

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 7TH DAY OF JANUARY 2015/17TH POUSHA, 1936

Crl.MC.No. 212 of 2013 ()

C.C.NO.904/2012 of JUDICIAL FIRST CLASS MAGISTRATE COURT-I, ALUVA.

PETITIONER(S)/PETITIONERS/ACCUSED:

1. T.BABU RAJ, AGED 73 YRS,
S/O. THOMAS, THOTTATHIL HOUSE, NEDUMBASSERY P.O.,
ALUVA.
2. THOMAS BABU, AGED 38 YRS,
S/O. T. BABU RAJ, THOTTATHIL HOUSE, NEDUMBASSERY P.O.,
ALUVA.

BY ADVS.SRI.B.RAMAN PILLAI
SRI.R.ANIL
SRI.M.SUNILKUMAR
SRI.SUJESH MENON V.B.
SRI.T.ANIL KUMAR
SRI.MANU TOM
SRI.THOMAS ABRAHAM (NILACKAPPILLIL)

RESPONDENT(S)/RESPONDENT/COMPLAINANT AND STATE:

1. K.FAIZEL,
S/O. ABOOBACKAR KOYA, PENTA QUEEN APARTMENTS, A BLOCK,
6TH FLOOR, PADIVATTOM, COCHIN-24.
2. STATE REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA.

R1 BY SRI.K. FAIZEL (PARTY IN PERSON).
R2 BY PUBLIC PROSECUTOR SRI.N.SURESH

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 19.11.2014,
THE COURT ON 07.01.2015 PASSED THE FOLLOWING:

APPENDIX

PETITIONER(S) EXHIBITS

ANNEXURE A: THE NOTARIZED TRUE COPY OF THE PARTNERSHIP DEED DATED 08.01.2003.

ANNEXURE B: THE NOTARIZED TRUE COPY OF THE LETTER DATED 07.03.2003.

ANNEXURE C: THE NOTARIZED TRUE COPY OF THE MINUTES DATED 05.11.2005.

ANNEXURE D: THE NOTARIZED TRUE COPY OF THE MINUTES OF THE MEETING DATED 30.12.2010.

ANNEXURE E: THE NOTARIZED TRUE COPY OF THE MINUTES DATED 31.03.2011.

ANNEXURE F: THE NOTARIZED COPY OF THE LAWYER'S NOTICE DATED 19.09.2011

ANNEXURE G: THE TRUE COPY OF THE CRIMINAL COMPLAINT DATED 15.11.2011 AS CMP.NO.2020 OF 2011 FILED IN THE COURT OF THE JUDICIAL FIRST CLASS MAGISTRATE-I, ALUVA.

ANNEXURE H: THE TRUE COPY OF THE F.I.R. DATED 17.11.2011 OF ALUVA EAST POLICE STATION.

ANNEXURE I: THE TRUE COPY OF THE FINAL REPORT (REFER REPORT) DATED 21.03.2012 IN CRIME NO.3304/2011, ALONG WITH THE NOTICE U/S. 173(1)(b) CR.P.C. DATED, 01.03.2012.

ANNEXURE J: THE CERTIFIED COPY OF THE COMPLAINT DATED 28.02.2012 FILED BEFORE THE JFCMC-I, ALUVA AGAINST 10 ACCUSED PERSONS.

ANNEXURE K: THE CERTIFIED COPY OF THE SWORN STATEMENT OF THE 1ST RESPONDENT.

ANNEXURE- K1: THE TYPED COPY OF SWORN STATEMENT OF THE 1ST RESPONDENT.

ANNEXURE L: THE CERTIFIED COPY OF THE SWORN STATEMENT OF ABDUL JALEEL.

ANNEXURE- L1: THE TYPED COPY OF THE SWORN STATEMENT OF ABDUL JALEEL.

ANNEXURE M: THE CERTIFIED COPY OF THE ORDER OF COGNIZANCE DATED 27.10.2012.

ANNEXURE N: THE TRUE COPY OF THE REPORT DATED, 01-09-2012 OF THE SUB-INSPECTOR OF POLICE, ALUVA EAST POLICE STATION.

ANNEXURE O: THE TRUE COPY OF THE LETTER DATED, 28.11.2011 OF THE CHIEF MANAGER, FEDERAL BANK, THOTTAKKATTUKARA BRANCH.

