

**IN THE COURT OF JUDICIAL FIRST CLASS MAGISTRATE-III,
PERUMBAVOOR**

Present: Smt. Anju Cletus, Judicial First Class Magistrate-III

Dated this the 17th day of August 2023

C.M.P. 628/2020 in CC.358/2019

in

OR. 14/2012 of Mekkappala Forest Station

Petitioner/Complainant : State of Kerala represented by
Range Forest Officer, Kodanadu,
(OR.14/12 of Mekkappala Forest Station)
(By APP, JFCMC-III, Perumbavoor)

Respondents : 1. V. Mohanlal (Accused No.1)
S/o K.Viswanathan Nair,
Vismaya, Vidyavihar Nagar,
Thevara, Kochin Corporation,
Kanayannur taluk, Ernakulam
(By Adv. K.R. Radhakrishnan Nair)

2. P.N. Krishnakumar,(Accused No.2)
S/o. Nanu Ezhuthachan,
No.177 (Krishna) Hill Gardens,
Kuttanellur Housing complex,
Ollur,Thrisur
(By Adv.Antony Lijo M.X)

3. K. Krishnakumar, (Accused No.3)
S/o Krishnamenon, Nayanam,
North N.F. Gate, Thrippunithura,
Ernakulam District (Ambujalayam)
Muthukulangara Temple road, Eroor,
Thrippunithura, Nadama
village,Kanayannur taluk (no more)

4. Nalini Radhakrishnan,(Accused No.4)
W/o Puzhankara Krishnan
Radhakrishnan, Peninsula Apartment,
Flat No.6/D, Tailors road, Peninsula
High Road 778, Chennai
(By Adv.Sri T.N.Arunkumar)

5. Paulose A.A, aged 48 years,
S/o Augustine,Anthikadu house,
Eloor South, Udyogamandal P.O.,
Ernakulam 683510
(Third party intervenor)

6. James Mathew, aged 59 years,
S/o Late K. Paulose,
Kalathil house, Kalanjoor P.O.,
Pathanamthitta district
(Third party intervenor)
(By Adv.Dr. Abraham P.
Meachinkara for Third party
intervenors)

ORDER

Petition filed under section 321 of the Code of Criminal Procedure by the learned Assistant Public Prosecutor seeking consent of this court to withdraw from the prosecution against all the accused persons in CC.358/19 pending before this court.

2. The petition averments in brief are as follows: The Income Tax Department had conducted search at the residence of the 1st respondent (Accused

no.1), who is a popular film actor, on 22.07.2011 and found the 1st respondent in possession of elephant tusks. On the basis of a communication made by the Income Tax Department, the Divisional Forest Officer, Malayattoor and the Forest Range Officer, Kodanad along with their staff had conducted a search in the house of the 1st respondent and found two elephant tusks fixed on a stand made of rosewood and two tusks fixed on both sides of a mirror at the residence of the 1st respondent on 21.12.2011 at Kochi. On finding that the 1st respondent had no lawful authority as prescribed under the Wild Life (Protection) Act 1972 for possession of tusks the Divisional Forest Officer seized the aforesaid tusks and released the same on bond to one M.J.Antony who is the representative of the 1st respondent. Consequently, on 12.06.2012 Occurrence Report No.14/2012 was filed before this court with respect to two pairs of elephant tusks found in the illegal possession of the 1st respondent. After investigation, Form II report against the accused No.1 to 4 (Respondents 1 to 4 herein) was laid by the Range Forest Officer, Kodanad before this court on 16.09.2019. The 1st pair of tusks possessed by the 1st respondent had been obtained by the 1st respondent from a dead captive elephant owned by the 2nd respondent (accused no.2), Sri. P.N. Krishnakumar and a certificate of ownership had been issued to the 2nd respondent as No.WL2-3903/86 dated 12.09.1986 with respect to such tusks. The 2nd pair of tusks belonged to the 4th respondent (accused no.4) Smt. Nalini Radhakrishnan, who had acquired the tusks by way of

