

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

MONDAY, THE 10TH DAY OF AUGUST 2015/19TH SRAVANA, 1937

Crl.MC.No. 4849 of 2015 ()

**C.M.P.NO.2200/2015 IN C.C.NO.996/1994 OF JUDICIAL FIRST CLASS MAGISTRATE
COURT-IV, KOZHIKODE**

PETITIONER/ACCUSED:

**FAHAD MASHOOR,
S/O. HABEEB MASHOOR, HILAL MANZIL,
KOYILANDY, KOZHIKODE DISTRICT.**

**BY ADVS.SRI.P.M.PAREETH
SRI.MOHAMMED SHAMEEL**

RESPONDENT/COMPLAINANT:

**STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM - 682 031.**

BY ADDL.DGP. SRI.TOM JOSE PADINJAREKKARA

**THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION
ON 10-08-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

sts

Crl.MC.No. 4849 of 2015 ()

APPENDIX

PETITIONER(S)' ANNEXURES:

**ANNEX A1 - A TRUE COPY OF THE ORDER DT. 03.8.2010 IN CRL.RP NO. 139/2002
OF THIS HON'BLE COURT.**

ANNEX A2 - A TRUE PHOTOCOPY OF THE G.O(RT) NO. 1180/2015 DT. 20.05.2015.

**ANNEX A3 - CERTIFIED COPY OF THE ORDER IN THE PURPORT OF PROCEEDINGS
IN CMP NO. 2200/15 IN CC 996/94 ON THE FILE OF JUDICIAL FIRST
CLASS MAGISTRATE COURT- IV, KOZHIKODE.**

RESPONDENT(S)' ANNEXURES: **NIL**

/TRUE COPY/

P.A.TO JUDGE

sts

ALEXANDER THOMAS, J.

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Crl.M.C.No.4849 of 2015

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Dated this the 10th day of August, 2015

O R D E R

The prayer in this Criminal Miscellaneous Case instituted under Section 482 of the Code of Criminal Procedure is as follows:

".....to set aside Annexure A3 and to direct the judicial first class magistrate -IV Kozhikode to receive the amount of Rs.12,000/- directed to be remitted by the petitioner as per Annexure A2 and to recall the warrant issued against the petitioner by allowing the above Criminal Miscellaneous Case."

2. The order under challenge in this Crl.M.C. is one at Annexure-A3 which reads as follows:

" Case advanced. Petitioner absent. Represented. Counsel for petitioner produced an order of Government which does not show the signature of the concerned officer or seal of office. Hence petitioner is directed to produce either original order or its certified copy. Call on 31.8.15."

3. It is stated by the petitioner that as per Annexure-A2 Government Order, G.O.(Rt)No.1180/15/Home Dated 20/05/2015, the Government considered the issue of invocation of powers conferred as per Section 433 of the Cr.P.C. for

remission and ordered that the request of the petitioner for remission is allowed and the sentence ordered in Crl.R.P.No.139 of 2002 by this Court (arising out of the conviction in C.C.No.996/1994 on the file of Judicial First Class Magistrate Court-IV, Kozhikode.) is allowed on the sentence of simple imprisonment for the offence under Section 338 of the IPC to the fine of Rs.1000/- and that he has also to pay Rs.1000/- for the offence under Section 279 of the IPC and further amount of Rs.10,000/- as compensation to be paid to the injured and that thus totally an amount of Rs.12,000/- shall be remitted by the petitioner at JFMC-IV, Kozhikode within one month from the date of that order. The petitioner approached the court below for getting the benefit of remission allowed as per Annexure-A2 G.O. upon which the court below passed impugned Annexure-A3 order insisting that the petitioner shall either produce original of the G.O. or its certified copy.

4. Heard. Sri.P.M.Pareeth, learned counsel for the petitioner and Sri.Tom Jose Padinjarekkara, learned Additional DG of Prosecutions appearing for the respondent State of Kerala.

5. Sri.P.M.Pareeth learned counsel for the petitioner urged

that a copy of the Annexure-A2 G.O.has also been marked to the Judicial First Class Magistrate Court-IV, Kozhikode as can be seen from endorsement No.3 therein on page 2 of Annexure -A2 G.O. That further on enquiry he has found that the Government Secretariat has no practice for issuing any certified copy and that there is no provision under the Secretariat manual to provide for certified copy of such G.O. It is further pointed out that it is almost impossible for him to produce the original of the said G.O.to the court below. Therefore the court below has placed unreasonable condition on the petitioner and that the court is empowered under Section 57 of the Evidence Act to take judicial cognizance of the said G.O.

