

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

WEDNESDAY, THE 4TH DAY OF NOVEMBER 2015/13TH KARTHIKA, 1937

Crl.MC.No. 3730 of 2015 ()

**CMP 922/2015 IN CC NO. 357/14 OF JUDICIAL FIRST CLASS MAGISTRATE COURT-I,
ERNAKULAM
CRIME NO. 1480/2013 OF PALARIVATTOM POLICE STATION, ERNAKULAM**

PETITIONER/PETITIONER :

**MOHAMMED K.M.,
S/O. MOOSA, AGED 41, KALASSERIL HOUSE
CHEPPANAM, PANANGAD, ERNAKULAM.**

**BY ADVS.SMT.LIZA MEGHAN CYRIAC
SRI.JOLLY JOHN**

RESPONDENT/RESPONDENT :

**STATE OF KERALA
REPRESENTED BY S.I. OF POLICE
PALARIVATTOM POLICE STATION, COCHIN-25.**

***ADDL. R2 IMPEADED**

***ADDL.R2. WILLIAMS
S/O. PAULOSE, THARAKAN VEEDU
PUTHOORKARA, AYYANTHOLE VILLAGE
PIN – 680 003.**

***IS IMPEADED AS PER ORDER DATED 9.7.15 IN CRL.MA NO. 6444/15.**

R1 BY ADV. PUBLIC PROSECUTOR SRI. P.V. ELIAS

**THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION
ON 04-11-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

Mn

...2/-

Crl.MC.No. 3730 of 2015 ()

APPENDIX

PETITIONERS' ANNEXURES :

- ANNEXURE-A1:** **A TRUE COPY OF THE REGISTRATION CERTIFICATE WITH
HYPOTHECATION DETAILS OF THE VEHICLE BEARING
REGISTRATION NO.KL-39-C-3864 MAHINDRA LOGAN DLE 1.5
TOURIST TAXI CAR.**
- ANNEXURE-A2:** **A TRUE PHOTOCOPY OF THE ORDER OF JUDICIAL FIRST
CLASS MAGISTRATE COURT-I, ERNAKULAM ALLOWING
CMP 3436/13 ON 06-JAN 2014.**
- ANNEXURE-A3:** **A TRUE PHOTOCOPY OF THE ORDER OF JUDICIAL FIRST
CLASS MAGISTRATE COURT-I, ERNAKULAM DISMISSING
CMP 730/2015 ON 10-APR-2015.**
- ANNEXURE-A4:** **A CERTIFIED COPY OF THE ORDER OF JUDICIAL FIRST CLASS
MAGISTRATE COURT-I, ERNAKULAM DISMISSING CMP 922/15
ON 11-MAY 2015.**
- ANNEXURE-A5:** **COPY OF POLICY SCHEDULE CUM CERTIFICATE OF
INSURANCE OF VEHICLE REGISTRATION NO. KL-39-C-3864
DATED 27/2/2015 TO 26/2/2016.**

RESPONDENT(S)' ANNEXURES :

- ANNEXURE R1(a)** **COPY OF THE REPORT OF THE CPO 6733 DATED 22.9.2015.**

//TRUE COPY//

P.A. TO JUDGE

Mn

ALEXANDER THOMAS, J.

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Crl.M.C.No.3730 of 2015

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Dated this the 4th day of November, 2015

O R D E R

The petitioner herein is the registered owner and the owner who is having possession of a Motor car bearing Reg.No.KL-39-C-3864, Logan DLE 1.5 Tourist Car (Mahindra Renault). According to the petitioner his vehicle was having a valid permit to run as a tourist taxi car and the same was entrusted by him to a taxi service company. The motor car was found missing and upon complaint, it was found by the Police on investigation that the driver of the taxi company had taken away the vehicle under the registered ownership of the petitioner and that he had fraudulently attempted to transfer the said vehicle to a 3rd party, CW8 (additional respondent No.2 herein). FIR registered as Crime No. 1480/2013 of Palarivattom Police station, Ernakulam for offences under Secs.406 and 420 of the IPC as against the aforestated taxi driver concerned who is arrayed as accused in the crime. The petitioner being

registered owner of the vehicle had approached the Jurisdictional Magistrate concerned by filing an application under Sec.451 of the Code of Criminal Procedure seeking interim custody of his vehicle. Such interim custody of the recovered vehicle was granted to the petitioner herein as per order dated 06/01/2014 as per Annexure-A2 order as per Crl.M.P.No.3436/2013 of the Judicial First Class Magistrate Court-I, Ernakulam with the following conditions:

- a) The Petitioner shall execute a Bond for Rs.2 Lakhs (Two Lakhs rupees only) with two solvent sureties for the like sum.
- b) He shall not make any material alteration, SELL or otherwise dispose of the vehicle.
- c) He shall produce the vehicle as and when directed by this Court.
- d) He shall produce the photographs of the vehicle after taking in the vehicle from Palarivattom Police Station showing four side views and attested by SHO with CD."