inheritance from her father in-law, who was the Maharaja of Cochin. Both pairs of tusks had been given by these persons to the 1st respondent for safe custody with due authorization. During the course of investigation, the Ministry of Environment and Forest vide letter F.No.1-7/2015/wl dated 29.04.2015 of the Central Government addressed the request of the 1st respondent as letter dated 01.06.2015 and directed him to approach the State Government/Chief Wild Warden as per S.40(4) of the Wild Life (Protection) Act, 1972. The tusks belong to the captive elephants with respect to which executive power of the State Government extends and the executive power of the Union does not have any application. In exercise of the special powers under section 40(4) of the Wild Life (Protection) Act 1972, the State government had vide a notification GO(Rt)538/2015 (F & WLD) dated 16.12.2015 accorded sanction to the 1st respondent to declare his possession of the tusks in compliance with the Act. The legality of the possession of the said elephant tusks in question by the 1st respondent was accepted by the competent authority under the Wild Life (Protection) Act 1972 by issuing a certificate of ownership in Form 16 (No. BD C2- 504/14, OCT No.01/14) dated 16.12.2016 of the Principal Chief Conservator of Forest (Wild Life) and the Chief Wild Life Warden, Kerala as per the GO (Rt) 538/2015 (F&WLD) dated 16.12.2015. Therefore, the possession and the custody of the two pairs of elephant tusks in question by the 1st respondent become legal as on the date of commencement of the

Wild Life (Protection) Act. The government by issuing a certificate of ownership is fairly estopped from going back from its previous statement by virtue of S. 115 of the Indian Evidence Act. The ownership certificate issued to the 1st respondent on 16.12.2015 on the basis of declaration made as per S.40(4) of the Wild Life (Protection) Act 1972 is having the status of a promissory estoppel. After issuing the certificate of ownership and Government Order granting time to make declaration, the occurrence in question has become no offence in the eyes of the penal law by virtue of the Doctrine of ex-post facto law. The original source of tusks could be either traced to a period before coming into force of the Wild Life (Protection) Act, 1972 or from the grant of ownership certificate. The original source of tusks in this case is a person, and therefore the element of public interest is comparatively less in this case. There is unexplained inordinate delay in filing the occurrence report before the court even after reliable information regarding the occurrence in question which shows that the prosecution has been initiated on the basis of an afterthought. The factual situation applies to all accused in this case. This case lacks prospects for successful prosecution. Continuation of the prosecution of this case is a futile exercise and total wastage of the precious time of this court. The Government of Kerala vide order No.L3/25/2019-Home dated 07.02.2020 has extended consent for withdrawal from prosecution in this case. The public interest and justice warrants an early withdrawal from prosecution in this

case. According to the Assistant Public Prosecutor, the accused No.1 approached the State Government by offering his willingness to declare possession of 2 tusks of elephant in question, if he was permitted to do so. Accordingly, in exercise of the special powers under Section 40(4) of the Wild Life Act, 1972 the State Government issued notification G.O(Rt).No.538/2015/F&WLD dated 16.12.2015 and granted sanction after complying with the mandatory provisions under the Act, 1972. Thereafter, the legality of possession of the 2 pairs of elephant tusks in question by the 1st accused was accepted by the competent authority by issuing a certificate of ownership in form No.16 dated 16.12.2016 of the Principal Chief Conservator of Forest (Wild Life) and the Chief Wild Life Warden, Kerala as per order dated 16.12.2015. Since such a certificate of ownership was issued, State of Kerala was estopped from contradicting, denying or declaring to be false the previous statements made by the Public Prosecutor in court and in order to get good faith of the people and public interest for the Government, the Government should not be allowed to revert from its promises. Therefore, in order to manifest good faith amongst the people, certificate of ownership has been issued and thereby permission is sought to withdraw from the prosecution.

3. The third party intervenors aforementioned had initially approached this court seeking an opportunity of hearing in the above petition. This court had by order dated 05.04.2022 dismissed the petitions filed by them finding that they have

no locus standi to be heard in the withdrawal petition. However, the Hon'ble High Court by order dated 19.05.2022 in OP (Crl.) No.25/2022 had reversed such order and directed this court to proceed with CMP 628/2020 with the participation of the third party intervenors and pass appropriate orders within three weeks from the date of such order. On receiving the order, opportunities were given to the learned Assistant Public Prosecutor and the learned counsel for the third party intervenor for hearing on the withdrawal petition. The third party intervenors filed objection to the withdrawal petition. Argument notes were filed by third party intervenors as well as the counsel for the accused No.1.

4. The contentions raised by the third party intervenors in their objection in brief are as follows. The 1st respondent had chosen to declare the articles only after O.R. 14/2012 of Meckappala Forest station was registered against him under the Wild Life (Protection) Act,1972. The State Government can exercise its power under S.40(4) of Wild Life (Protection) Act only in the case of bonafide inheritance after proper and effective enquiry as prescribed under S.41 of the Act and publication of notification in the official gazette. There is no gazette notification in this case hence the alleged certificate of ownership has no legal sanctity and is void *ab inito*. The public prosecutor cannot rely on the illegal certificate of ownership granted to the 1st respondent against which a challenge is pending before the Hon'ble High Court of Kerala. The doctrine of estoppel and