6. Sri.Tom Jose Padinjarekkara, learned Additional DG of prosecutions appearing for the respondent State of Kerala submitted that it can be seen from the perusal of Annexure-A2 G.O. that a copy of same has also been marked to the JFMC-IV, Kozhikode and also to Sessions Court, Kozhikode. Further he would urged that by virtue of the enabling provisions contained under Section 57 of the Indian Evidence Act, the court below is empowered to take judicial cognizance of that Government Order

and pointed out to this Court that it has been so held in rulings of the Apex Court in Union of India v. Nihar Kanta Sen and Others reported in AIR 1987 SC 1713, para 7 and Asst. Collector of Central Excise v.Vasanthakumar reported in 1988(1) KLT 92 = 1988 KHC 107, para 17 etc.

Section 57 of the Indian Evidence Act provides as follows:

"57. Facts of which Court must take judicial notice- The Court shall take judicial notice of the following facts:-

- (1) All laws in force in the territory of India;
- (2) All public Acts passed or hereafter to be passed by parliament of the United Kingdom, and all local and personal Acts directed by Parliament of the United Kingdom to be judicially noticed;
- (3) Articles of War for the Indian Army, Navy or Air Force;
- (4) The course of proceeding of Parliament of the United Kingdom, of the Constituent Assembly of India, of Parliament and of the legislatures established under any law for the time being in force in a Province or in the State;
- (5) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland;
- (6) All seals of which English Courts take judicial notice: the seals of all the Courts in India, and of all Courts out of India established by the authority of the Central Government or the Crown Representative: the seals of Courts of Admiralty and Maritime jurisdiction and of Notaries Public, and all seals which any person is authorized to use by the Constitution or an Act of Parliament of the United Kingdom or an Act or Regulation having the force of law in India;
- (7) The accession to office, names, titles, functions, and signatures of the persons filling for the time being any public office in any State, if the fact of their appointment to such office is

- notified in any Official Gazette;
- (8) The existence, title and national flag of every State or Sovereign recognized by the Government of India;
 - (9) The divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the Official Gazette;
 - (10) The territories under the dominion of the Government of India;
 - (11) The commencement, continuance, and termination of hostilities between the Government of India and any other State or body of persons;
 - (12) The names of the members and officers of the Court and of their deputies and subordinate officers and assistants and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakils, pleaders and other persons authorized by law to appear or act before it;
 - (13) The rule of the road on land or at sea.

In all these cases, and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so, unless and until such person produces any such book or document as it may consider necessary to enable it to do so."

7. Under clause (a) of Article 13(3) of the Constitution of India "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. That a Government Order as the one in Annexure -A2 is an order reflecting exercise of the sovereign executive power of the State which also includes the power to exercise its lawful powers conferred under Section 433 of the

Code of Criminal Procedure. The power to grant remission is also referred to in Article 161 of the Constitution of India. Under these circumstances, the Government Order at Annexure -A2 could have been judicially taken cognizance by the learned Magistrate.

8. In *Union of India v. Nihar Kanta Sen and Others* reported in AIR 1987 SC 1713 = 1987 KHC 1031, para 7 the Apex Court has held as follows:

"7. Intermediary as defined by S. 2(l) includes a proprietor, tenure-holder, under-tenure holder or any other intermediary above a Raiyat. An intermediary's right, title and interest in the land stood acquired by the State on the issue of notification under S. 4 of 1953 Act. Thereafter no intermediary could claim any right, title and interest in the property. There is no dispute that Nirode Kanta Sen the predecessor-in-interest of the claimants held a Patnidar interest in respect of the property in dispute as is evident from the sale deed dated 20-1-1925 executed by Benode Behari Roy in favour of Nirode Kanta Sen (Ex. 7(b)) and sale deed dated 27-10-1921 executed by K. G. Dumaine in favour of Jogendra Kumar Sen (Ex. 7) who executed release deed in favour of Nirode Kanta Sen on 16-12-1927 (Ex. 4(a)). These documents evidenced transfer of patnidar rights in the property in favour of Nirode Kanta Sen. Under the provisions of The Bengal Patni Regulations VIII of 1819, holder of a Patni deed enjoyed the right of the zamindar unless some limitation was expressly mentioned in the deed. The interest of a Patnidar was capable of being transferred by sale in the same manner as any other real property. A patni right holder is a proprietor therefore included within the meaning of intermediary under the Act. Since Nirode Kanta Sen had patni rights in the property, he was an intermediary and his right, title and interest in the property vested in the State with effect from 15-4-1955 and thereafter Nirode Kanta Sen and his heirs could not claim any right or interest in the property except that they were entitled to receive compensation for the property so acquired in accordance with the provisions of the 1953 Act. The High Court refused to consider this question on the ground that copies of

relevant notifications issued under S. 4 were not on record. The State had filed copies of relevant notifications before the High Court as additional evidence but the High Court refused to accept the same. The notifications issued are published in the Gazette, the High Court should have taken judicial notice of the same. Even though the claimants ceased to have any right or title in the requisitioned property after 15-4-1955, the High Court proceeded to award compensation to the claimants on the assumption that they continued to hold right, title and interest in the property even after 15-4-1955, this was apparently in utter disregard of the legislative mandate contained in S. 4(2) of the 1953 Act."