2. It is common ground that seizure mahazar has been prepared in respect of the stolen vehicle and photographs of the vehicle have also been taken. The investigation was duly completed and Final Report/Charge Sheet was submitted by the Police before the learned Magistrate, which led to the institution of Calendar Case, C.C. No.357/2014 on the file of the Judicial First Class

Magistrate Court-I, Ernakulam. The accused was absconding and there was no possibility for taking up the case for trial in the near future. In the above circumstances, the petitioner herein approached the learned Magistrate by filing Crl.M.P.No.730/2015 in C.C.No.357/2014 before the learned Magistrate and prayed for permission to sell the car. The learned Magistrate rejected the said request as per the impugned Annexure-A3 order dated 10-04-2015 passed in Crl.M.P.No.730/2015. One of the reasons stated in Annexure- A3 order was that the trial is not yet over and the production of the vehicle at the time of trial is necessary. Yet another aspect stated in the impugned order is that allegations in the Final Report show that the accused had sold the car to CW8 and that there may be other persons who may claim interest on the vehicle. Further that other conditions were also imposed at the stage of interim release of the vehicle that the petitioner shall not make any material alteration and that he shall not sell or dispose of the vehicle etc. and that the petitioner has not made any proper application to lift those conditions imposed at the time of grant of interim custody of the vehicle as per the aforestated order dated 06/01/2014.

3. Thereupon the petitioner had again approached the learned Magistrate by filing Crl.M.P.No.922/2015 in C.C.No.357/2014 pertaining to the aforestated Crime No.1480/2013 of Palarivattom Police Station, making a request to lift the conditions in the order dated 06-01-2014 passed by the learned Magistrate at the time of grant of interim custody of the vehicle to the petitioner and also seeking consequential permission to sell the vehicle. The said request of the petitioner was also rejected by the learned Magistrate as per the impugned Annexure-A4 order dated 11-05-2015 passed in Crl.M.P.No.922/2015. Based on the ruling of the Apex Court in Sundherbhai Ambalal Desai and C.M.Mudaliar v. State of Gujarat reported in AIR 2003 SC 638, the learned Magistrate in paragraph 6 of the impugned Annexure-A4 order upheld the contentions of the petitioner herein that it is not necessary to produce the car physically at the time of trial as the photographs of the car counter signed by the SHO along with CD and as the seizure mahazar was also duly prepared by the Investigating Officer, containing the descriptions of the car is also available in the materials on record. However, in paragraph 7 of the impugned order the learned Magistrate noted the allegations that the accused had allegedly

sold the vehicle to CW8 (respondent No.2) and that therefore there may be other person who may claim interest on the vehicle. Though physical production of the car may not be necessary for the purpose of trial, the availability of the car till the disposal of the trial is to be ensured, held the learned Magistrate. That unless there are conditions ensuring the availability of the car till the completion of the trial, in case the other persons having interest on the car raises any claim, that it will be impossible to pass final orders regarding the vehicle. The learned Magistrate also made an attempt to distinguish the ruling of the Delhi High Court in Manjit Singh v.State of Delhi reported in 214 (2014) DLT 646 by observing that in that case there was no possibility for any third party claims on the vehicle etc. It is these impugned orders at Annexures-3 and 4 that are under challenge in this Crl.M.,C. The prayer in this Crl.M.C. instituted under Sec.482 of the Code of Criminal Procedure is for an order from this Court to set aside the impugned Annexure-A3 and A4 orders and also consequently for permission to sell the car, with appropriate safeguards and conditions.

4. Heard Smt. Liza Meghan Cyriac, learned counsel appearing for the petitioner and the learned Prosecutor appearing for the 1st

respondent State of Kerala.