legitimate expectation cannot be applied in the case of the public authorities to justify their wrongful actions. Section 40(1) of the Wild Life (Protection) Act requires 'Every person having at the commencement of this Act the control, custody or possession of any captive animal specified in Schedule I or Part II of Schedule II, or any uncured trophy derived from such animal or salted or dried skin of such animal or the musk of a musk deer or the horn of a rhinoceros, shall, within thirty days of the commencement of this Act, declare to the Chief Wildlife Warden or the Authorized Officer the number and description of animal or article of the foregoing description under his control, custody or possession and the place where such animal or article is kept'. The 1st respondent has chosen to declare the articles only after OR 14 of 2012 of Mekkappala Forest Station was registered against him under the provisions of the Wildlife (Protection) Act, 1972. Section 40(2) of the Act restricts as 'No person shall, after the commencement of this Act, acquire, receive, keep in his control, custody, or possession, sell, offer for sale or otherwise transfer or transport any animal specified in Schedule I or Part II of the Schedule II or any uncured trophy or meat derived from such animal, or the salted or dried skins of such animal or the musk deer or the horn of a rhinoceros, except with the previous permission in writing of the Chief Wild Life Warden or the authorized officer'. Section 40(2A) states that 'No person other than a person having a certificate of ownership, shall, after the commencement of the Wild Life

(Protection) Amendment Act 2002 acquire, receive, keep in his control, custody or possession any captive animal, animal article, trophy or uncured trophy specified in Schedule I or Part II of Schedule II, except by way of inheritance'. Section 40(2B) of the Act provides that 'Every person inheriting any captive animal, animal article, trophy or uncured trophy under sub-section(2A) shall, within ninety days of such inheritance make a declaration to the Chief Wild Life Warden or the authorized officer and the provisions of section 41 and 42 shall apply as if the declaration had been made under sub-section (1) of section 40. Provided that nothing in sub-section (2A) and (2B) shall apply to the live elephant'. Further, section 40(3) of the Act provides that 'Nothing in sub-section (1) or sub-section (2) apply to a recognized zoo subject to the provisions of section 39-I or to a public museum. Section 40(4) of the Act states that 'The State Government may by notification, require any person to declare to the Chief Wildlife Warden or the authorized officer any animal or animal article or trophy (other than a musk of a musk deer or horn of a rhinoceros) or salted or dried skins derived from an animal specified in Schedule I or Part II of Schedule II in his control, custody or possession in such form, in such manner, and within in such form, in such manner, and within such time as may be prescribed'. This clause seeks to amend Section 40 of the Act to provide that the transfer of captive animals (other than live elephants), animal article, trophy or uncured trophy specified in Schedule I or Part II of

Schedule II shall be recognized only where such transfer is effected by way of inheritance. Notification as defined in the Act under Section 2(22) means a notification published in the official Gazette. On a plain reading of sub-section (1), (2), (2A), (2B)(3) and (4) of Section 40 of the Act, State Government can exercise power under Section 40(4) only in the case of bonafide inheritance, after proper and effective inquiry as stipulated under Section 41 of the Act and publication of Notification in the Official Gazette. There is no Gazette Notification in this case hence the alleged Certificate of Ownership has no legal sanctity and is void *ab initio*. The Assistant Public Prosecutor cannot rely on the illegal Certificate of Ownership granted to the 1st accused as the matter is pending consideration before the Hon'ble High Court of Kerala. The Ivory possessed by the 1st accused is a 'Thondy' material involved in OR 14 of 2012 of Mekkappala Forest Station which is at the disposal of the trial court only. Section 50(3A) and Section 50(4) of the Act, 1972 and Sections 451 and 452 of Code of Criminal Procedure 1973 requires that articles seized shall be dealt with by the Magistrate in accordance with law. In this case, neither four elephant tusks and thirteen items of wildlife artifacts made of Ivory were seized nor produced before Magistrate Court. The learned Assistant Public Prosecutor has not mentioned about the pendency of two Writ Petitions WP(C)No.11074 of 2019 and WP(C) No.27187 of 2019 challenging the Certificate of Ownership to 1st respondent (1st Accused). Law must be equal to all citizens

without discrimination and withdrawing a case against the accused in the present case where 1st accused is a famous film actor is not for any other reason or in accordance with the principles settled by the Apex Court, but the reason is to give clean chit to the first accused being a film actor and the Government never exercised withdrawal of any prosecution initiated under the Forest Act, herein before. The withdrawal petition do not serve the ends of justice. Hence, the same is liable to be dismissed.

