

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

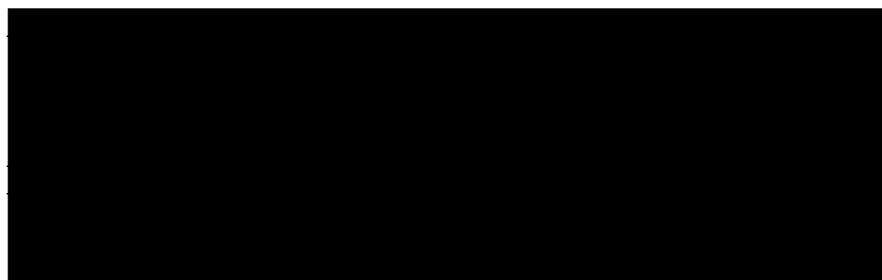
MONDAY, THE 20TH DAY OF NOVEMBER 2023 / 29TH KARTHIKA, 1945

CRL.MC NO. 7600 OF 2023

CRIME NO.1000/2023 OF Karunagapally Police Station, Kollam
AGAINST THE ORDER/JUDGMENT CMP 2146/2023 OF JUDICIAL MAGISTRATE OF
FIRST CLASS - I, KARUNAGAPPALLY

PETITIONER/PETITIONER BEFORE COURT BELOW:

JAYAKRISHNA MENON



BY ADVS.

VIVEK NAIR P.

C.UNNIKRISHNAN (KOLLAM)

NIDHI BALACHANDRAN

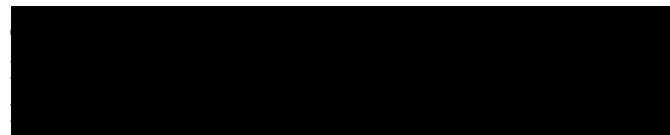
UTHARA A.S

ANANDA PADMANABHAN

VIJAYKRISHNAN S. MENON

GOUTHAM KRISHNA U.B.

RESPONDENTS/STATE, INVESTIGATING OFFICER & ACCUSED:

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
PIN - 682031
- 2 STATION HOUSE OFFICER
KARUNAGAPPALLY POLICE STATION,
KOLLAM, PIN - 690518
- 3 KRISHNANKUTTY

- 4 K.V. SADANANDAN



BY ADVS.

Martin Jose P

P.PRIJITH(K/233/2005)

THOMAS P.KURUVILLA (K/420-B/2005)

AJAY BEN JOSE (K/729/2012)

MANJUNATH MENON (K/000474/2015)

SACHIN JACOB AMBAT (K/734/2016)

ANNA LINDA EDEN (K/1201/2020)

HARIKRISHNAN S. (K/497/2019)

R.GITESH (K/630/2002)

S.SREEKUMAR (SR.) (S-571)

SRI. M.P PRASANTH, PP

THIS CRIMINAL MISC. CASE HAVING COME UP FOR
ADMISSION ON 20.11.2023, THE COURT ON THE SAME DAY PASSED
THE FOLLOWING:

**CR****P.V.KUNHIKRISHNAN, J.**
-----**Crl.M.C.No.7600 of 2023**
-----**Dated this the 20th day of November, 2023****ORDER**

Petitioner is aggrieved by Annexure A10 order passed by the Judicial First Class Magistrate Court, Karunagappally in C.M.P.No.2146/2023 in Crime No.1000/2023 of Karunagappally Police Station. It is an order passed in a petition filed under Section 451 of the Code of Criminal Procedure, 1973 (in short, Cr.P.C) seeking interim custody of an elephant named Raman involved in Crime No.1000/2023 of Karunagappally Police Station. The above case is filed alleging offences punishable under Section 406 and 420 IPC.