5. As there was specific observation in the order that the Final Report/Charge Sheet discloses that the accused had allegedly sold the vehicle to CW8, this Court had directed the petitioner to implead CW8 and accordingly the Investigating Officer was directed to furnish the address of the aforesaid CW8 to the petitioner's counsel and thereupon the petitioner's counsel had impleaded CW8 as additional respondent No.2 in this Crl.M.C. The attempt to effect service of notice on additional R2 appears to have evaded by that party for reasons solely known to him. This Court as per order dated 17-08-2015 directed that the petitioner will repeat service of notice to additional R2 through the Circle Inspector of Police concerned and that in case the additional R2 is not available, then notice by affixure shall be effected in this process and report in this regard shall be furnished by the Police officials concerned through the Public Prosecutor. In compliance with the directions of this Court the petitioner had again taken steps for service of notice on additional R2 . Further in compliance with the order dated 17-08-2015, the official respondents have informed that as the additional respondent No.2 was not available in the residential address, the

notice was affixed in a conspicuous place, at the front wall of the said residential house by the police officials concerned in the said address, in the presence of two witnesses. The address of CW8 is the one that has been furnished by the Investigating Officer concerned through the Public Prosecutor and is the one that is shown in the Investigation records that pertain to this crime. Therefore service of notice on additional R2 has been duly completed. Despite completion of service of notice, additional R2 has not chosen to enter appearance either in person or through counsel in these proceedings.

6. On a reading of the impugned orders, and on going through the rulings of the Apex Court as in Sundherbhai Ambalal's case (supra) reported in AIR 2003 SC 638, General Insurance Council and Others. v. State of Andhra Pradesh and Others reported in (2010) 6 SCC 768 etc. this Court is of the considered opinion that the approach made by the court below is not fully in accordance with the legal positions settled by the Apex Court and various High Courts in the various rulings.

7. In paragraph 7 of the aforestated Apex Court ruling in Sundherbhai Ambalal's case (supra), the Apex Court has held that

the powers under Sec.451 of Cr.P.C. should be exercised expeditiously and judiciously and that it would serve various purposes, viz,

- “1. The owner of the article would not suffer because of its remaining unused or by its misappropriation;
2. The court or the police would not be required to keep the article in safe custody;
3. If the proper panchnama before handing over possession of the article is prepared, that can be used in evidence instead of its production before the court during the trial. If necessary, evidence could also be recorded describing the nature of the property in detail; and
4. This jurisdiction of the court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles.”

It has been held therein that steps by preparing the detailed proper panchnama of such articles and taking photographs and videographs of such articles would be done and that proper panchnama before handing over the possession of the articles if prepared that can be used in evidence instead of its production before the court during the trial and if necessary, evidence could also be recorded describing the nature of property in detail. In paragraph 18 of the said decision, the Apex Court held that in case the vehicle is not claimed by the accused, owner, or the insurance company or by a third person, then such vehicle may be ordered to

be auctioned by the court. If the said vehicle is insured with the insurance company, then the insurance company be informed by the court to take possession of the vehicle which is not claimed by the owner or a third person. If the insurance company fails to take possession, the vehicles may be sold as per the direction of the court. The court would pass such order within a period of six months from the date of production of the said vehicle before the court. In any case, before handing over possession of such vehicles, appropriate photographs of the said vehicle should be taken and detailed panchnama should be prepared etc.

8. In a subsequent judgment in a case General Insurance Council and Others. v. State of Andhra Pradesh and Others. (supra) it was held that in respect of custody and disposal of the vehicle the insurer may be permitted to move a separate application for release of the recovered vehicle as soon as it is informed of such recovery before the Jurisdictional Court and ordinarily, release shall be made within a period of 30 days from the date of the application and necessary photographs may be taken duly authenticated and certified, and a detailed panchnama may be prepared before such release and that photographs so taken may be used as evidence

during the trial and the physical production of the vehicle may be dispensed with. Further in General Insurance Council's case (supra) the Apex Court has held in paragraphs 14 to 16 thereof as follows:

“14. We also feel, it is necessary that in addition to the directions issued by this Court in *Sunderbhai Ambalal Desai* [(2002) 10 SCC 283] considering the mandate of Section 451 read with Section 457 of the Code, the following further directions with regard to seized vehicles are required to be given:

“(A) Insurer may be permitted to move a separate application for release of the recovered vehicle as soon as it is informed of such recovery before the jurisdictional court. Ordinarily, release shall be made within a period of 30 days from the date of the application. The necessary photographs may be taken duly authenticated and certified, and a detailed panchnama may be prepared before such release.

(B) The photographs so taken may be used as secondary evidence during trial. Hence, physical production of the vehicle may be dispensed with.