5. This court after hearing the learned Assistant Public Prosecutor and the learned counsel for the third party intervenors had dismissed the withdrawal petition on 09.06.2022 finding that that withdrawal petition has been filed in a hasty manner without addressing the challenges raised before the Hon'ble High Court in WP(C) 27187/2019 by the intervenors regarding legality of the ownership certificate issued to the 1st accused after registration of the OR.14/12 of the Mekkappala Forest Station.

6. The order dated 09.06.2022 of this court dismissing the withdrawal petition was challenged by the petitioner and the accused before the Hon'ble High Court in Crl.R.P No.591 of 2022, 593/2022 and Crl.R.P.No.754 of 2022. The Honb'le High Court by common order dated 22.02.2023 set aside the order in CMP.628/2020 dated 09.06.2022 with a direction to reconsider the withdrawal petition afresh in the light of settled principles of law as discussed by the Hon'ble High Court and pass an order within a period of six months.

7. On remand back, heard the learned Assistant Public Prosecutor, the learned counsel for the third party intervenors Adv. Abraham P. Meachinkara and the learned Senior Counsel Shri. S. Sreekumar who appeared for the accused no.1.

8. The learned Senior Counsel on behalf of the accused no.1 submitted that no prosecution would lie against the accused as the ownership certificate has been granted to him in accordance with law with retrospective effect. It was submitted that this court may not venture into the question of legality of the ownership certificate as the matter is being considered by the Division Bench of the Hon'ble High Court of Kerala. It was also pointed out that there is no allegation that the accused has hunted a wild elephant and thereby obtained the tusks. It was submitted that even going by the prosecution records the tusks belonged to captive elephants and therefore there is no public interest involved in this matter. It was argued that the third party intervenors have involved in this case only as a matter of publicity stunt and continuance of prosecution against the accused would be a futile exercise leading to wastage of precious time of the court.

9. The learned Assistant Public Prosecutor has filed this petition seeking consent to withdraw the prosecution against respondents 1 to 4 (A1 to A4). Form II Forest Offence Charge Sheet was filed by the Range Forest Officer, Kodanad before this court on 16.09.2019 against the four accused in OR 14/12 of Mekkappala Forest Station. The two pairs of elephant tusks were allegedly found

in the illegal possession of the 1st accused. The court had taken cognizance of offence u/ss. 39, 40 (2) (2A), 49A, 49B, 52, 57 r/w ss.2 (2)(7)(11)(14)(32)(36) and punishable under s.51 (1) (1A) of the Wild Life (Protection) Act, 1972 and issued summons to A1 to A4. A3 is no more. A1, A2 and A4 appeared before this court through their counsel. The above petition seeking withdrawal of the prosecution was filed on 23.03.2020, ie., 6 months after submission of Form II report. The withdrawal is sought primarily on the ground that after the above OR was registered, the accused no.1 had obtained ownership certificate as per s.42 of the Wild Life (Protection) Act 1972 in respect of the ivory tusks by virtue of which ownership of the ivory tusks would relate back to the date of commencement of the Wild Life Protection Act and in such circumstances no prosecution would lie against the accused no.1. According to the prosecution, on account of the certificate of ownership issued by the Principal Chief Conservator of Forests (Wildlife) and Chief Wildlife Warden, Kerala in favour of the accused no.1, no prosecution would lie against the accused no.1 to 4. However, the third party intervenors in their objection to the withdrawal petition have urged that the legality of the ownership certificate issued in favour of the accused no.1 is under challenge before the Hon'ble High Court as WP(C) 27187/2019 and in such circumstances it wouldn't be fair to drop the prosecution relying on the impugned ownership

certificate. The third party intervenors have also produced a certified copy of the WP(C) 27187/2019 pending before the Hon'ble High Court, before this court.

Section 321 of the Cr.PC is as hereunder:

“321. Withdrawal from prosecution. The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal,

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences:

Provided that where such offence-

(i) was against any law relating to a matter to which the executive power of the Union extends, or

(ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or

(iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, and the Prosecutor in charge of the case has not been appointed by the Central Government, he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution.“

Section 321 of Cr.P.C does not provide any grounds for seeking withdrawal.

10. The prosecution relied on the decision of the Apex Court in ***Sheonandan Paswan v. State of Bihar & Ors.*** [1983 KHC 434 : (1983) 1 SCC 438: AIR

1983 SC 194], to argue that the Court's jurisdiction in dealing with the application under S.321 of the Code is only to see whether the Public Prosecutor had applied for withdrawal in the interest of Public justice, or he has done so actuated by improper or oblique motive, that a substantial amount of loan has already been realised, that the continuance of the criminal case in the circumstances of this case would be only an exercise in futility at the cost of Public money and time. Reliance was placed on the reported decision ***Saramma Peter v. State of Kerala*** [1991 KHC 225 : 1991 (1) KLT 881 : 1991 (2) KLJ 47], to argue that the Public Prosecutor has power to seek withdrawal of prosecution.

