

(2012) 03 KL CK 0056

In the High Court Of Kerala

Case No : Writ Petition (C) No. 34939 of 2011 and connected cases

Sujith

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 23-03-2012

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 102, 102(1), 102(3), 39, 451
Kerala Protection of River Banks and Regulation of Removal of Sand Act, 2001 —
Section 20, 21, 22, 23, 24
Penal Code, 1860 (IPC) — Section 166

Citation : (2012) 2 KLT 547

Hon'ble Judges : Thottathil B. Radhakrishnan, J;C.T. Ravikumar, J

Bench : Division Bench

Advocate : V. Sethunath and V. Vinay, for the Appellant; T. Asaf Ali Director General of Prosecutions, for the Respondent

Judgement

Thottathil B. Radhakrishnan, J.—Heard the learned counsel for the petitioners and the learned Director General of Prosecutions. Examining the statutory provisions as contained in the Kerala Protection of River Banks and Regulation of Removal of Sand Act, 2001, for short, the "Act", in the backdrop of decisions rendered by this Court touching different aspects of that Act, we see that the learned Judge, in making the order of reference, was justified in stating that the situation in hand needs further consideration because, in the ultimate analysis, it is also the requirement that S.20 of the Act is effectively implemented.

2. Section 20 of the Act provides the penalty for contravention of the provisions of the Act or the rules made there under, S.21 provides the penalty for abetment of any offence punishable under the Act. Taking cognizance of any offence punishable under the Act stands governed by sections 24 and 25. Statutory provisions authorizing various actions in terms of the provisions of the Act, either by the revenue authorities or by the criminal courts, have been dealt with, quite elaborately, in different decisions; Abdul Samad v. State of Kerala (2007 (4) KLT

473), Moosakoya v. State of Kerala (2008 (1) KLT 538), Ahammed Kutty v. State of Kerala (2008 (1) KLT 1068), Thonikkadavath Shoukathali Vs. The Tahsildar and State of Kerala, and few others as well. Examining them, we do not find any conflict among those precedents on any issue relating to Ss. 20, 21, 22, 24 or 25 of the Act.

3. We also need to note that S.22 of the Act provides that nothing in the Act shall prevent any person from being prosecuted under any other law, for the time being in force, for any act or omission made punishable under the Act. This means that if the act or omission resulting in the violation of Ss. 20, 21 or 22 of the Act also amounts to an offence punishable under any other law, including the Indian Penal Code, the law will take its due course and the provisions as to the taking of cognizance would not then be controlled by Ss. 24 and 25 of the Act in so far as the criminal proceedings are relatable to the allegation as to commission of such other offences, as may be made out. Ignoring S. 22, while construing Ss. 20, 21, 24 and 25, would be counter-productive to the objects sought to be achieved by the Act.

4. The Act was brought in to protect river banks and river beds from large scale dredging of river sand and to protect their biophysical environment system and to regulate the removal of river sand and for matters connected therewith or incidental thereto. The Preamble to the Act, which was referred to in the precedents noted above, pointedly shows that the ultimate object sought to be achieved and the requirement that ought not to fail is to provide regulatory measures as part of environment management.

5. An examination of the provisions of the Act, with the aforesaid in mind, would show that there is abundant room for mischief and subversion of the objects sought to be achieved by that Act, including the clear expressions in its Preamble. Such abuse would only shield the offenders who plunder natural resources for commercial gain, in defiance of the laws. If not curtailed, such abuse would essentially be against the interest of national wealth and, in turn, against national interest. We have no doubt that the ill-crafted legislation cripples public and national interests. It cannot contain the onslaughts on nature. It does not provide to preserve the Earth, Her waters etc. for the generations who are in the waiting, yet to be born for a sojourn on this planet. It does not prevent Her rape for wealth. Laws made by man shall riot be as eye-wash; if he lets them to be so, even the eyes would be washed off; if not his, but surely; those who may run with him or, may be, those yet to tread. The substance of the order of reference is not a criticism of the views taken in the judgments referred to therein, but, the manner in which prosecutions which ought to have gone ahead in terms of the laws including the provisions of Chapter V of the Act stand crippled under the oblique cover of those precedents. The statements and declarations as contained in those precedents are not intended to provide such cover for the law breakers.

6. Legislature and the Executive ought to be aware of the fact that considerable

confusion has been created by the manner in which the different provisions of the Act are couched and also by the situation created by the lapse of an Ordinance. The learned Director General of Prosecutions submits that the issue, in all likelihood, is to gain the attention of the State Legislative Assembly in its current session, or, the Cabinet and the Governor shortly, even if the Assembly is not in session. May be that, there is considerable confusion in the mind of the executive. But, law, in its truest sense, really, has no confusion in that regard because legal principles are to be used only to carry forward and render justice in accordance with law; not merely to state the law. For, law is not an end in itself; it is a means to justice which is the soul of the society.

