

IN THE HIGH COURT OF KERALA AT ERNAKULAM

**PRESENT:
THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS**

FRIDAY, THE 30TH DAY OF OCTOBER 2015/8TH KARTHIKA, 1937

Cri.MC.No. 5231 of 2015 ()

**AGAINST THE JUDGMENT IN CC 80/2013 of C.J.M.,THODUPUZHA
AGAINST THE JUDGMENT IN OS 201/2012 of MUNISIFF COURT, THODUPUZHA
CRIME NO. 180/2013 OF KANJAR POLICE STATION, IDUKKI DISTRICT**

PETITIONER(S)/ACCUSED IN CRIME NO.180/2013:

- 1. JOSEPH @ JOSE AGED 52 YEARS
S/O.MATHAI, KOCHUMALAYIL HOUSE, MULAMATTAN
ARAKULAM P.O., ARAKULAM VILLAGE, THODUPUZHA TALUK
IDUKKI DISTRICT.**
- 2. JOMON @ BAIJU AGED 32 YEARS
S/O.ABRAHAM, KOCHUMALAYIL HOUSE, MULAMATTAN
ARAKULAM P.O., ARAKULAM VILLAGE, THODUPUZHA TALUK
IDUKKI DISTRICT.**
- 3. JOJOMON, AGED 30 YEARS
S/O.ABRAHAM, KOCHUMALAYIL HOUSE, MULAMATTAN
ARAKULAM P.O., ARAKULAM VILLAGE, THODUPUZHA TALUK
IDUKKI DISTRICT.**
- 4. JOSE, AGED 52 YEARS
S/O.FRANCIS, EDAVAKANDATHIL HOUSE
ARAKULAM P.O., ARAKULAM VILLAGE, THODUPUZHA TALUK
IDUKKIDISTRICT.**

BY ADV. SRI.SHAIJAN JOSEPH

RESPONDENT(S)/DEFACTO COMPLAINANTS:

- 1. STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM - 682 031.**
- 2. THE STATION HOUSE OFFICER
KANJAR POLICE STATION, KANJAR
IDUKKIDISTRICT - 685 590.**
- 3. JOMON JOSEPH
S/O.JOSEPH, POOVATHINAL HOUSE, MOOLAMATTOM KARA
MOOLAMATTOM P.O., THODUPUZHA, IDUKKI PIN - 685 589.**

**R3 BY ADV. JOY.C.PAUL(B/O)
R3 BY ADV. SRI.JOY C. PAUL
R3 BY ADV. SRI.BOBBOY GEORGE
BY PUBLIC PROSECUTOR SRI.P.V.ELIAS.**

**THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 30-10-2015,
THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

Crl.MC.No. 5231 of 2015 ()

APPENDIX

PETITIONER(S)' EXHIBITS

ANNEXURE-A1: TRUE COPY OF THE JUDGEMENT IN O.S. 201/2011 DATED 31.10.2012

ANNEXURE-A2: TRUE COPY OF THE COMPLAINT IN CRL.M.P NO.953/2013

ANNEXURE-A3: TRUE COPY OF THE FIRST INFORMATION REPORT DATED 19.2.2011

ANNEXURE-A4: TRUE COPY OF THE FINAL REPORT DATED 30.4.2013

RESPONDENT(S)' EXHIBITS

NIL.

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///True copy///

P.S. to Judge

ALEXANDER THOMAS, J.

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Crl.M.C.No. 5231 of 2015

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Dated this the 30th day of October, 2015

O R D E R

The prayer in this petition filed under Sec.482 of the Code of Criminal Procedure seeking invocation of this Court's inherent powers conferred under Sec.482 of the Code of Criminal Procedure is for an order from this Court to quash the impugned Anx.A-4 final report/charge sheet filed by the Police in the impugned Anx.A-3 FIR in Crime No.180/2013 of Kanjar Police Station, Idukki district, which has led to the institution of Calendar Case, C.C.No.80/2013 on the file of the Chief Judicial Magistrate's Court, Thodupuzha, and all further proceedings arising therefrom.

