscation contained in subsection (2) can operate only on the combination of three postulates. First is that the owner or his agent was totally unaware of the illicit use. Second is that he had taken all reasonable and necessary precautions against such use. Third is, the person in charge of the vehicle had also taken reasonable and necessary precaution against such use. If

the owner succeeds in satisfying only the first two postulates, he would not get the benefit of the restriction against confiscation. The third condition is as important as the other two and unless that also is established no advantage would practically enure to the owner of the vehicle. Sub-section (2) would remain at bay if the third condition remains unsatisfied.

The contention that such a strict view would adversely affect an innocent vehicle owner cannot be countenanced since any narrow or liberal interpretation of confiscatory provisions in the Act can eventually lead to disastrous consequences for forest wealth which is a very endangered bounty of nature. The idea behind extension of confiscatory provisions to vehicles etc., is to convey a peremptory and explicit message to the vehicle owners not to allow their vehicles to be used for depletion of forest wealth. If any vehicle is caught in the nefarious act of carrying illicit forest produce, it is not enough that the owner establishes his innocence alone. If he wants to retrieve his vehicle he must show further that the person who was in charge of the vehicle has taken reasonable and necessary precautionary measures against such user of the vehicle. The owner cannot rest with establishing his innocence in the matter. It may be that having succeeded in showing his innocence his failure to establish the next limb might lead to hard consequences to him. Legislature intended, by providing such stringent conditions, to prevent harder consequences for the society and for the posterity."

23. The view thus distilled by all these judgments was accepted and adopted in several judgments thereafter, including that in *State of Kerala v. Marina Varghese* (1999 (2) KLT 469), wherein Justice C.S.Rajan had, in support of the requirement that the provisions be applied strictly, said as under: "The contention that such a strict view would adversely affect an innocent vehicle owner cannot be countenanced since any narrow or liberal interpretation of confiscatory provisions in the Act can eventually lead to disastrous consequences for forest wealth which is a very endangered bounty of nature. The idea behind extension of confiscatory provisions to vehicles etc. is to convey a peremptory and explicit message to the vehicle owners not to allow their vehicles to be used to depletion of forest wealth. If any vehicle is caught in the nefarious act of carrying illicit forest produce, it is not enough that the owner establishes his innocence alone. If he wants to retrieve his vehicle he must show further that the person who was in charge of the vehicle has taken reasonable and necessary precautionary measures against such user of the vehicle. The owner cannot rest with establishing his innocence in the matter. It may be that having succeeded in showing his innocence his failure to establish the next limb might lead to hard consequences to him. Legislature intended, by providing such stringent conditions, to prevent harder consequences for the society and for the posterity."

24. After having thus noticed the bedrock of the power, from which orders for confiscation can be issued, it becomes necessary also to examine what is the real nature of such powers. It has often been settled in various judgments, including Exhibits R11 and R14, that the power vested with the Forest Officer under the

provisions of the Act are quasi-judicial in nature. If that be so, it is indubitable that the powers are to be exercised in a manner befitting such power and action proposed thereunder be in strict conformity with the requirements of the confines of the provisions which partake, in its substantial essence, near judicial soul.

25. The expression "quasi-judicial" is not always used with clarity or with accuracy. It is a term which is not easily definable. It is generally taken to be involving an executive or administrative official's adjudicative acts. The quasijudicial acts are, generally speaking, treated as valid if there is no abuse of discretion. It requires that a decision be given not arbitrarily or in the mere discretion of an authority, but according to the facts and circumstances of the case, as determined upon an enquiry held by the authority, after affording an opportunity to the party to be affected, of being heard and whenever necessary, to lead evidence in support of his contentions. The Hon'ble Supreme Court has stated time to time that the concept of quasi-judicial act implies that it is not wholly judicial; it describes only a duty cast on the Executive Body or Authority to norms of judicial procedure in performing some acts in exercise of such executive power. Quasijudicial decision is, therefore, an administrative decision, which is subject to some measure of judicial procedure. It is, in its essence, an administrative function which the law requires to be exercised in some respects as it were judicial. The decision is always administrative, dictated by policy and expediency but which would require the officer to act fairly towards the objections and to the contentions refuting the allegations. A quasi-judicial function has always been known to be a term which stands midway in judicial and administrative function. The primary test is whether the authority has any express statutory duty to act judicially in arriving at a decision in question. If the reply is in the affirmative, the authority is deemed to be quasijudicial and if the reply is in the negative, it would not be (this principle is succinctly stated by the Hon'ble Supreme Court in *State of Himachal Pradesh v. Raja Mahendra Pal* ((1990) 4 SCC 93). Obviously thus an order issued by an authority exercising a quasi-judicial function must disclose the reasons for the conclusions and if the Rules are broken, the determination is susceptible to be set aside but it is not sufficient merely to show that the evidence points to a different conclusion. In the United States the phrase often covers judicial decisions taken by an administrative agency - the test is in the nature of the Tribunal rather than what it is doing. In England, it belongs to an administrative category and is used to cover a situation where the administration is bound by law to observe certain forms but is a free agent in reaching the final decision. In India, the position is not very different. The officer invested with this function is to act without arbitrariness and is enjoined to discharge its discretion in the manner mandated under the statutory or other provisions.