RESPONDENTS' EXHIBITS

- ANNEXURE R1(a) : TRUE COPY OF THE PARTNERSHIP DEED DATED 08.01.2003.**
- ANNEXURE R1(b) : TRUE COPY OF THE STATEMENT OF ACCOUNTS.**
- ANNEXURE R1(c) : TRUE COPY OF THE STATEMENT OF ACCOUNT OF 337501010034226 IN UNION BANK OF INDIA, ALUVA.**
- ANNEXURE R1(d) : TRUE COPY OF THE LETTER ISSUED BY THE UNION BANK DATED 29.07.2011, INFORMING THE STOPPAGE.**
- ANNEXURE R1(e) : TRUE COPY OF THE STATEMENT 6 BANK ACCOUNT OF THE FIRM.**
- ANNEXURE R1(f) : TRUE COPY OF THE EXTRACT OF THE FIRM ISSUED FROM THE OFFICE OF THE INSPECTOR GENERAL OF REGISTRATION, TRIVANDRUM. DATED 23.05.2012.**
- ANNEXURE R1(g) : TRUE COPY OF THE FIR OF CRIME NO.1711/12 DATED 26.06.2012.**
- ANNEXURE R1(h) : TRUE COPY OF THE LETTER ISSUED FROM THE FEDERAL BANK, STATING THE BANK DID NOT ALLOW TO OPERATE AS SINGLE ACCOUNT AT ANY POINT OF TIME DATED 29.09.2004.**
- ANNEXURE R1(i) : TRUE COPY OF THE LETTER ISSUED BY THE INCOME TAX DEPARTMENT DATED 21.09.2011.**

//True Copy//

P.A. To Judge

Bb

K. Ramakrishnan, J.

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CrI.M.C.No.212 of 2013

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Dated this, the 07th day of January, 2015.

O R D E R

This is an application filed by the accused Nos. 1 and 2 in C.C.No.904/2012 on the file of the Judicial First Class Magistrate Court, No-I, Aluva to quash the proceedings under Section 482 of Code of Criminal Procedure.

2. The petitioners were arrayed as accused Nos. 1 and 2 in C.C.No.904/2012 on the file of the Judicial First Class Magistrate Court, No-I, Aluva. The petitioners are the partners of the firm "Blue Chip Mines and Industries". The protest complaint was filed by the first respondent who was also a partner of the above firm for some time, but, expelled by other partners of the firm. The protest complaint was filed by the first respondent after the first complaint dated 15.11.2011 filed by him and forwarded to the Police by the Court under Section 156(3) of the Code of Criminal Procedure was investigated and referred by the police after finding that the allegations levelled by the first respondent were without any basis and it is of purely Civil nature and was filed to wreak private vengeance. The allegations in the complaint relate to

the dispute regarding accounts and the transactions of the partnership firm of which the first petitioner is the Managing Partner and second petitioner is the partner. The first respondent was also a partner of the above firm till his expulsion on 31.03.2011 and he filed complaint against the petitioners and few bank officials only after issuance of the lawyer's notice dated 19.09.2012 by the petitioners informing the first respondent that he was no more the partner of the firm as per the retirement and release deed dated 31.03.2011 signed by all the then partners except the first respondent and the resolution dated 31.03.2011 passed by all the then partners except the first respondent for expelling him from the partnership and demanding him to clear the liabilities of Rs.9,01,882.87/- due to the firm from him and they filed Arbitration O.P.No.1112/2011 before the District Court, Ernakulam on 24.10.2011 against him, claiming interim reliefs. First petitioner is aged 73 years. He retired as Chief Engineer, Irrigation, State of Kerala. Second petitioner took his M.Tech Degree from Cochin University in 1998 and he is the son of the first petitioner. On 15.07.2002, the petitioners and eight others who include the brother of the second petitioner and

