

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 8TH DAY OF JANUARY 2015/18TH POUSHA, 1936

Crl.MC.No. 847 of 2013 ()

**AGAINST THE COMMON ORDER IN C.M.P.NO.47/12 & CMP.NO.51/12 IN C.C.NO.01/2012
(S.T.NO.405/06) of JUDICIAL FIRST CLASS MAGISTRATE COURT - VI,
THIRUVANANTHAPURAM DATED 12.10.2012.**

PETITIONER(S)/ACCUSED:

**THAMBI KANNANTHANAM, AGED 56 YEARS,
DOOR NO.40/9307, FLOOR 1, SREE KRISHNA KRIPA TOWER,
JEW STREET, PULLEPPADY, KOCHI 35
RESIDING AT 9-A, BLOOM NEST, VENGISWORAR NAGAR
2 MAIN ROAD, VADAPALANI, CHENNAI 26.**

BY ADV. SRI.K.V.SABU

RESPONDENT(S)/COMPLAINANT:

- 1. STATE OF KEALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM. 682 031.**
- 2. SAJ FLIGHT SERVICES PVT. LTD.,
AIRPORT ROAD, THIRUVANANTHAPURAM,
REP.BY ITS DIRECTOR REJI K.VARGHESE, PIN 695 001.**

**R2 BY ADVS. SRI.P.A.AHAMMED
SRI.THOUFEEK AHAMED**

R1 BY PUBLIC PROSECUTOR SMT. MADHU BEN.M.

**THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 08-01-2015,
THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

APPENDIX

PETITIONER'S ANNEXURES

ANNEXURE A1	A COPY OF THE PETITION U/S 91 CR.P.C. FOR PRODUCTION OF DOCUMENTS
ANNEXURE A2	A COPY OF THE WITNESS SCHEDULE
ANNEXURE A3	A COPY OF THE ORDER DT.12.10.12 IN CMP NO.47/12 & 51/12
ANNEXURE A4	A COPY OF THE PROCEEDINGS DT.8.1.2013 AND 21.1.2013.

RESPONDENT'S ANNEXURES

NIL

//True Copy//

P.A. To Judge

Bb

K. Ramakrishnan, J.

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Crl.M.C.No.847 of 2013

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Dated this, the 08th day of January, 2015.

ORDER

Accused in C.C.No.01/2012 on the file of the Judicial First Class Magistrate Court-VI, Thiruvananthapuram has filed the above application under Section 482 of Code of Criminal Procedure challenging the common order passed by the magistrate in C.M.P.Nos.47/2012 and 51/2012 in the above case.

2. The case was taken on file on the basis of a private complaint filed by the second respondent Company through its Managing Director against the present petitioner and another alleging offences under Section 138 of the Negotiable Instruments Act on the basis of an alleged cheque given by the accused in discharge of some liability from them to the second respondent Company. The case of the accused was that there was no money transaction between them, but, there was some other transaction in respect of producing a film between witness Nos.2 and 3 who are the directors of the complainant Company also and the Managing Director had no direct knowledge about the transaction. After the completion of the

complainant's evidence and after questioning the petitioner under Section 313 of Code of Criminal Procedure, the petitioner himself was examined as DW1 and thereafter, he filed C.M.P.Nos.47/2012 and 51/2012 for summoning certain documents and submitted a witness list containing name and address of five persons to prove his case. PW1 had filed a counter stating that none of the witnesses are the custodians of the documents mentioned and there is nothing mentioned in the witness list or the petition the purpose for which they will have to be examined as well. However, after examination of PW1 and PW2, subsequently, certain documents were produced, namely; copy of the balance sheet from 2004 to 2010, original balance sheet from 2010 to 2011 and Minutes of the board meeting in which the decision to lend money to the accused was approved and after considering these aspects, the magistrate had allowed the application in part permitting the petitioner to examine witness No.1 and witness No.5 in the witness list and directed witness No.5 to produce the day book for the period 2004. Though the petitioner had taken steps to summon those two witnesses, summons could not be served on 5th witness and though the first witness was present, he was not examined and he was sent back and thereafter,

though non bailable warrant was issued to get the presence of 5th witness, his presence could not be procured and so, the learned magistrate closed the evidence and this common order is being challenged by the petitioner by filing the above petition.

3. Heard the Counsel for the petitioner and the Counsel for the second respondent and the Public Prosecutor.

4. The Counsel for the petitioner submitted that the second and third witness in the witness list are partners of the petitioner in the film making process and they were the directors of the complainant Company also and the real transaction can be known to them only. According to the Counsel for the petitioner, the amounts were not paid as loan, but, it was intended as an investment for production of the film of which witness Nos. 2 and 3 are partners of the accused. Even that case is admitted and if any amount was paid by the company to the petitioner and he had undertaken to pay the amount and issued the cheque, then, the liability under Section 138 can be attracted as against him. But, whether it was an investment for and on behalf of the company or not etc., are matters to be considered by the court on appreciation of the evidence. So, I am not going into those aspects in this

petition. Further, it was admitted by Counsel for the petitioner that witness No.5 was the Company Secretary of the second respondent Company at that time. Now, he is not in service. He was directed to produce the day book for the period 2004 of the second respondent Company. If he is not the custodian of the document even if he is summoned, no purpose will be served.

5. The Counsel for the second respondent had submitted that, if the document is in their possession, they are prepared to produce the same before the court. Otherwise, they are prepared to furnish the particulars entered in the day book in the form of a statement. The Counsel for the petitioner submitted that if the day book is produced, he will be satisfied with the same. So, this court feels that there is no necessity to summon witness No.5 for that purpose as he is not the custodian of the document and the documents sought to be produced through witness No.5 is expected to be in the custody of the second respondent Company who is represented by PW1 as Managing Director. So, directing PW1 to produce the day book of the second respondent Company for the period 2004 will be sufficient and if it is not in their possession, then, directing him to file an affidavit regarding the availability or

otherwise will be sufficient for that purpose. If the petitioner can produce witness No.1, then, court below is directed to give an opportunity to examine witness No.1 to prove his case. As regards the other aspects are concerned, even if the witness No.2 or 3 are partners along with the first accused who is the petitioner herein, that can be proved by the accused by adducing other evidence as well. So, under the circumstances, there is no necessity to deviate from the order rejecting the prayer for summoning witness Nos. 2 and 3 in the witness list shown by the petitioner. So, the petition is disposed of as follows.

(i) There is no need to examine witness No.5 as it is admitted by both sides that he is not the custodian of the documents sought to be produced and the document is expected to be in the possession of PW1 as Managing Director of the second respondent Company as it relates to the transactions of the second respondent Company.

(ii) PW1 is directed to produce the day book for the period 2004 – 2005 and if the document is not in their possession, PW1 is directed to file an affidavit regarding this aspect. If the document is produced, then, court below is directed to give an opportunity to the petitioner to prove the

same either by recalling PW1 to prove the entries in the day book if any produced by PW1 or by marking the same on consent.

(iii) If the petitioner produces witness No.I, then, court below is directed to give an opportunity to examine him also. Further, if he wants to prove that the transaction was on the basis of a partnership with witness Nos. 2 and 3, an opportunity be given to the accused to prove that fact also by other means not by examining witness Nos.2 and 3 mentioned in the witness list. But, however, court below is directed to dispose of the case as expeditiously as possible at any rate within two months from the date of receipt of this order.

With the above direction and observation, the Criminal Miscellaneous Case is disposed of.

Office is directed to communicate this order to the concerned court immediately.

Sd/-

K.Ramakrishnan, Judge.

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[True copy]

P.A to Judge