(C) Insurer would submit an undertaking/guarantee to remit the proceeds from the sale/auction of the vehicle conducted by the Insurance Company in the event that the Magistrate finally adjudicates that the rightful ownership of the vehicle does not vest with the insurer. The undertaking/guarantee would be furnished at the time of release of the vehicle, pursuant to the application for release of the recovered vehicle. Insistence on personal bonds may be dispensed with looking to the corporate structure of the insurer.”

15. It is a matter of common knowledge that as and when vehicles are seized and kept in various police stations, not only do they occupy substantial space in the police stations but upon being kept in open, are also prone to fast natural decay on account of weather conditions. Even a good maintained vehicle loses its roadworthiness if it is kept stationary in the police station for more than fifteen days. Apart from the above, it is also a matter of common knowledge that several valuable and costly parts of the said vehicles are either stolen or are cannibalised so that the vehicles become unworthy of being driven on road. To avoid all this, apart from the aforesaid directions issued hereinabove, we direct that all the State Governments/Union Territories/Director Generals of Police shall

ensure macro implementation of the statutory provisions and further direct that the activities of each and every police station, especially with regard to disposal of the seized vehicles be taken care of by the Inspector General of Police of the division/Commissioner of Police concerned of the cities/Superintendent of Police concerned of the district concerned.

16. In case any non-compliance is reported either by the petitioners or by any of the aggrieved party, then needless to say, we would be constrained to take a serious view of the matter against an erring officer who would be dealt with iron hands. With the aforesaid directions, this writ petition stands finally disposed of."

9. In K.W.Ganapathy v. State of Karnataka reported in CDJ 2002 Kar HC 034 the Karnataka High Court considered a similar case on application by the registered owner of a car which was stolen by the accused. The police had completed the investigation and filed the Final Report/Charge Sheet and the case was pending trial. The accused was absconding and it was not known when the absconding accused is likely to be traced out and as to by when the trial against him will be concluded.

10. After securing the interim custody of the vehicle, the registered owner made another application before the Jurisdictional Magistrate as in this case pointing out that the value of the car is getting deteriorated and that his liabilities and vehicle loan taken by him were mounting up and therefore he sought permission to sell the car. The Karnataka High Court held that the photographs

and panchnama prepared in respect of the car would be the sufficient evidence and the car need not be produced at the time of trial. As there was no reasonable indication as to by when police could trace out the absconding accused and as to when the trial could be reasonably concluded and as the case involved only the offence of theft in respect of car under the ownership of the petitioner therein, the Karnataka High Court directed the petitioner to sell the car with the condition that the Jurisdictional Magistrate shall take steps to ensure that the current market value of the car should be assessed duly and necessary bonds with one surety be taken for the value so assessed and with the condition that in case the final orders to be passed by the Jurisdictional Magistrate regarding the custodian rights of the car go against the petitioner therein, then he shall then deposit the value before the trial court.

11. The Delhi High Court has also considered a similar case in its ruling, *Manjit Singh v. State of Delhi* reported in 214(2014)DLT 646. In *Manjit Singh's* case (supra) petitioner therein was the registered owner of a car which was stolen and the said car was more than 5 years old and the petitioner stated that lot of maintenance is required for the car and its market value is getting

depreciated and therefore he is under the compulsion to sell the car otherwise the value of the car will get depreciated etc. The prosecution therein contended that there is a possibility that the accused from whose possession it has been allegedly recovered may also stake the claim which depends on the final outcome of the trial and accordingly ordered that if the petitioner therein wanted to sell the car, he may do so with a condition that the prospective or intending purchaser should step into his shoes and execute bond to produce the vehicle during the proceedings as and when required. This was challenged by the petitioner before the Delhi High Court by contending that he should be permitted to sell the car without any such conditions. It was contended therein that the conditions imposed by the court below therein were in clear violation of the legal principles laid down by the Apex Court in rulings as in Sundherbhai Ambalal's case (supra), General Insurance Council's case (supra) etc. wherein the Apex Court had held that the photographs of the car can be used as secondary evidence during trial and that it is not necessary to produce the vehicle during trial etc. The Delhi High Court has dealt with the relevant provisions of law and the various rulings as well as the standing orders of the

police authorities concerned and the consequences of the disobedience of the directions of the Apex Court rulings in paragraphs 41 to 46 of the said judgment in Manjit Singh's case (supra). The Delhi High Court allowed the prayer of the petitioner therein and the conditions imposed by the court below requiring that the prospective/intending purchaser to execute a bond was set aside and the petitioner therein was permitted to sell the vehicle without any such conditions after taking photographs of the said vehicle etc.