11. The Hon'ble High Court by its common order dated 22.02.2023 in Crl.R.P No.591 of 2022, 593/2022 and Crl.R.P.No.754 of 2022 has observed that valid grounds for seeking withdrawal shall be public policy, interest of administration, expediency to proceed with the prosecution for reasons of State and paucity of evidence. In paragraph 26 of the aforesaid order it has been held:

“It is also to be noted that the learned Public Prosecutor may withdraw from prosecution not merely on ground of paucity of evidence but also on broad principles of public justice. The mere fact that permission was given by the Government to proceed for withdrawal and the Court must take effort to elicit reasons for withdrawal so as to ensure that the Public Prosecutor was satisfied with the

withdrawal of prosecution for good and relevant reasons. Similarly, while granting consent, the Court must be satisfied that the Public Prosecutor has not improperly exercised his power or the same is not an attempt to interfere with the normal course of justice. Further the Court has to see that the Public Prosecutor made application in good faith, in the interest of public policy and justice, and not to thwart or stifle the process of law. That apart, the court has to see that the permission has not been sought with an ulterior motive concocted with the vindication of the law that the Public Prosecutor is duty bound to maintain and the Court would be justified in its scrutinizing the nature and gravity of the offence and its impact upon public life, especially where matters involving public fund and public trust are implicated.”

12. The Hon’ble High Court observed that the withdrawal petition shall be reappreciated in the light of the principles laid down in ***State of Kerala v. K. Ajith & Ors.*** [2021 KHC 6332 : AIR 2021 SC 3954 : ILR 2021 (3) Ker. 567], which discussed the earlier decisions dealing with Section 321 of Cr.P.C. In ***K. Ajith & Ors. Case*** (supra) in para. 23 the Apex Court has set out the principles that govern s.321 of the Cr.PC as hereunder:

- *“Section 321 entrusts the decision to withdraw from a prosecution to the public prosecutor but the consent of the court is required for a withdrawal of the prosecution;*

- *The public prosecutor may withdraw from a prosecution not merely on the ground of paucity of evidence but also to further the broad ends of public justice;*
- *The public prosecutor must formulate an independent opinion before seeking the consent of the court to withdraw from the prosecution;*
- *While the mere fact that the initiative has come from the government will not vitiate an application for withdrawal, the court must make an effort to elicit the reasons for withdrawal so as to ensure that the public prosecutor was satisfied that the withdrawal of the prosecution is necessary for good and relevant reasons;*
- *In deciding whether to grant its consent to a withdrawal, the court exercises a judicial function but it has been described to be supervisory in nature.*
- *Before deciding whether to grant its consent the court must be satisfied that:*
 - (a) The function of the public prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes.*
 - (b) The application has been made in goodfaith, in the interest of public policy and justice, and not to thwart or stifle the process of law;*
 - (c) The application does not suffer from such improprieties or illegalities as would cause manifest injustice if consent were to be given.*

(d) The grant of consent sub-serves the administration of justice; and

(e) The permission has not been sought with an ulterior purpose unconnected with the vindication of the law which the public prosecutor is duty bound to maintain.

While determining whether the withdrawal of the prosecution subserves the administration of justice, the court would be justified in scrutinizing the nature and gravity of the offence and its impact upon public life especially where matters involving public funds and the discharge of a public trust are implicated; and in a situation where both the trial judge and the revisional court have concurred in granting or refusing consent, this Court while exercising its jurisdiction under Article 136 of the Constitution would exercise caution before disturbing concurrent findings. The Court may in exercise of the well-settled principles attached to the exercise of this jurisdiction, interfere in a case where there has been a failure of the trial judge or of the High Court to apply the correct principles in deciding whether to grant or withhold consent.”

13. After considering the rival submissions the Hon’ble High Court at paragraph 31 held :

“In fact, the grant of ownership certificate is the main challenge in W.P(c).No.27187/2019 pending before the Division Bench of this Court. The decision of the Division Bench will be decisive in so far as the ownership certificate in dispute.

As far as the question with regard to refusal of leave sought for under Section 321 of Cr.P.C is concerned, the vital question arises for consideration is whether the prosecution sought permission to withdraw from prosecution as per the settled propositions of law laid down herein above.”