wives of the second petitioner and his brother Dr.Isac Babu formed a partnership with the object of mining, production of granite, broken stones etc under the name and style "Blue Chips Mines and Industries" with its office at Palarivattom. The first petitioner was the Chairman and Managing Partner and another partner by name Kunju Muhamed was the Joint Managing Partner. They were made the joint signatories for the transaction with the bank. All the partners contributed to the capital of the business of the firm. First respondent was not a partner at that time. The petitioners and other partners except the first respondent had invested more than 4,50,00,000/- (Four Crores and Fifty Lakhs) towards the purchase of more than 10 acres of property at Chalavara Village, Ottapalam Taluk for running a quarry and purchase of machinery for the quarry and crushing unit, instillation of the same and for other miscellaneous expenses. Due to the objection raised by the Grama Panchayath and also agitation by the local people belonging to Communist Party of India, (Marxist), the industry could not start production or do anything in connection with business for three years. After several rounds of litigation, they were able to commence the

operation of the quarry and the crusher in 2006. The entire amount was spent by the partners other than the first respondent by availing loan of Rs.15,00,000/- in 2003 and Rs.30,00,000/- (Thirty Lakhs) from Federal Bank. They sustained heavy loss on account of the accumulated bank interest and overdue charges. On 08.01.2003, the partnership was re-constituted and fresh deed was executed whereby, the earlier seven partners retired due to personal reasons and remaining partner Sri. Harris Mohammed, continued as partner. At that time, first respondent was also inducted as a partner as an incoming partner. He joined the partnership without making any investment or contribution to the business either to the working capital or to the capital assets of the firm. Clause 7 of the Deed makes it clear that the capital required for the business of the partnership should be contributed by all the partners except Sri.Faizel who is the first respondent. He was included as a partner with an intention to enhance operational efficiency as he could deal with various departments smoothly and could arrange good business for the firm. Annexure A is the notarized copy of the partnership deed dated 08.01.2003 by which first respondent was also included

as partner. As the other joint signatory Sri.Kunju Muhamed had retired along with other partners, first respondent was given the authority as joint signatory with the first petitioner. But, he was arrogant in not attending the office and not available for most of the time and so, the transaction of the firm with the bank had seriously affected. The firm had two loan accounts with Federal Bank and since the first respondent was not available to operate the accounts smoothly as a joint signatory, it was decided to confer that authority on the second petitioner and the other remaining partner also. So, they issued Annexure B letter to the bank that second petitioner and Harris Mohammed were also authorised to operate the bank account either jointly or with any other partner. It was again re-constituted on 17.12.2004 by adding four partners and relieving Haris Mohammed, the then existing partner. There also it was reiterated that except the first respondent, others have contributed for the capital required for the business of the firm. It was also decided to share the profits and decided to give 15% to the first respondent instead of 25% earlier agreed with a consent of the all partners including the first respondent. Similar reduction was made in

the case of Managing Partner also. Even after re-constitution, he was indifferent and non co-operative as he had been from the inception and he was not attending the work site or office of the firm, did not show any involvement in the activities of the firm. He did not even show the courtesy of going to the bank in order to comply certain official formalities in the bank so as to regularize and for re-scheduling the loan accounts for making all the partners as guarantors to the credit facility availed by the firm. So, as per Annexure C resolution dated 05.11.2005, the first petitioner was authorised to open and operate the bank accounts under his sole signature. Even thereafter, the attitude of the first respondent did not change. Annexure D minutes was passed on 30.12.2010 by all the partners except the first respondent directing the first respondent to surrender his mobile phone and directed him to submit his resignation. Since he did not comply with the same, and the other partners felt that it would be difficult to proceed with the transaction of the firm with the first respondent in the firm as per Annexure E resolution dated 31.03.2011 they decided to expel the first respondent from the partnership. Thereafter, he was not the partner of the firm.

There was a liability of Rs.9,01,882.87/- from the first respondent to the firm as on 31.03.2010 and he did not clear the liability. So, Annexure F notice was issued. They also filed O.P.No.1112/2011 before the District Court, Ernakulam on 24.10.2011 under Section 9 of Arbitration and Conciliation Act and they filed Arbitration Request No.54/2011 under Section 11(b) of the Arbitration and Conciliation Act before this court. It was after receipt of this lawyer notice as well as notice in the arbitration proceedings that he filed criminal complaint against the petitioners and managers of Aluva Thottakkattukara branch of Federal Bank and Aluva branch of Union Bank of India as C.M.P.No.2020/2011 before Judicial First Class Magistrate Court, No-I, Aluva as Annexure G and it was forwarded to the police for investigation by the learned magistrate under Section 156(3) of Code of Criminal Procedure and Annexure H First Information Report was registered as Crime No.3304/2011 of Aluva Police Station under Section 120B, 406, 420, 468 and 477A of Indian Penal Code. The allegations in the complaint are false. After investigation, the investigating officer filed Annexure I refer report stating that it is of civil nature and the complaint was filed to wreck his