7. As already noted, S.22 provides that nothing in the Act shall prevent any person from being prosecuted under any other law for the time being in force for any act or omission made punishable under the Act. Therefore, the restrictions in S.25 as to taking cognizance do not apply to criminal proceedings relating to apprehension, prosecution, conviction and punishment on the allegation of commission of an offence under other laws. The provisions of S.23 of the Act would also not apply to such proceedings—Chapter V of the Act does not provide alternatives to different provisions in the Code of Criminal Procedure which regulate arrest; process to compel appearance; process to compel the production of things; proceedings in trial etc. Under S.24 of the Act, all offences under the Act are cognizable. The Act is not a comprehensive and complete code by itself. The Act does not exclude the application of the Code of Criminal Procedure. Hence, the general procedural law would apply to the extent it is not excluded specifically by the Act. When a complaint is made in terms of the provisions of Chapter V of the Act, the provisions of the Code of Criminal Procedure would, undoubtedly, apply to the proceedings initiated thereby.

8. Now, S.102(1) of CrI.P.C. empowers any police officer to seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence. Under sub-s. (3) of S.102, the police officer shall forthwith report the seizure to the Magistrate having jurisdiction. The provision in S.102 undoubtedly would apply when any police officer finds any property under circumstances which create suspicion of the commission of any offence which would be punishable under any law. In its application to sand or vehicle which is subjected to proceedings under S.23 of the Act, even if the seizure is done by a revenue official, a police officer may effect seizure of the self same goods, in terms of S.102(1) of CrI.P.C. and the revenue official shall then hand over the seized goods to that police officer. This is because the authority, power and the corollary duty of the police officer under S.102(1) of CrI.P.C. is not abridged in any manner by the provisions in the Act. The legislative authorization in S.23 of the Act, though a clumsily worded provision, is only to seize for the purpose of confiscation and not to effect seizure for purposes intended by S.102(1) of CrI.P.C., which include detection, containment, investigation, prosecution and trial in terms of the penal laws. Remember, the offences under the Act are

cognizable, meaning that a police officer may arrest without warrant; though, S.25 of the Act interdicts cognizance by Court, except on a complaint by a person authorized in terms of that section of the Act. Following such seizure, police officer shall report such seizure to the Magistrate concerned, in terms of S.102(3) CrI.P.C.

9. The directions, 12 in number, contained in *Moosakoya v. State of Kerala* (2008 (1) KLT 538) deal exclusively with the domain of the confiscation or appropriation of the value of the vehicle. They do not, in any manner, deal with the prosecution of the offenders in terms of the Act. However, coming to *Thonikkadavath Shoukathali Vs. The Tahsildar and State of Kerala*, , the three further directions issued in para. 27 may give an impression that they are intended to govern also cases where prosecution has to be initiated. Though advertence is made to S.102 CrI.P.C. in *Moosakoya* (supra) and *Shoukathali* (supra), the focus by the learned Judges deciding those cases was only on the aspect of seizure under S.23 of the Act for confiscation of vehicles. We read those decisions only in that manner because, as already noted, the confiscation provided thereby is, as noted in *Moosakoya* (supra), a power that rests with the District Collector or such revenue authority, as the case may be. Now, looking at S.23, we see that the Legislature has clearly envisaged the requirement to punish the offenders apart from confiscation of vehicles. This means that the requirement to initiate action by filing complaint in terms of S.25 has necessarily to be followed in all cases where situation calls for such action. The purport of the Act and the clear provision in S.23 that who ever transports sand without complying with the provisions of the Act "shall be liable to be punished" categorically shows that under such circumstances, the person effecting the seizure, be it a police official or a revenue official, has the bounden duty to have the culprit brought to face the consequence of the penal laws governing the situation. That duty is also on the person authorized in terms of S.25 of the Act. This duty can never be disregarded. Therefore, the directions in *Shoukathali* (supra) apply only to seizure for confiscation and appropriation by the State as noticed in *Moosakoya* (supra). Those directions do not regulate seizures for and in connection with prosecution; which matter falls under S.102 CrI.P.C. They relate only to the aspect of confiscation and appropriation of the amounts that may be generated as available to the River Management Fund.