2. The four petitioners herein are the four accused in the impugned Anx.A-3 Crime No.180/2013 of Kanjar Police Station, Idukki district, registered for offences under Secs.142, 143, 145, 147, 294(b), 379, 427, 506(ii) read with Sec.34 of the I.P.C. The Police after investigation filed the impugned Anx.A-4 final report/charge sheet in the aforesaid crime, whereby some of the offences mentioned in FIR have been deleted and the offences charged

therein are only those under Secs.379, 294(b), 506(ii) read with Sec.34 of the I.P.C., which has led to the pendency of the aforestated Calendar Case, C.C.No.80/2013 on the file of the Chief Judicial Magistrate's Court, Thodupuzha. The main ground urged in the petition is that the impugned proceedings predominantly arise under civil disputes between the parties, wherein the petitioners have successfully won before the trial court concerned.

3. The crime was registered on the basis of Anx.A-2 complaint dated 19.2.2013 filed by the defacto complainant (contesting respondent No.3) before the Chief Judicial Magistrate's Court, Thodupuzha, as Crl.M.P.No.953/2013. Therein, the main allegation of the defacto complainant is that the petitioners/accused had committed theft and other related offences in the property, as described above, in the said property in question, over which the contesting respondent No.3 has exclusively title and possession. It appears that the learned Magistrate had forwarded Anx.A-2 complaint to the Police for investigation by taking recourse to the provisions contained in Sec.156(3) of the Code of Criminal Procedure. This led to the registration of the impugned Anx.A-3 FIR in Crime No.180/2013 of Kanjar Police Station, Idukki district, in

which Anx.A-4 final report/charge sheet was filed for the aforestated offences, which has led to the pendency of the aforestated Calendar Case. It is these criminal proceedings, which are under challenge in this Criminal Miscellaneous Case.

4. Heard Sri.Shaijan Joseph, learned counsel appearing for the petitioners, the learned Public Prosecutor appearing for respondents 1 and 2, Sri.Joy.C.Paul, learned counsel appearing for the contesting respondent No.3 (defacto complainant).

5. It is common ground that contesting respondent No.3 had filed a civil suit as O.S.No.201/2011 before the Munsiff's Court, Thodupuzha, against the five defendants therein. In the said suit the 1st, 2nd, 3rd petitioners are defendants 2, 4 and 5 respectively. In the said suit, the defacto complainant herein had sought the relief of declaration of title, fixation of boundary, partition and permanent prohibitory injunction as against these defendants, in respect of the property in question, which is the subject matter of the impugned criminal proceedings. The defacto complainant herein had mainly relied on Ext.A-3 (deed No.1797/97), Ext.A-5 (possession certificate dated 21.7.2011) and Ext.A-7 (tax receipt dated 11.7.2012), etc., which were marked in the said suit in support of

his claim for title and possession, etc. The civil court, after an elaborate consideration of the entire matter, came to the considered conclusion in para Nos.29 and 30 of Anx.A-1 judgment dated 31.10.2012 in O.S.No. 201/2011, which reads as follows:

“29. It is pleaded that the cause of action for the suit arose on 24.7.2011 when the defendants had turned down the request of the plaintiff to demarcate 10 cents each to the two sets of defendants. In the suit also the plaintiff is seeking for allotting him with 58 cents of property after setting apart two plots of 10 cents each to the defendants as their 'kudikidappu'. The available materials will go to show that the defendants are in long possession of the plaint schedule property and as on the date of both Exts.A2 and A3, the defendants were in possession of the property. If that be so, the plaintiff never got possession over the plaint schedule property and even his vendor was not in possession over the property at the relevant points of time. How can the said vendor transfer the property in favour of the plaintiff when he himself was having no possession over the property. The net result of the above discussion on the materials available is that the same will lead this Court to the only conclusion that the plaintiff had miserably failed to prove his title as well as possession over the plaint schedule property. It follows that he is not entitled for the declaration as it is sought for in the plaint.

30. Issue No. (ii to iv):- It is already found that the plaintiff is having no title or possession over the plaint schedule property. The plaintiff is seeking for earmarking 2 plots of land each of 10 cent from the plaint schedule property as the 'kudikidappu' for the two sets of defendants; if necessary by effecting a partition and to allot the remaining 58 cents to the plaintiff. This Court cannot find (sic) any legal basis for the said prayer of the plaintiff; especially when he is not seeking for recovery of possession of the property. Even after hearing the counsel for the plaintiff, this Court could not understand the rationale behind the said prayer and the plaintiff who has referred in his plaint to an unreported decision of the Hon'ble High Court of Kerala in 1988 as applicable to the context has not produced the same. It is already found that the defendants are in possession of the entire plaint schedule property and admittedly they are residing in the two buildings situated in the property. In the above circumstances, the prayer of the plaintiff to restrain the defendants from the plaint schedule property also cannot be allowed. The issues are accordingly answered against the plaintiff.