26. The operational form of Section 61 of the forest Act is not different. It invests the power to order confiscation in the competent authority as authorised by the Government by following a prescribed procedure, which then, obviously, would

concede to the definition of being a quasi-judicial function. This becomes more explicit because under the provisions of Section 61B, the authority is obligated to issue a notice to the person from whom the articles are seized and also that he be given a reasonable opportunity of being heard. The fetters placed on the power of the authority under sub-clause (2) of Section 61, from making an order of confiscation if the owner of the article of the vehicle proves certain conditions, would also ineluctably lead to no other inference than that the authority is confined to a jurisdiction which can be nothing other than quasi-judicial.

27. I, therefore, propose and I think I am justified in it that the order of confiscation, that is sought to be justified by the State in this writ petition, be examined from the touch-stone of the law and the principles enumerated herein.

28. It cannot be lost sight of that every confiscation order issued by the authorities in this case have been set aside by this Court or by the court below. Each of such judgments were founded on specific reasons relating to the procedure and non-compliance of principles of fair play and natural justice. In Exhibits R11 and R14 judgments, this Court had held that the proceedings being quasi judicial in nature, the statements relied upon by the authorities against the respondent could become legally relevant only if the makers of such statements were allowed to be crossexamined by the respondent. This admittedly had not been done because it is recorded in Exhibit P1 that the makers of such statements are not available for cross-examination. If that be so, obviously none of the statements that have been relied upon for conclusion against the petitioner would thereafter be so admissible.

29. Before I proceed further, I must hasten to record that the directions in Exhibits R11 and R14 judgments that the owner of the vehicle must always obtain the right of cross-examination of witnesses does not appear to be a view followed in some later judgments. One such judgment was delivered by Justice K.T.Thomas in Joseph v. Authorised Officer (1993 (1) KLT 212) in O.P.No.16015/1992, wherein his Lordship, while dealing with the same provision as is involved in this case, has recorded his opinion as under: "Then the question is whether right to crossexamination is part of the principles of natural justice.

It is apposite in this context to quote the following observations made by Tucker L.J., in Russel v. Duke of Norfolk (1949 All.E.R. 109-at 118): "The requirement of natural justice must depend on the circumstances of the case, the nature of enquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth". Observations of Harman J. in Byrne v. Kinematograph Renters Society Ltd., (1958-1 W.L.R. 762) are equally illuminating:

"What then are the requirements of natural justice in a case of this kind? First I think that the person accused should know the nature of the accusation made; secondly that he should be given an opportunity to state his case; and thirdly, of courts: that the tribunal should act in good faith. I do not myself think that there

really is anything more."

A bench of two Judges of the Supreme Court (Palekar and Aiyangar, JJ) in *Hira Nath Mishra v. Rajendra Medical College* (1973) 1 SCC 805, followed the above principle and observed that principles of natural justice are not inflexible and may differ in different circumstances. Their Lordships did not accept the contention that cross-examination is such a right denial of which would involve infringement of the principles of natural justice. Of course, the context mentioned in the said case is domestic enquiry conducted by a disciplinary authority in an educational institution. A bench of three Judges of the Supreme Court consisting of S.M.Sikri C.J., A.N.Ray and M.H.Beg JJ. (as they then were) in *Kanungo & Co. v. Collector, Customs Calcutta* (AIR 1972 SC 2136) had occasion to consider the question whether right to cross-examination is a limb of the principles of natural justice. The context was confiscation proceedings adopted by customs authorities under the provisions of Sea Customs Act, 1878. This is what the bench said: "In our opinion, the principles of natural justice do not require that in matters like this the persons who have given information should be examined in the presence of the appellant or should be allowed to be cross-examined by them on the statements made before the Customs Authorities." (Vide *Kanungo & Co. v. Collector* AIR 1972 SC 2136). A Full Bench of this Court has considered a similar contention in the context of assessment proceedings under the Kerala General Sales Tax Act in *M.K.Thomas v. State of Kerala* (1977 STC (Vol.40) 278). After referring to certain decisions, the Full Bench concluded that "we are satisfied that the petitioner these cases cannot claim the right of cross-examination as part of the reasonable opportunity contemplated by S.17(3) of the Act (KGST Act)". So far as the confiscatory provisions in both the Acts are concerned, there is much similarity between them. Hence a different stand under the Forest Act is not warranted by the provisions. I have already referred to the relevant provisions of the Act, particularly those relating to proceedings for confiscation under S.61A of the Act.