14. By virtue of Section 40 (1) of the Wild Life Protection Act, 1972, every person having at the commencement of this Act the control, custody or possession of any captive animal specified in Schedule I or Part II of Schedule II, [or animal article, trophy or uncured trophy] derived from such animal or salted or dried skins of such animal or the musk of a musk deer or the horn of a rhinoceros, shall, within thirty days from the commencement of this Act, declare to the Chief Wild Life Warden or the authorised officer the number and description of the animal, or article of the foregoing description under his control, custody or possession and the place where such animal or article is kept. As per Section 40(2), no person shall, after the commencement of this Act, acquire, receive, keep in his control, custody or possession, sell, offer for sale or otherwise transfer or transport any animal specified in Schedule I or Part II of Schedule II or any uncured trophy or meat derived from such animal, or the salted or dried skins of such animal or the musk of a musk deer or the horn of a rhinoceros, except with the previous permission in writing of the Chief Wild Life Warden or the authorised officer. However, by virtue of Section 40(4) of the Wild Life Protection Act the State Government may,

by notification, require any person to declare to the Chief Wild Life Warden or the authorised officer [any animal or animal article] or trophy (other than a musk of a musk deer or horn of a rhinoceros) or salted or dried skins derived from an animal specified in Schedule I or Part II of Schedule II in his control, custody or possession in such form, in such manner, and within such time, as may be prescribed. Therefore, if a person having at the commencement of this Act, the control, custody and possession specified in such form the scheduled I or Part II of schedule II shall have to make arrangements to declare the same within 30 days from the commencement of this Act. Since the Act came into force in the year 1972 w.e.f 01.06.1973, such declaration should have been made on or before 01.07.1973 and not thereafter, as mandated under Section 41 of the Act, 1972. As per Section 42 after commencement of the Act, no person shall acquire, receive and keep in control, custody or possession of the same or stands or transported with previous permission in writing of the Chief Wild Life Conservator otherwise officer. As per Section 40(2A) introduced by Act 16 of 2003, no person other than a person having a certificate of ownership, shall, after the commencement of the Wild Life (Protection) Amendment Act, 2002 acquire, receive, keep in his control, custody or possession any captive animal, animal article, trophy or uncured trophy specified in Schedule I or Part II of Schedule II, except by way of inheritance. Section 40(2B) provides that every person inheriting any captive animal, animal

article, trophy or uncured trophy under sub-section (2A) shall, within ninety days of such inheritance make a declaration to the Chief Wild Life Warden or the authorised officer and the provisions of sections 41 and 42 shall apply as if the declaration had been made under sub-section (1) of section 40, provided that nothing in sub-sections (2A) and (2B) shall apply to the live elephant. Similarly, as per Section 40(4) of the Act, the State Government may, by notification, require any person to declare to the Chief Wild Life Warden or the authorised officer [any animal or animal article] or trophy (other than a musk of a musk deer or horn of a rhinoceros) or salted or dried skins derived from an animal specified in Schedule I or part II of Schedule II in his control, custody or possession in such form, in such manner, and within such time, as may be prescribed. Therefore, in order to make declaration under Section 40(4), the State Government shall issue notification, then also, the person who is competent to declare in so far as item specified in Schedule I or part II of Schedule II shall be persons having control, custody or possession in such manner and within such time, as may be prescribed.

15. In the present case, the withdrawal is sought primarily on the ground that after the above OR was registered, the accused no.1 had obtained ownership certificate as per s.42 of the Wild life Protection Act in respect of the ivory tusks by virtue of which ownership of the ivory tusks would relate back to the date of commencement of

the Wild Life Protection Act and in such circumstances no prosecution would lie against the accused no.1. According to the prosecution, on account of the certificate of ownership issued by the Principal Chief Conservator of Forests (Wildlife) and Chief Wildlife Warden, Kerala in favour of the accused no.1, no prosecution would lie against the accused no.1 to 4.

16. In the light of the principles laid down in *K. Ajiths case (supra)* it has to be considered whether withdrawal from prosecution in this case would serve the broad ends of public justice. The Wild Life Protection Act has been enacted to provide for the conservation, protection and management of wild life and for matters connected therewith or ancillary or incidental thereto with a view to ensuring the ecological and environmental security of the country. Evidently, the Wild Life (Protection) Act, 1972 was enacted to subserve the broader interest of the country and not to protect right of individuals . Elephant is an animal included in Schedule I of the Wild Life (Protection) Act 1972 enjoying highest level of protection, irrespective of whether it is a wild elephant or a captive elephant. Elephant tusks are trophies under s.2 (31) of the Wild Life Protection Act. Illegal possession of elephant tusk is an offence under the Act. It is to be understood that the accused had no authority as per law to possess elephant tusks at the time of registration of OR 14/2012. The accused are charged with offence punishable under s.51 (1) (1A) of the Wild life Protection Act which prescribes minimum imprisonment of 3 years. By virtue of the Proviso to S.54