2. Petitioner herein is the defacto complainant in Crime No.1000/2023 of Karunagappally Police Station and the petitioner in C.M.P.No.2146/2023 on the file of the



Judicial First Class Magistrate Court, Karunagappally. Mata Amritanandamayi Math, Vallikkavu is the owner of an elephant named Raman, is the submission of the petitioner. Annexure A1 is the Certificate of Ownership issued by the Principal Chief Conservator of Forests (Wildlife) & Chief Wildlife Warden, Kerala dated 30.07.2014. Annexure A2 is the Certificate of Implantation of Microchip dated 10.06.2008 issued by the Kerala Forests and Wildlife Department. Annexure A3 is the authorisation letter issued to the petitioner from Mata Amritanandamayi Math to conduct the case and Annexure A4 is the relevant page of the data book of captive elephant maintained by Kerala Forests & Wildlife Department. It is the case of the petitioner that, a perusal of Annexures A1, A2 and A4 would show that Mata Amritanandamayi Math is the owner of the elephant. It is the case of the petitioner that the elephant was gifted to the Madom by one Sri. Sadanandan and since the



elephant was showing the symptoms of Musth, it was entrusted to the 3rd respondent to look after the elephant as he was having other elephants in his ownership. It is the case of the petitioner that, subsequently, through social media and other inputs, Amritanandamayi Math got information that the elephant is harassed at the hands of the mahouts and other attending employees engaged by the 3rd respondent. Hence it was decided by the Math to take back the elephant from the place of the 3rd respondent is the submission of the petitioner. But the 3rd respondent refused to handover the elephant and hence a complaint was filed by the petitioner which led to Annexure A5 F.I.R. After registration of Annexure A5 F.I.R., the petitioner filed an application under Section 451 Cr.P.C. for the interim custody of the elephant. Annexure A6 is the application. The 3rd respondent appeared and filed objection in the application as evident by Annexure A7. Along with Annexure A7, the 3rd respondent produced



two documents as gift deeds showing that the elephant was handed over to Sri. Sadanandan by the Madom as per the agreement dated 18.02.2017. Annexure A8 is the alleged gift deed. The second document is another gift deed dated 28.02.2017 alleged to have been executed by Sri. Sadanandan in favour of the 3rd respondent. Annexure A9 is the agreement. According to the petitioner, Annexures A8 and A9 are forged documents. It is also the case of the petitioner that, Section 39(3) of the Wild Life (Protection) Act, 1972 clearly prohibits transfer by way of gift without the permission of Chief Wild Life Warden. Hence it is stated that, the 3rd respondent has no authority to keep the elephant based on Annexures A8 and A9. But the learned Magistrate dismissed the petition as per Annexure A10 order. Aggrieved by Annexure A10 order, this Crl.M.C is filed.

3. Heard Adv. Sri.C.Unnikrishnan, the learned counsel appearing for the petitioner, the learned Senior



counsel Adv. Sri.S. Sreekumar as instructed by Adv. Sri. Martin Jose P, appearing for the 3rd respondent and the learned public prosecutor. Even though notice was issued to the 4th respondent, who is alleged to have executed Annexure A9 gift deed, he refused to appear before this Court.

4. Counsel for the petitioner submitted that the learned Magistrate has not considered the facts before rejecting the petition. The counsel also submitted that, if there are rival claimants in a petition under Section 451 Cr.P.C., the court has a duty to decide who has got a better claim. According to the petitioner, the 3rd respondent has no title/ownership of the elephant. The counsel also relied on Section 39(3) of the Wild Life (Protection) Act and submitted that, even if Annexures A8 and A9 are accepted, the same is void in the light of the specific prohibition in the Wild Life (Protection) Act. The Senior counsel Sri.S. Sreekumar who appeared for the 3rd



respondent relied on Annexures A8 and A9 and submitted that the 3rd respondent is the owner of the elephant. The Senior counsel submitted that the jurisdiction of the learned Magistrate is very limited in a Section 451 Cr.P.C. petition and the court below found that the 3rd respondent is in possession of the elephant and in such circumstances, the learned Magistrate is perfectly justified in allowing the 3rd respondent to retain the possession of the elephant.