private vengeance for expelling him from the partnership. Thereafter, he filed Annexure J Protest Complaint showing the earlier four accused persons mentioned in Annexure G and other six additional accused persons including the Managing Director and Chairman of the Federal Bank and Union Bank of India and the prayer in the complaint was for conducting re-investigation with an alternate prayer for receiving the complaint. The allegation was that they have forged his signature, manipulated the documents and caused heavy loss to the firm and to him. The learned magistrate, without conducting proper enquiry, simply recording Annexure K and K1, L and L1 Sworn statement of the witnesses namely the complainant - first respondent and one Abdul Jaleel and without application of mind, took cognizance of the case as against the present petitioners alone alleging offence under Section 406, 420, 468, 477A, 120B of Indian Penal Code and decided not to issue any process to other accused persons. The court below had not applied its mind, no proper enquiry was conducted as required under Section 202 of Code of Criminal Procedure and so, they have no other option except to approach this court seeking the following relief:

“To call for the records in C.C.No.904/2012 of the court of Judicial First Class Magistrate-I, Aluva and to quash Annexure-J Protest complaint and all further proceedings pursuant to the same in C.C.No.904 of 2012 and allow this Criminal Miscellaneous Case.”

3. The first respondent filed detailed counter and produced Annexure R1 series documents stating that serious criminal offences have been committed including forgery and misappropriation of fund of the firm and the Police has not properly conducted the investigation and only after application of mind, court below had taken cognizance of the case. Since it is a matter for evidence, they are not entitled to get quashing of the proceedings. So, he prayed for dismissal of the complaint.

4. Heard the Counsel for the petitioners and the first respondent who appeared in person and the Public Prosecutor appearing for the second respondent.

5. The Counsel for the petitioners submitted that even admitting that the entire allegations in the complaint are correct and true, no criminal offence has been made out. Further, Civil suits have been filed in respect of the same, and

as such, no criminal offence is made out and court below had, without application of mind and conducting proper enquiry under Section 202 of Code of Criminal Procedure, took cognizance of the case. Nothing was mentioned about the refer report also. So, according to the learned counsel, the procedure adopted by the court below before issuing process is against law and the same is liable to be quashed.

6. On the other hand, the first respondent who appeared in person submitted that the arbitration reference filed by the petitioners has been turned down by this court on the ground that when there is allegation of fraud and forgery, arbitrator cannot go into those aspects and as such, the prayer for appointment of arbitrator cannot be allowed. When there is an allegation of forgery and also allegation of fraud and manipulation of accounts, which has to be decided on the basis of evidence, the court below was perfectly justified in taking cognizance of the case against the petitioners who were really managing the affairs of the firm. So, he prayed for dismissal of the application.

7. It is an admitted fact that earlier, a partnership firm by name "Blue Chips Mines and Industries" was started by the

petitioners along with other partners in the year 2002. But, they could not commence the business of quarrying and also run a crusher unit in the property purchased by them, on account of the objections raised by the local people under the leadership of a leading political party of that area and also on account of the objection raised by the Panchayath in granting licence to the firm for running the unit. It is also in a way admitted that after long litigation, they could able to get the necessary licence to run the business. But, by the time, some of the partners retired from the partnership and as per Annexure A partnership deed, it was re-constituted by which the first respondent was also included as a partner. It is seen from the partnership deed that there was no investment made by the first respondent. However, they have decided to share the profit with him at a particular rate and he was made as a joint signatory along with the first petitioner who operate the accounts in the bank as well. It is also seen from the documents produced by the petitioners that, later, on account of the difference of opinion arose between them, they decided to remove the first respondent from the partnership and in the meetings held for that purpose, first respondent did not attend

and minutes were recorded to that effect in his absence. It was thereafter, that the litigations have been started.