No party has a right to cross-examine the officials involved in the seizure of the vehicle of contraband in proceedings for confiscation under S.61A of the Act. Hence petitioners cannot complain that the Authorised Officer has infringed principle of natural justice by refusing to allow the petitioners to cross-examine the officials."

30. I have included the above observations of His Lordship, Justice K.T.Thomas in this judgment only because I do not want the future offenders to take it as a matter of inflexible rule that unless they obtain a right to cross-examine, the proceedings would fall. This does not appear to be an inflexible rule as has been recorded in the judgment above.

31. Notwithstanding this, in the facts of this case, since Exhibits R11 and R14 judgments have now become final between the parties and since the official authorities were mandated and directed by this Court in those judgments not to rely on the statements unless the makers of such statements were presented for

cross-examination, the respondent in this case would undoubtedly be entitled to obtain benefit of those directions and Exhibit P1 order, to the extent to which it goes against those directions, obviously will have to be found to be vitiated.

32. There is no doubt that Section 61B of the Act virtually provides a presumption against the owner of the vehicle. Section 61A(2) which provides that no order of confiscation shall be made, if the owner proves to the satisfaction of the Authorised Officer that the transport was without his knowledge and that he had taken all reasonable and necessary precautions, would indicate ineluctably that the burden of such proof is on his shoulders. It is only if he is able to discharge that burden that he would obtain the benefit of an order of confiscation not being issued against him. Add to this the rigor of the third postulate framed by the Division Bench of this Court in Mathew's case (*supra*), the owner will have to discharge his burden from the touchstone and stand-point that all the three imperative requirements, the first being that he was totally unaware of the illicit use of the vehicle, the second being that he had taken all reasonable and necessary precautions against such use and the third being that the person in charge of the vehicle had also taken reasonable and necessary precautions against such use. The owner has to prove all these three conditions and not merely the first two because if the third condition is found followed, the rigor of the second and consequential confiscation would become inevitable.

33. I have to, therefore, essentially examine whether the respondent had discharged his burden of all the above three postulates. The confiscation order involved here, namely Exhibit P1, does not say that the owner of the vehicle was aware of the illicit transport. Therefore, the first postulate is already taken care of. As regards the second postulate that he should have taken all reasonable and necessary precautions against such use is concerned, it is admitted that the vehicle was not used by the owner directly but that it was given on hire to a certain Mr.K.J.Varghese, whose statement is Exhibit R12 as noticed above, on a monthly lease arrangement and that the agreement creating such arrangement clearly had a condition that the vehicle shall not be used by the hirer for any illegal or unlawful activity including commission of forest offences. I am sure nothing more could have been done by an owner when he hires a vehicle to another except that the hirer be bound to a condition not to use the vehicle for any illegal purpose. That being so, it will be justified to hold that the respondent had taken all reasonable and necessary precautions against the use of his vehicle for illicit purposes. It is the third postulate-that the agent of the owner should also be seen to have taken all reasonable and necessary precautions-which is of climacteric importance in this case, because even going by Exhibit P1 order, it is this postulate which is alleged to have been transgressed by the owner to make confiscation of the vehicle inevitable. It is, therefore, necessary that I examine this in little more detail.

34. It is admitted, at least it appears to be without any contrary proof, that the

vehicle was, at the time of its detention, under the charge and custody of the aforementioned K.J.Varghese. His statement, namely Exhibit R2, is certain that he had taken the vehicle under an arrangement of hire from the respondent. He admits that he had entered into an agreement of monthly rent for the purpose of such hire and that the said agreement had a specific condition ingrained in it that the vehicle shall not be used for any illegal purposes, much less to commit a forest offence.

35. Section 61A(2) of the Act says that the agent of the owner should have taken all reasonable and necessary precautions. The question, therefore, would be if K.J.Varghese can be said to be in the position of an agent of the owner. The confiscation order admits to the arrangement of hire, but confines that the hirer had an equal duty as the owner since he is his agent. I am not sure if this is how an agent can be defined. In *Lakshminarayan Ram Gopal and Son Ltd. v. Government of Hyderabad* (1955-1 SCR 393 : AIR 1954 SC 364), the Hon'ble Supreme Court had occasion to explain the position of an agent, a servant and an independent contractor. It was succinctly opined in the judgment that the difference between the relations of master and servant and of principal and agent lay in this : a principal has the right to direct what work the agent has to do; but a master has the further right to direct how the work is to be done. An agent has to be distinguished on the one hand from a servant and on the other from an independent contractor. A servant acts under the direct control and supervision of his master and is bound to conform to all reasonable orders given in the course of his work. An agent though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal.