5. The learned Public Prosecutor after getting instructions submitted that, as per the available files in the office of the Assistant Conservator of Forests, Social Forestry Division, Kollam, the male elephant by the name 'Raman' bearing Microchip No.00064747FE/104 is owned by the Secretary, Mata Amritanandamayi Math, Amritapuri, Vallikkavu, Karunagappally, Kollam. It is also submitted by the Public Prosecutor based on the instructions that Annexures A1, A2 and A4 produced along



with the application are issued by the Kerala Forest Department and are valid, real and genuine.

6. This Court perused Annexure A10 order. The jurisdiction of the court while invoking the powers under Section 451 Cr.P.C is settled by several decisions of this court and the apex court. It will be better to extract Section 451 Cr.P.C to know the scope of the power of the court:

"451. Order for custody and disposal of property pending trial in certain cases.

When any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

Explanation.- For the purposes of this section," property" includes-

- (a) property of any kind or document which is produced before the Court or which is in its custody,
- (b) any property regarding which an offence appears to have been committed or which appears to have been



used for the commission of any offence.”

7. From the above section, it is clear that, when a property is produced before any Criminal court, during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial. Thus, the wording in the Code clearly lays down that while passing an order under Section 451 Cr.P.C, the court has to decide as it thinks fit for the proper custody of such property. The wording ***“as it thinks fit for the proper custody of such property”*** itself shows that, application of mind is necessary before passing the order. In other words, the court has to pass a judicial order after applying its mind for determining the person who is entitled to the proper custody of the property pending conclusion of the inquiry or trial. While exercising such powers, the court can decide who has got a better title if there are two claimants. It is true that the ultimate decision regarding



the custody is to be taken by the court at the stage of Section 452 Cr.P.C. which is after the conclusion of the trial. In **Shalima K.M. v. State of Kerala and others [2017 KHC 262]**, this Court considered the jurisdiction of the Court under Section 451 Cr.P.C. It will be better to extract the relevant portion of that judgment:

“13. Section 451 of the Code enables the court to pass orders for the custody or disposal of the property during an inquiry or trial. In deciding on the person to whose custody property or vehicle has to be given, court would naturally be concerned with finding out who the person entitled to possession pending final disposal of the case is. In order to decide that question, naturally, the relevant materials bearing on the question of entitlement to possession will have to be considered and a proper decision will have to be arrived at.

14. An order passed under section 451 is actually not a disposal of property, but only an arrangement for proper custody pending conclusion of trial or enquiry. The disposal of property by destruction, confiscation or delivery to any person claiming entitled to possession or otherwise arises only at the conclusion of trial. Sale or otherwise disposing of property pending trial under S.451 of the Code will



arise only if it is subject to speedy or natural decay or if otherwise, the Court thinks it expedient to do so and that too, if necessary, after recording such evidence required. Normally, though not in all cases, preservation of property pending trial is necessary because it may be required for the purpose of evidence, identification or otherwise during trial. An order under S.451 of the Code does not settle the title or even right to possession. Refusal of claims to custody under S. 451 does not preclude the person in an enquiry under S.452 of the Code. It is only an interim arrangement pending enquiry or trial subject, at any rate, to further orders under S.452 after conclusion of enquiry or trial, if not earlier pending enquiry or trial itself. It is true that in case of rival claims, even though preservation and upkeep are the main considerations, other factors just as right to possession, who is best entitled to possession etc. may be considerations. Even an enquiry under S.452 of the Code, though conclusive in connection with the criminal proceeding, strictly it is also not a final disposal as between rival claimants because it is always subject to final decision by a competent civil court, which alone could decide the rival claims to title finally. Either under S.451 or under S.452 of the Code, there can be instances when the criminal courts may be inclined to refuse disposal of property pending decision by a civil court. A person is given custody



under S.451 only as a representative of the Court bound by terms of entrustment to act according to the directions.”