8. It is seen from Annexure G complaint that allegations were made against the present petitioners that they have in conspiracy with the bank officials who were shown as third and fourth accused in the complaint, manipulated certain documents, submitted documents forging his signature and created loans so as to cause heavy loss to the complainant also. It was forwarded to the police under Section 156(3) of Code of Criminal Procedure and on that basis, Annexure H First Information Report was registered as Crime No.3304/2011 of Aluva Police Station alleging offences under Section 120B, 406, 420, 468 and 477A of Indian Penal Code. After investigation, they filed Annexure I refer report stating that since civil suits were pending in respect of the transaction of the firm, it was of civil nature and no criminal offence has been made out. On getting the refer notice, he filed Annexure J Protest Complaint showing 10 accused persons and sworn statement of the complainant and one witness were taken and after hearing the complainant's Counsel and considering the evidence, the learned magistrate has passed Annexure M order decided to

take cognizance of the case as C.C.No.904/2012 for the offences under Sections 406, 420, 468, 477A and 120B of Indian Penal Code against accused Nos. 1 and 2 alone as since the evidence is not sufficient to make out the case against accused Nos. 3 to 10, cognizance was not taken against them. This order is being challegned by the petitioner.

9. Section 200 to 204 of Code of Criminal Procedure deals with taking cognizance of the case on a private complaint and the procedure to be followed by the magistrate which reads as follows:

200. Examination of complainant:- A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

201. Procedure by Magistrate not competent to take cognizance of the case:- If the complaint is made to a Magistrate who is not competent to take cognizance of the offence, he shall,-

(a) if the complaint is in writing, return it for

presentation to the proper Court with an endorsement to that effect;

(b) if the complaint is not in writing, direct the complainant to the proper Court.

202. Postponement of issue of process:- (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, [and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction] postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made-

(a) Where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

203. Dismissal of complaint:- If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.

204. Issue of process:- (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be-

(a) a summons-case, he shall issue his summons for

the attendance of the accused, or

(b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fess are payable, no process shall be issued until the fess are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87.

10. Under Section 200 of Code of Criminal Procedure, court shall take the statement on oath of complainant and the witnesses present if any and if the court is not satisfied with the evidence, then, it may postpone the issue of process and direct the complainant to produce all the witnesses and if the accused are residing outside the jurisdiction after conducting enquiry under Section 202 of Code of Criminal Procedure, the court after satisfaction, if case is made out, proceed against those persons by issuing process and if the court is satisfied that no offence is made out, then, dismiss the complaint under Section 203 of Code of Criminal Procedure.

11. In the decision reported in **Parameswaran Nair Vs. Surendran [2009 (1) KLT 794]**, this court has held

that the magistrate is not bound by the opinion formed by the investigating officer and the options available to the magistrate are:

- i) he may accept the report and drop the proceedings.
- ii) he may disagree with the findings in the report and take the view that there is sufficient grounds for proceeding further and take cognizance and issue of process.
- iii) he may direct further investigation under Section 156(3) of Code of Criminal Procedure.

12. While deciding to take cognizance of the complaint before him, the magistrate has to record the statement of the complainant and his witnesses if any present as provided under Section 200 of Code of Criminal Procedure. If on recording statement, magistrate finds that a further investigation is necessary, then, as provided under Section 202, the magistrate is competent to direct an investigation to be made by a police officer or by such other person as he thinks fit and on getting report, the magistrate can dismiss the complaint under Section 203 of Code of Criminal Procedure if he is of the opinion that there is no sufficient ground for proceeding. He can issue summons to the accused if he is of the opinion that there is sufficient ground for proceeding further.

13. In the decision reported in **G.H.C.L. Employees Stock Option Trust Vs. India Infoline Ltd. [2013 (2) KLT SN 43 (C.No.50) SC]**, the Hon'ble Supreme Court has held that the case of breach of trust or cheating are both a civil wrong and a criminal offence, but under certain situations where the act alleged would predominantly be a civil wrong, such an act does not constitute a criminal offence. In the same decision, it has been observed that summoning of an accused in a criminal case is a serious matter. Hence, criminal law cannot be set into motion as a matter of course. The order of magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable there to. The magistrate has to record his satisfaction with regard to the existence of a prima facie case on the basis of the allegations made in the complaint supported by satisfactory evidence and other materials on record. Same view has been reiterated in the decisions reported in **Chandrika B. Vs. Santhosh and Another [2014 (1) KLD 79 (SC)]**, **Hareram Satpathy Vs. Tikaram Agarwala and others [AIR 1978 SC 1568]**, **Mathews Mar Ivaniose H.G. Vs. Dr.Thomas Mar Athanasious and**

Another [2014 (4) KHC 343], Kader Vs. State of Kerala [1999 (3) KLT 262].