(4) of the Wild Life (Protection) Act 1972 no offence for which a minimum imprisonment has been prescribed in S.51 shall be compounded. Thus, the legislative intention as it appears from these provisions is that the offences which have been allegedly committed by the accused have to be viewed seriously with strict interpretation of law. The accused no.1 has allegedly obtained ownership certificate in respect of the elephant tusks in his possession on 16.12.2016. Thereafter, Form II report was filed before the court against the accused after completing the investigation. This court had issued summons to the accused after taking cognizance. On appearance of the accused before the court, the present petition was filed by the Assistant Public Prosecutor to withdraw the prosecution on the ground that the possession of the elephant tusks by the accused no.1 has become legitimate by virtue of grant of ownership certificate with retrospective effect. The validity of the ownership certificate granted during the pendency of the investigation is under challenge before the Division Bench of the Hon'ble High Court. The withdrawal of prosecution will be against the broader interest of the country if the grant of ownership certificate during the investigation is found to be not in accordance with law.

17. While allowing a withdrawal petition the court has to satisfy itself that the prosecutor has formulated an independent opinion before seeking consent to withdraw and that the function of the public prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for illegitimate

reasons or purposes. The present withdrawal petition has been filed in consequence of the executive action of granting ownership certificate pertaining to the elephant tusks in favour the accused no.1. At the time of filing of this petition the third party intervenors were not participating in any of the proceedings before this court. However, after the third party intervenors have come into picture as per the direction of the Hon'ble High Court, the withdrawal petition of the Assistant Public Prosecutor is objected on the ground that withdrawal is sought on the basis of an ownership certificate which is invalid before law. It was brought to the notice of this court that the State is a party to the Writ Petitions now pending before the Hon'ble High Court filed by them challenging the validity of the ownership certificate issued to the accused no.1 and the present petition has been filed during the pendency of the Writ Petitions without mentioning that such a challenge is being contested before the Hon'ble High Court. This fact has been willfully or otherwise not disclosed in the withdrawal petition. Thus, it appears that the withdrawal petition has not been filed on application of free mind. Section 40(4) of the Act states that 'The State Government may by notification, require any person to declare to the Chief Wildlife Warden or the authorized officer any animal or animal article or trophy (other than a musk of a musk deer or horn of a rhinoceros) or salted or dried skins derived from an animal specified in Schedule I or Part II of Schedule II in his control, custody or possession in such form, in such manner, and within in such form, in such manner, and within such time

as may be prescribed'. S.2 (22) says notification means notification published in the Official Gazette. No such Gazette notification has been produced before this court in support of the application for withdrawal. These circumstances do not inspire confidence in this court to hold that there has been proper application of mind and free exercise of the discretion of the learned Assistant Public Prosecutor as per s.321 of Cr.PC.

18. The Hon'ble High Court in the common order in CrI.R.P No.591 of 2022, 593/2022 and CrI.R.P.No.754 of 2022 has observed that law must be uniform to all, irrespective of their status as peasant, poor, middle class or higher class. Admittedly, the accused no.1 is a popular film actor. The intervenors have submitted before this court that after registration of OR in the year 2012, there has been enormous delay on the part of the investigating agency to submit Form II report. According to the intervenors, the Form II report was filed by the forest department in the year 2019 after the interference of the Hon'ble High Court at the instance of the intervenors. The learned Assistant Public Prosecutor submits that the ownership certificate issued to the 1st respondent on 16.12.2015 on the basis of the declaration made as per S.40(4) of Wild Life (Protection) Act is having the status of a promissory estoppel and that the government is prevented from retracting from it. The defence of promissory estoppel has been put forth by the prosecution as if the procedure of granting ownership certificate, irrespective of whether it is legal or illegal, is justified under law. This court

is of the view that the Assistant Public Prosecutor is duty bound to convince this court that the procedure adopted in dropping the prosecution against the accused is in accordance with law. Admittedly, there has been inordinate delay in investigation and prosecution of this case from the very inception. The learned Assistant Public Prosecutor by way of the withdrawal petition submitted that there is unexplained inordinate delay in filing the occurrence report before the court even after reliable information regarding the occurrence in question which shows that the prosecution has been initiated on the basis of an afterthought. The investigation and prosecution being the prerogative of the State, no one else can be found fault with for the inordinate delay in the proceedings. This court is of the view that no party including State can claim the benefit of the laches from their side.