10. Since the Act enjoins that cognizance in terms of Chapter V thereof can be taken only upon a complaint in writing made by a person authorized in terms of S.25, that has to be done; meaning thereby, that it shall be done unless that officer is sure, in his personal official capacity, that it need not be done. Having regard to the different aspects of the Act and the objects sought to be achieved thereby, all officers concerned ought to stand reminded for all times to come that it would be dangerously perilous in connection with the discharge of their official duties, if they do not file any complaint which ought to be filed. The Director General of Prosecutions points out that there appears to be a misapprehension that there is no compulsion in the Act to ensure that those who ought to be

prosecuted are to be brought to face criminal proceedings in terms of Chapter V. If any revenue or police official concerned with the enforcement of the provisions of the Act nurtures any such misapprehension, that is misplaced. When it is provided in S.25 of the Act that no court shall take cognizance of any offence punishable under the Act except upon a complaint in writing made by a person authorized in this behalf by the Government, or the District Collector, or a Geologist of the Department of Mining and Geology; as a necessary corollary; those three classes of officers, as also any person authorized in that behalf by the Government, stand with the legislative command made through the statute, requiring that they shall make such complaints, in writing, in all cases where, to the satisfaction of the officer concerned, offence is disclosed in terms of the provisions of Chapter V. Such statutory authorization to make a complaint in terms of Chapter V of the Act contains the reciprocal duty on the empowered authority to make the complaint on the disclosure of the offence. To file a complaint, or not, on a situation of disclosure as to commission of an offence, cannot be left to the wisdom of the detecting authority, be it a revenue official or police official. That would be perilous in the constitutional conspectus and statutory regime in the situational situs of the legislation in hand. It cannot be left to the prerogative of those limits of governance. Adjudication in that regard, within the Constitution, is with the judiciary. That cannot be subverted by not taking the violator to the jurisdictional criminal court. If any officer does not abide by the dictate of the Constitution and the laws as aforesaid, that would even amount to dereliction of duty and could, in given cases, invite a face-to-face with the penal laws. In this regard, see S.166 of I.P.C. and *Aslam S. and Another Vs. State of Kerala and Others*, . Also see S.39 of the Code of Criminal Procedure read with the definition of a "public servant" in I.P.C. If any officer concerned requires executive command over and above the legislative command, such reminder is available in Circular No. LR (K)/41134/2005 dated 6.10.2006 issued by the Commissioner of Land Revenue. Direction in clause 11 of the said circular is that the driver of the vehicle transporting such sand should be prosecuted under appropriate provisions of the law. Obviously, the officers should take this advice to ensure that no offenders are left without being prosecuted. Questions as to whether an offence has been committed involving property, including goods, vehicle etc., and whether the person concerned is liable to be punished are matters which the competent criminal court alone can decide in a prosecution, properly launched. Therefore, it would be inadvisable to exclude that which is mandated in Chapter V and leave it to the wisdom of the revenue authority, whether or not, to initiate prosecution by instituting a complaint in terms of Chapter V. The doctrine of judicial supremacy in adjudication is the contextual beacon. That is the law.

11. Rules 27 and 28 of the Kerala Protection of River Banks and Regulation of Removal of Sand Rules, 2002, for short, the "Rules", provide the procedure to be complied with by the police officer or revenue officer, as the case may be, who seizes the vehicle used for illegal transport of sand. The police officers and

revenue officials shall seize the vehicle used for illegal transportation of sand under R.27. This is the mandate of law. That shall be done. Rules 27 and 28 lay down as to what is to be done with the vehicle after the seizure, and the procedure to be adopted by the officers. That relates to seizure that may lead to confiscation under the Act Those rules do not regulate seizure under S.102(1) CrI.P.C. At the same time, the prosecutions have also to be appropriately initiated as enjoined by law. In the absence of any statutory provision as regards the action to be taken by the revenue officials in such situations, the larger constitutional and national interests in terms of the Constitution of India, have to be taken care of. We record the submission of the learned Director General of Prosecutions that the lacuna and lack of clarity in the statutory provisions as contained in the Act and the Rules are being addressed by the Government and legislative provisions, which could also be by an Ordinance, are in the offing. However, the situation cannot be left to be in a stalemate. The vacuum that we see in the law as it now stands, needs to be taken care of. The Act and the Rules have provided restrictions regarding removal and movement of sand. But the provisions for regulating the enforcing machinery is inappropriately couched on account of deficit draftsmanship. The lacuna is clear. It is a vacuum never intended by the Legislature. That field which is left with no legislative device to effectuate all the legislative provisions of the Act has to be guarded by this Court using the constitutional power to protect the larger national interest by preventing unauthorized pilferage of national wealth and plundering of natural resources. The constitutional power of this Court under Art. 226 includes the power to act in such situations and provide the procedures as are necessary, to appropriately operationalize the statutory provisions which are available in the Act for prosecution and for confiscation etc. This is because the provisions in the Act for prosecution cannot be made redundant by the continued existence of vacuum in the procedural aspect. Such exercise of power by this Court is abundantly necessary in the situation in hand to prevent loss of national resources and wealth; loss to the exchequer etc., and also to protect the environment. Intervention by this Court is inevitable and the omission that is being supplied hereby is only to make applicable the provisions of the general procedural law, namely, CrI.P.C. This would fall within different doctrines, including *causis omissus*, authorizing effectuation of required curative intervention by the constitutional courts, during the course of interpretation of legislations. 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 Vs. State of Kerala, . 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

These Writ Petitions are ordered accordingly.