8. In the light of the above decision, it is clear that the point to be decided at the stage of Section 451 Cr.P.C. is who is the best suited person for possession of the property pending trial. If there are rival claimants, who has got the better title can be decided by the Court at the stage of Section 451 Cr.P.C. subject to the final decision to be taken under Section 452 Cr.P.C. upon the conclusion of the trial. Therefore, who has got better title as far as the elephant in question is concerned, is the point to be decided in this case.

9. This Court perused Annexure-A1 certificate of ownership issued by the Kerala Forest Department as far as the elephant 'Raman' is concerned. As per Annexure-A1, the Secretary, Mata Amritanandamai Ashram is the owner of the elephant. Annexure-A2 is the certificate of implantation of microchip issued by the Kerala Forests and



Wildlife Department. A perusal of the same would also show the owner of the elephant as Mata Amritanandamayi Math, Ananthapuri, Vallikkavu. Annexure-A4 is the relevant page of the data book of captive elephant maintained by the Kerala Forests and Wildlife Department which also shows Mata Amritanandamayi Madom as the owner of the elephant. The Senior Counsel appearing for the 3rd respondent submitted that the period of validity of Annexures A1, A2 and A4 has already expired. In such circumstances, this Court directed the Public Prosecutor to get instructions. The Public Prosecutor, after getting instructions from the Assistant Conservator of Forests, Social Forestry Division, Kollam, submitted that Annexures A1, A2 and A4 produced along with the CrI.M.C. are issued by the Kerala Forest Department and are valid, real and genuine. It is also submitted by the Public Prosecutor that as per the available files with the Assistant Conservator of Forests, the male elephant by the name Raman bearing



microchip No.00064747FE/104 is owned by the Secretary, Mata Amritanandamayi Math. Therefore it is prima facie clear from Annexures A1, A2 and A4 and also from the instruction received by the Public Prosecutor from the Assistant Conservator of Forests, Social Forestry Division, Kollam, that the owner of the elephant is Mata Amritanandamayi Math. But, this is a matter to be finally decided by the court concerned at the stage of Section 452 Cr.P.C.

10. The main reason put forth by the learned Magistrate for rejecting the application of the petitioner for getting interim custody of the elephant was that the elephant is under the care and protection of the 3rd respondent and the documents before the court also shows that the elephant is well maintained by the 3rd respondent. It is also stated that the elephant - subject matter of the petition is not seized and produced before the Court by the Investigating Officer to invoke Section



451 Cr.P.C. But this Court directed the Registry to get a report from the learned Magistrate to find out whether the elephant was produced before the court. As per letter dated 21.09.2023, the learned Magistrate informed that the elephant is not actually produced before the Court, but it is only symbolically produced as per Mahazar. An elephant needs to be produced only symbolically in a court, unless there is dispute about the identity. There is no dispute regarding the identity of the elephant. Therefore in the light of the symbolic production of the elephant the court has jurisdiction to decide a petition under Section 451 Cr.P.C. because an elephant need not be physically produced before the court. The only documents that are produced by the 3rd respondent before the court below are Annexures A8 and A9. Annexure-A8 is a gift deed issued by the Mata Amritanandamayi Math in favour of the 4th respondent. Annexure-A9 is another gift deed executed by Sadanandan, the 4th respondent, in



favour of the 3rd respondent. It is the definite case of the petitioner that Annexures A8 and A9 are forged documents. Moreover, the 4th respondent is not appearing before this Court to admit Annexures A8 and A9 even though notice is issued to the 4th respondent.