19. Another argument put forward is that the original source of tusks in this case is a person, and therefore the element of public interest is comparatively less in this case. It is true that there is no allegation that the accused were personally involved in poaching the elephants. However, as pointed out earlier the accused have been booked for an offence which prescribes minimum imprisonment and which is non-compoundable. Considering the legislative intention behind the strict provisions of law, the offences allegedly committed by the accused cannot be viewed lightly. Evidently, it is the larger interest of the country that is affected by the commission of an offence under the Wild Life (Protection) Act and not individual rights of any

person. So, the argument that the element of public interest in this case is less is unacceptable.

20. Another contention of the learned Assistant Public Prosecutor is that the case lacks prospects for successful prosecution and continuation of the prosecution of this case is a futile exercise and total wastage of the precious time of this court. This court is of the view that nothing would stand in the way of withdrawing the prosecution against A1 to A4, if the ownership certificate issued to A1 is in accordance with law. Even in the absence of a withdrawal petition, the question whether a charge would lie against the accused persons would largely depend on the validity of the ownership certificate which has been issued to the accused no.1. The validity of the ownership certificate would determine whether a successful prosecution is possible in this case or not. So, I am of the view that at this stage of the proceedings it is not possible to conclude whether continuation of the prosecution proceedings would be a futile exercise or not.

21. The Hon'ble Apex Court considered the scope of Section 321 Cr.P.C in ***Balwant Singh & Ors. v. State of Bihar*** [(1977) 4 SCC 448]. The intervenors argued that Section 321 Cr.P.C can be invoked especially in situations as under:

- (1) Communal feuds which may have been amicably settled should not re-erupt on account of one or two prosecution pending;

- (2) Labour disputes which might have given rise to criminal cases, when settled, might probably be another instances where the interest of public justice in the broader connotation may perhaps warrant withdrawal from the prosecution; and
- (3) other instances also may be given where public justice may be served by withdrawal even apart from the merit of the case.

22. The present case doesn't involve an offence affecting public tranquility, the settlement of which would be desirable to establish peace and harmony in the society. As already pointed out, no member of the public is personally aggrieved by the nature of the offence allegedly committed. There are no circumstances in this case which would warrant withdrawal of the prosecution to ensure public justice.

23. In *M.N.Shankarayarayanan Nair v. P.V.Balakrishnan* [(1972) 1 SCC 318] it has been held that the court should not grant permission to withdraw from prosecution as necessary formality for the mere asking'. In *Sheonandan Paswan v. State of Bihar* [AIR 1987 SC 877], it was held that the judicial function implicit in exercise of the judicial discretion for granting the consent has to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes. In *Yohanana alias*

Pappachan v. State of Kerala & anr [1996 Cri.L.J. 3883],. it was held that case once filed cannot be mechanically withdrawn and it is a well settled principle that continuation of prosecution to its logical end is the rule and withdrawal of a case is an exception, which could be resorted to only sparingly. If withdrawal is allowed in a routine manner, the confidence of the public in the judicial system will be lost.

24. Considering the broader principles of law in the light of the circumstances of this case, this court is of the view that that request for withdrawal of the prosecution in this case on the basis of an ownership certificate issued to the accused during the investigation shall not be allowed when the validity of the such ownership certificate is under challenge before the Division Bench of the Hon'ble High Court. The withdrawal petition has been filed without disclosing the fact that the ownership certificate is under challenge. The prosecution also could not produce before the court the gazette notification pertaining to the declaration of possession of the elephant tusks by the accused no.1 and consequent grant of the ownership certificate.

25. This withdrawal petition has been filed during the pendency of the Writ Petitions challenging the ownership certificate issued to the accused no.1. The prosecution couldn't satisfy this court that the ownership certificate granted to the accused no.1 during the investigation is valid and reliable. Needless to say, nothing

would stand in the way of withdrawing the prosecution against A1 to A4, if the ownership certificate issued to A1 is in accordance with law. Even in the absence of a withdrawal petition, the question whether a charge would lie against the accused persons would largely depend on the validity of the ownership certificate which has been issued to the accused no.1. At this stage of the proceedings, I am of the view that it would be in the interest of justice to consider whether the prosecution should continue or not in the light of the adjudication which is yet to be made by the Hon'ble High Court regarding the validity of the ownership certificate issued to the accused no.1. Considering these circumstances, I am not inclined to allow the withdrawal petition.

Hence, the CMP is dismissed.

(Pronounced in the open Court on this the 17th day of August, 2023)

Sd/-

Judicial First Class Magistrate -III
Perumbavoor

||True Copy||

Judicial First Class Magistrate -III
Perumbavoor