36. In the case at hand, the position of K.J.Varghese can never be seen to be that of a servant and going by the judgment of the Hon'ble Supreme Court above, it will be completely impossible to hold that he is an agent either. This is because K.J.Varghese was acting independently without any dictation from the owner and he was, therefore, in the position of an independent individual without any confines being cast upon him by the owner of the vehicle. In fact, he is not even an independent contractor because he was not acting remotely in connection with the owner but totally in an independent fashion and he was using the vehicle for the purposes over which the owner had no control whatsoever.

37. Sri.P.Gopal, the learned counsel for the respondent, also feebly tried to contend that the value of the timber and logs seized was so exiguous that an order to confiscate the vehicle, which was of much higher value, was illegal. He relied upon Pushpan (*supra*) in support of his contention. This submission I have said is feeble because the Hon'ble Supreme Court in *State of Jharkhand v. Govind Singh* ((2005) 10 SCC 437) and *State of Kerala v. Sukumara Panicker* (1987 (2) KLT 341(FB)), has found this contention to be completely without any

basis, thus overruling Pushpan's case (supra). The specific observations of the Full in Sukumara Panicker (supra) is as follows: "Viewed in the above background and context, with great respect to the learned Judges who decided Pushpan's case (1984 KLT 1021), the observations therein to the effect, that "it is well settled that the confiscation of the vehicle is illegal and unsustainable, if the value of the contraband alleged to have been carried in the vehicle, is negligible compared to the value of the vehicle", has been too widely stated and does not represent the law correctly. In our view, at the most, the said factor may not be totally an irrelevant one in adjudicating the question as to whether the vehicle may be confiscated in exercise of the powers under S.61A(2) of the Act, in all the circumstances of the case. But, this is again a matter to be primarily considered by the authorised officer, in the light of the policy, object and purpose of the Act, taken as a whole, which we have enumerated herein above. To go beyond and to state that the order of confiscation is illegal and unsustainable if the value of the contraband alleged to have been carried in the vehicle is negligible compared to the value of the vehicle, is an overstatement of the law not warranted by S.61A(2) of the Act, in the light of the preamble, object and scheme of the Kerala Forest Act, which we have extracted herein above."

38. It is, therefore, clear without any requirement for further re-statement that the contention regarding the value of contraband seized relative to the value of the vehicle is no longer a valid criterion while deciding the validity of the confiscation of the vehicle.

39. I think by now I have considered all the issues that have been raised either of the parties in this case.

40. I have found in paragraph 32 that the respondent would be entitled to the relief against the confiscation order since it has been issued in violation of the binding directions contained in Exhibits R11 and R14 judgments of this Court. I have also conclusively noticed above that the respondent, who is the owner of the vehicle, has not been even alleged to be in the knowledge of illicit transportation of timber but only that his agent had not taken sufficient care. However, as I have recorded above, the hirer of the vehicle by no stretch of imagination can be said to be the agent of the owner. The issues relating to the application of Ancy Philip (supra) and the value of the vehicle are obviously against the respondent and in favour of the State as has been recorded by me in paragraphs 17 and 39.

41. However, since the respondent cannot be held responsible for the illicit use of the vehicle or that he had not taken sufficient care to prevent such use because the hirer is not his agent, I am of the view that the respondent deserves to succeed and that consequentially this writ petition deserves to be dismissed.

42. In arriving at the conclusion as above, I do not think it is relevant to consider whether a forest offence had been committed, as had been touched upon by the District Court in Exhibit P2, because even assuming that a forest offence had

been committed, it would in no manner subject the respondent to an order of confiscation of his vehicle, for the reasons recorded above. However, from the materials on record, it would appear that the stand of the Government that a forest offence had been committed is on very extremely shaky ground since, as has been concluded by the District Court, such conclusions appears to be without any evidence to prove that the timber and logs are conclusively forest property especially because even the Divisional forest Officer has in Exhibit P1 recorded that the vila chit had been produced by the aforementioned K.J.Varghese before him relating to the alleged contraband articles. I do not propose to conclude on this affirmatively because I think even without this the respondent could succeed. This writ petition is thus dismissed upholding the impugned judgment dated 20.03.2007 of the District Court in C.M.A.No.48/1989 but based on my conclusions which I have recorded herein.