14. It is clear from the above decisions that court need not record a detailed order regarding taking cognizance of the case and as to how the magistrate had satisfied with the materials available on record. But, what is required is only whether going through the order, it can be inferred that that court has applied its mind before issuing process. It is seen from the proceedings paper that after filing the complaint, sworn statement of the complainant was taken on 07.07.2012 and posted to 04.08.2012 for further evidence. On that day, it was seen that one witness also present and his evidence was taken and thereafter, the matter was referred to the police for further investigation under Section 202 of Code of Criminal Procedure and on that basis, a crime was registered as Crime No.3304/2011 and after investigation, they filed a refer report stating that it was a case of civil nature and civil proceedings are pending between the parties in respect of the transactions of the partnership and after receipt of the report, the learned magistrate closed the evidence and it was posted for hearing to 20.10.2012 and again to 27.10.2012 and it was thereafter,

as per Annexure M order, the court below had passed the following order.

“Complainant present. Heard the counsel and the arguments, evidence adduced and documents produced. The case is taken on file as C.C.904/12 for offences u/s.406, 420, 468, 477 A and 120 B of IPC against the accused No.1 & 2. The involvement of the other accused is not made out. Hence persons stated as A3 to 10 cannot be arrayed as accused, case taken against only A1 & 2 in the plea. Issue summons to accused. Call on 11.01.2013.”

15. So, it is clear from this that court below had not satisfied with the evidence of CWs 1 and 2 for taking cognizance and thereafter, a report was called for from the police invoking the power under Section 202 of Code of Criminal Procedure and after getting the report and after hearing Counsel for the complainant and perusing the documents and evidence and the materials collected through enquiry through police officers came to the conclusion that there is prima facie case made out against accused numbers 1 and 2 for the offence under Sections 406, 420, 468, 477A and 120B and case was taken on file as C.C.No.904/2012 against them alone. Further, it was in a way admitted that the arbitration reference made by the petitioners as A.R.No.07/2013 was dismissed by this court as per the reported decision in **Baburaj, T. and another Vs. Faizal, K**

[ILR 2014 (2) Kerala Series 453]. There, this court has observed that since there were allegations of forgery and fraud and misappropriation in the conduct of the partnership, the request for appointment of arbitrator cannot be allowed and this order was passed relying on the decision in **Radhakrishnan N. Vs. M/s. Maestro Engineers and Others [2010 (1) SCC 72]** and **Idukki District Cricket Association Vs. Athulya Cricket Club Nediyasala and Another [2012 (1) KHC 677]**. So, it is clear from this that when there is an allegation of fraud, misrepresentation and forgery and misappropriation, though it is also having a civil colour, if it is proved, it will amount to criminal offence as well. Further, it cannot be said that court was not satisfied with the evidence to make out a prima facie case to proceed against the petitioners. On going through Annexure M order, it will be seen that court has considered the documents and evidence and it is thereafter, prima facie satisfied that there are materials to proceed against accused Nos. 1 and 2 alone who are the petitioners herein and decided to take cognizance of the case against them alone. So, under these circumstances, at this stage, it cannot be said that the magistrate has not

applied his mind before taking cognizance of the case against the petitioners and merely because civil litigations are pending is not a ground to quash the proceedings especially when the allegations made in the complaint will prima facie make out a commission of criminal offences also and when the allegations are sufficient to attract criminal offences and the matter can be decided only on the basis of the evidence, then, this court cannot, invoking the power under Section 482 of Code of Criminal Procedure, quash the proceedings at the threshold itself to stall a criminal prosecution that has been instituted by a person alleging grave offences. So, there is no merit in the petition and the same is liable to be dismissed.

In the result, the petition is dismissed.

Sd/-
K.Ramakrishnan, Judge.

Bb

[True copy]

P.A to Judge