(emphasis supplied)

Thus the civil court came to the considered conclusion, after an elaborate process of adjudication that the available materials will go to show that the defendants therein are in long possession of the plaint schedule property and as on the dates of both Exts.A-2 and A-3 therein, the defendants were in possession of the property and that the plaintiff never got possession over the plaint schedule property and that even the vendor was not in possession over the property at the relevant points of time. On this basis, the civil court further held that since that is the position, the vendor cannot transfer the plaint schedule property in favour of the plaintiff when the vendor himself was not in having any possession over the property. Accordingly, the civil court held that the irresistible conclusion therein is that the plaintiff has miserably failed to prove his title as well as possession over the plaint schedule property and that therefore it follows that the plaintiff is not entitled for declaration of title as sought for in the plaint. In para 30 of Anx.A-1 judgment also civil court found that since the defendants are in possession of the entire plaint schedule property and admittedly, they are residing in the two buildings situated in the said property, the prayer of the plaintiff to restrain the defendants from the plaint

schedule property also cannot be allowed. Accordingly, the civil court, as per the Anx.A-1 judgment, had dismissed the said suit filed by the defacto complainant herein. It appears that the defacto complainant herein had filed the Appeal Suit, A.S.No.8/2013 before the file of the Addl. District Court, Thodupuzha, along with a delay condonation petition therein. It is common ground that no interim stay has been obtained in the said Appeal Suit even till date. Thereafter, on 19.2.2013 the defacto complainant herein had approached the Chief Judicial Magistrate's Court, Thodupuzha, by filing Anx.A-2 Crl.M.P.No.953/2013 alleging that the petitioners herein (defendants in the suit) had committed the aforestated offence of theft etc., in the aforestated property in question, which is the plaint schedule property referred to in the suit. The Police, after investigation has now charged sheeted the petitioners for the offences under Sec.379, 294(b), 506(ii) read with Sec.34 of the I.P.C.

6. It is the specific case of the defacto complainant that the aforestated offences are said to have been committed by the petitioners herein on 17.2.2013. Even much prior to that date, the civil court concerned as per Anx.A-1 judgment dated 31.10.2012 had found that the defacto complainant herein had miserably failed

to prove his claim for title and possession and that the petitioners herein (defendants concerned in the suit) are in possession of the plaint schedule property and that they are residing in the two buildings situated in the property and that the prayer of the plaintiff to restrain the defendants therein/petitioners herein from entering the said property cannot be allowed. It is also common ground that no stay order has been passed by the lower appellate court in the first appeal even till date. Since that is the position, it is absolutely improper to initiate criminal proceedings as against the petitioners herein for having entered into the said property and for having taken the usufructs therein on the ground that they have committed theft. Indisputably, as per the civil court's judgment and decree, the petitioners were in possession of the said property and at any rate, it was found conclusively that the plaintiff therein could not prove the title or possession in the said property. Therefore, to charge the petitioners for offence under Sec.370 of the I.P.C., to say the least, is highly improper and amounts to abuse of the process of the court.

7. As regards the offence under Sec.294(b) of the I.P.C. the allegation in the impugned criminal proceedings is that the

petitioners had used vulgar and abusive words as against the defacto complainant. The legal position in this regard was laid down by this Court in the case, Latheef v. State of Kerala reported 2014

(2) KLT 987, paragraph 5 thereof reads as follows:

'5. Abusive words or humiliating words or defamatory words will not as such amount to obscenity as defined under the law. Of course there is no doubt that the words alleged to have been used by the revision petitioner are in fact abusive and humiliating. But to make it obscene, punishable under Section 294(b) IPC, it must satisfy the definition of obscenity. Section 294 IPC does not define obscenity. Being a continuation of the subject dealt with under Section 292 IPC the definition of obscenity under 292(1) IPC can be applied in a prosecution under Section 294 IPC also. To make punishable, the alleged words must be in a sense lascivious, or it must appeal to the prurient interest, or will deprave and corrupt persons. In P.T Chacko V. Nainan Chacko reported in (1967 KLT 799) this Court held that, " the test of obscenity is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences." In Sangeetha Lakshmana V. State of Kerala reported in (2008(2) KLT 745) this Court held thus, "*in order to satisfy the test of obscenity, the words alleged to have been uttered must be capable of arousing sexually impure thoughts in the minds of its hearers.*" Thus it is quite clear that, to make obscene the alleged words must involve some lascivious elements arousing sexual thoughts or feelings or the words must have the effect of depraving persons, and defiling morals by sex appeal or lustful desires. I find that the words alleged to have been used by the revision petitioner in this case are really abusive and humiliating, but those words cannot be said to be obscene. As already stated, every abusive word or every humiliating word cannot, by itself, be said to be obscene as defined under the Indian Penal Code. I find that the conviction against the revision petitioner under Section 294 (b)IPC in this case, on the basis of the above words alleged to have been used by him, is liable to be set aside, and the revision petitioner is entitled to be acquitted.'

In the instant case also, from a mere perusal of the materials available on record, it can be seen that the only allegation raised by the defacto complainant is that the petitioners accused have used

humiliating, abusive, vulgar or defamatory words and not even of remote whisper is anywhere therein that the words used contained lascivious elements or prurient elements or using sexual thoughts or feelings or that the words must have the effect of depraving persons, and defiling morals by sex appeal or lustful desires, etc. Therefore, offence under Sec.294(b) is not made out in the facts of this case.

8. The only other surviving major offence is one under Sec.506(ii) of the I.P.C. For the reason that the civil court has already held that the defendants are in possession of the plaint schedule property, it is improper to initiate criminal proceedings as against the petitioners for the offence under Sec. 506(ii). At any any rate, it can be seen that the said offence indisputably is a non-cognizable offence and that none of the respondents have any case that mandatory prior permission of the jurisdictional Magistrate as conceived under Sec.155(2) of the Cr.P.C. was obtained before including the offence under Sec.506(ii). The offence under Sec.34 of the I.P.C. is not an independently prosecutable offence.

9. It is also to be noted that the defacto complainant has only stated in Anx.A-2 complaint dated 19.2.2013 filed before the

Chief Judicial Magistrate's Court, Thodupuzha, in para 6 thereof, that he has instituted a civil suit as against the accused before the civil court concerned, which is now pending before the District Court, Thodupuzha. The facts that the civil suit filed by the defacto complainant was dismissed as per Anx.A-1 judgment on 30.10.2012 and that the defacto complainant had lost in the civil litigation and that in the appeal suit, no interim stay order was passed, etc. have not been disclosed by him in Anx.A-2. It amounts to suppression of crucial factual details as stated above.

10. In view of these reasons, this Court is of the considered opinion that the impugned criminal proceedings are liable to be interdicted. It is made clear that the aforestated findings are made solely on the basis of the fact that the civil court by Anx.A-1 judgment rendered on 31.10.2012 had made the aforestated findings and there was no stay of the said judgment and decree of the trial court even till date. Therefore, as on the date of the occurrence of the offence on 17.2.2013, it cannot be said that initiation of the impugned criminal proceedings was proper and lawful. The findings in this judgment are made in the limited context of the challenge made as against the impugned criminal

proceedings and shall not in any way trammel or influence the outcome of the pending civil litigation process now pending before the civil appellate court concerned. It is also made clear that the findings and observations in this judgment shall not in any way affect either of the parties as regards their rival claims in respect of aforesaid civil cause of action. Nothing in this order will in any way preclude either of the parties including the contesting respondent herein from working out their remedies in accordance with law before the civil appellate court and the higher forums thereto. In this view of the matter, it is ordered in the interest of justice that the impugned Anx.A-4 final report/charge sheet filed in the impugned Anx.A-3 Crime No.180/ 2013 of Kanjar Police Station, which has led to the pendency of the Calendar Case, C.C.No. 80/2013 on the file of the Chief Judicial Magistrate's Court, Thodupuzha, and all further proceedings arising therefrom pending against the petitioners are quashed.

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

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///True copy///

Sd/-
ALEXANDER THOMAS, JUDGE

P.S. To Judge.