Therein the Apex Court has held that the notification published in the gazette should have been taken judicial cognizance by court concerned.

9. In *Asst. Collector of Central Excise v. Vasanthakumar* reported in 1988(1) KLT 92 = 1988 KHC 107, the Division Bench of this Court has held in para 17 and 18 as follows:

"17. Having regard to the complexity of problems which modern State has to face and the welfare measures that a State is called upon to undertake, it is well nigh impossible for the Parliament or the State Legislature to exercise all legislative functions directly. It is well recognised that the Parliament and the State Legislature have authority to delegate their legislative functions in a limited way for various purposes to the Executive. The exercise of those powers is called subordinate legislation and delegated legislation. Often guidelines are provided for in the Statute itself, and details are left to be worked out by the Executive. The details may relate to the date on which the provisions of a Statute may come into force, or the goods that have to be brought within the mischief of the statutory provision or exempted from its purview and so on. In many cases, as in the case of notifications involved in this case, the Act itself may make provision for placing the notifications, rules, schemes or orders for legislative scrutiny. These are some of the safeguards normally provided to check abuse or arbitrariness on the part of the executive in exercise of delegated functions. The function of the Executive in

exercise of the functions so delegated is nothing but legislative in character and the notifications, regulations or orders issued in exercise of the powers delegated are law. As indicated above, a modern State undertakes enormous activities including social welfare measures in the interest of general public. This gives rise to ever increasing need for delegation of functions of legislature to the Executive. As compared to statutes, the volume of delegated legislation both in England and India, has immensely increased and it has been well said that "in mere bulk, the child now dwarfs the parent." The exercise of those delegated powers appears under different names such as rules, regulations, orders, notifications, directions, schemes, circulars, bye-laws etc. Since these subordinate legislations supplement a statute or exempt certain matters from its operations, though they are made by the executive they qualify to be termed as "law". The long line of decisions of the Supreme Court referred to above would lead to the conclusion that power exercised by the executive by virtue of the conferment of the delegated authority by the Statute is a legislative act and hence law within the meaning of S.57 of the Evidence Act.

18. In the light of the principle enunciated in the above decisions of the Supreme Court, we do not find any difficulty in holding that the relevant notifications issued under S.11-B and S.123 (2) of the Customs Act are legislative in character. It is in exercise of delegated powers, notifications are issued. S.11-B of the Customs Act lays down that having regard to the magnitude of the illegal imports of goods of any class or description, if the Central Government is satisfied that it is expedient in the public interest to take special measures for the purpose of checking the illegal import, circulation or disposal of such goods or facilitating the detention of such goods it may by notifications in the official gazette, specify goods of such class or description. Similarly under S.123 of the Customs Act the Parliament confers power on the Central Government to issue notifications including any class of goods within the mischief on S.123 of the Act which provides that where any goods to which that Section applies are seized under the Act in the reasonable belief that they are smuggled goods the burden of proving that they are not smuggled goods shall be on the person from whose possession the seizure is made, and if any person, other than the person from whose possession the goods are seized, claims to be the owner thereof, also on such other person and in any other case on the person if any who claims to be the owner thereof. The issue of notifications in exercise of the powers so conferred is nothing but a legislative activity. It follows that the notifications in question are laws within the meaning

of S.57 of the Evidence Act and the court is bound to take judicial notice of these notifications. Learned Magistrate was clearly in error in holding that the prosecution must fail for reason of non-production of the notifications. What the court has to do in a case where it is bound to take judicial notice has been explained by the Full Bench decision in Executive Officer v. V. P. Devassy (1970 KLT. 991) in the following terms:-

".....It is clear from S.57 of the Evidence Act that in all cases where the Court is bound to take judicial notice, the court may resort for its aid to appropriate books or documents of reference. There is thus a duty cast on the court to refer to the necessary documents for the purpose of taking judicial notice of something of which it is bound to take judicial notice. Therefore, if that were necessary, the Court should have looked into the gazette or other book or document of reference for the purpose of ascertaining whether or not the law here in question had been brought into force. It is only where a document of reference for the purpose of deciding such a question is not readily available that the question of the Court calling upon the party concerned to produce it would arise."

Therein also this Court has held that the notification in question should have been taken judicial cognizance in view of the legal position adumbrated in Section 57 of the Indian Evidence Act. Moreover it is seen that a copy of the said G.O. has also been directly marked by the State Government to the JFMC-IV as it can be seen from endorsement No.3 on page No.2 of Annexure-A2 Government Order.

10. Under these circumstances, the impugned order at Annexure-A3 is set aside. The court below shall take a note of

Annexure-A2 G.O.and pass necessary orders in accordance with law.

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

Sd/- ALEXANDER THOMAS, JUDGE

MJL