12. On a consideration of the facts and circumstances of this case it can be seen that indisputably the petitioner is the registered owner who is having valid possession of the vehicle in question. It is also not under dispute that the petitioner had entrusted the running of his car as a taxi cab with a taxi provider company. The car was unlawfully taken away by none other than the driver attached to the said taxi company to whom the car was entrusted by the company. The person who is really aggrieved by the commission of the crime, is none other than the petitioner, who is indisputably the registered owner. True, that the case, as revealed in the final report, is that the accused had allegedly sold the vehicle

to a third party, CW8, (R2). CW8 has not responded to this petition and has not turned up to contest the case despite completion of due service of notice to him. As in the aforestated rulings referred to above in Ganapathy's case (supra) and Manjit Singh's case (supra), the car was stolen from the registered owner and the accused was absconding. Even, the Prosecutor is not able to furnish any instructions with any precision as to by when the absconding accused herein could be traced out and as to by when the trial could be commenced and completed. The accused has been absconding for a very long time. The car in this case is more than 5 years old. Its value is getting depreciated and if the car is allowed to be retained until conclusion of the trial, its value will get all the more depreciated very steeply and the ultimate money that can be obtained by the sale of the car after the completion of the trial will be negligible. Moreover, true that the offences involved in this case are those under Sec.406 (breach of trust) and Sec.420 (cheating) whereas the offences involved in Ganapathi's case (supra) and Manjit Singh's case (supra) are those involving theft, etc. But, the crucial fact of the matter is that the petitioner is the registered owner of the vehicle and he had entrusted the car to the taxi service

company who in turn had entrusted the car to the accused for taxi operation. Therefore, the legal principles flowing from those decisions have application in the facts and circumstances of this case as well.

13. Another crucial aspect to be appreciated in this case is that there is no allegation by the prosecution that the car has been used as an object or accessory for the commission of any serious and heinous crime like murder, rape, forest offence, etc. On the other hand, the petitioner happens to be the victim of the crime. Therefore, this Court is of the considered opinion that there are no inhibiting factual aspects in the matter of exercise of judicial discretion in this case. If there were serious allegations in the case that the vehicle was involved as an accessory or an object for the commission of serious and heinous crime like murder, rape, etc., then consideration could have been different. Therefore, in the facts and circumstances of the case, this Court is of the considered opinion that discretion could be exercised, in the light of the aforesaid rulings.

14. In this view of the matter, the impugned orders at Annexures -3 and 4 are set aside. It is further made clear that in

case the Investigating Officer wants to prepare a fresh and more comprehensive mahazar, then he will be at liberty to do so as per the prescribed procedure. The Investigating Officer will also ensure that sufficient photographs and videographs of the vehicle are taken from all angles. Mahazar and photographs/videographs will constitute sufficient evidence in the trial and there is no necessity for production of the car at time of the trial. The Assistant Motor Vehicle Inspector concerned will assess the value of the car on a reasonable basis and in this process he shall also take into account Annexure-A5 valuation shown by the New India Assurance Co.Ltd. at the time of issuance of the current insurance policy of the car. Thereafter, in compliance with the directions issued by the Apex Court in General Insurance Council's case (supra) the petitioner will submit an affidavit before the Jurisdictional Magistrate's court concerned undertaking and guaranteeing to remit the value of the car as assessed or the actual sale value of the car whichever is higher, in the event, the Jurisdictional Magistrate Court on the completion of the trial adjudicates on the final custodial rights that rightful ownership of the vehicle does not vest with the petitioner. On fulfilling these conditions, the Jurisdictional Magistrate Court

concerned will grant necessary permission to the petitioner to sell the vehicle. The petitioner will also undertake in the aforestated affidavit that immediately after the sale of the vehicle he will inform the Magistrate Court about such sale and also as to the sale value received by him. It is made clear that in the event on the conclusion of the criminal trial, it is found at the time of passing of order on final custodial rights regarding this vehicle by the court below concerned that the petitioner is not having rightful ownership of the vehicle and that it is with some other person, then he shall remit the aforestated amount as stated above before the court below. It is also made clear that on completion of the criminal trial, if any such third party claimant has valid claim that he/she has a rightful claim over the car, then it will be open to such person to make appropriate claim before the appropriate forum on those aspects.

With these observations and directions, this Crl.M.C stands finally disposed of.

Sd/- ALEXANDER THOMAS, JUDGE

MJL