11. In addition to that, Section 39 of the Wild Life (Protection) Act, 1972 (for short, Act 1972) deals with wild animals, etc., to be Government property. It will be better to extract Section 39 of Act 1972:

“39. Wild animals, etc., to be Government property.—

- 1) Every—
 - (a) wild animal, other than vermin, which is hunted under section 11 or sub-section (1) of section 29 or sub-section (6) of section 35 or kept or bred in captivity or hunted in contravention of any provision of this Act or any rule or order made thereunder or found dead, or killed by mistake; and
 - (b) animal article, trophy or uncured trophy or meat derived from any wild animal referred to in clause (a) in respect of which any offence against this Act or any rule or order



- made thereunder has been committed;
- (c) ivory imported into India and an article made from such ivory in respect of which any offence against this Act or any rule or order made thereunder has been committed;
- (d) vehicle, vessel, weapon, trap or tool that has been used for committing an offence and has been seized under the provisions of this Act,

shall be the property of the State Government, and, where such animal is hunted in a sanctuary or National Park declared by the Central Government, such animal or any animal article, trophy, uncured trophy or meat derived from such animal, or any vehicle, vessel, weapon, trap or tool used in such hunting shall be the property of the Central Government.

- (2) Any person who obtains, by any means, the possession of Government property, shall, within forty-eight hours from obtaining such possession, make a report as to the obtaining of such possession to the nearest police station or the authorised officer and shall, if so required, hand over such property to the officer-in-charge of such police station or such authorised officer, as the case may be.
- (3) No person shall, without the previous permission in writing of the Chief Wild Life Warden or the



authorised officer—

- (a) acquire or keep in his possession, custody or control, or
- (b) transfer to any person, whether by way of gift, sale or otherwise, or
- (c) destroy or damage, such Government property.”

12. Section 39(3) of Act 1972 says that no person shall, without the previous permission in writing of the Chief Wild Life Warden or the authorised officer, acquire or keep in his possession, custody or control, or transfer to any person, whether by way of gift, sale or otherwise, or destroy or damage, such Government property. Section 43 of Act 1972 is also relevant and is extracted hereunder:

“43. Regulation of transfer of animal, etc.—

- (1) No person having in his possession captive animal, animal article, trophy or uncured trophy in respect of which he has a certificate of ownership shall transfer by way of sale or offer for sale or by any other mode of consideration of commercial nature, such animal or article or trophy or uncured trophy.



- (2) Where a person transfers or transports from the State in which he resides to another State or acquires by transfer from outside the State, any such animal, animal article, trophy or uncured trophy in respect of which he has a certificate of ownership, he shall, within thirty days of the transfer or transport, report the transfer or transport to the Chief Wild Life Warden or the authorised officer within whose jurisdiction the transfer or transport is effected.

Provided that the transfer or transport of a captive elephant for a religious or any other purpose by a person having a valid certificate of ownership shall be subject to such terms and conditions as may be prescribed by the Central Government.

- (3) Nothing in this section shall apply—
- (a) to tail feather of peacock and the animal article or trophies made therefrom;
- (b) to transfer of captive animals between recognised zoos subject to the provisions of section 38-I, and transfer amongst zoos and public museums.”

13. This Court in **Principal Chief Conservator of Forests, Tvm and Another v. Secretary, Paramekkavu Devaswom [2015 (3) KHC 351]**



considered this point in detail. It will be better to extract the relevant portion of that judgment:

“19. The Statement and Object of the Act, 2003 as quoted above indicated to create a ban of commercial sale or ban of sale of animals included in Schedule I or Part II of Schedule II. Now the provisions of the Act as amended by the Act, 2003 are to be noted. Section 40 of the Act contemplates for declaration by every person having at the commencement of the Act the control, custody or possession of any captive animal. Further, there was restriction of acquiring, receiving or control of sale without permission of the Chief Wild Life Warden. Section 40(4) empowered by notification requiring any person to declare any animal article or trophy, which provision was amended by the 2003 Amendment Act and in place of words “animal article or trophy”, the words “any animal or animal article or trophy” were substituted. The intention, thus, was clear that declaration under sub-section (2) to Section 40 could have been asked for any animal and such declaration was not confined to the declaration of animals at the commencement of the Act alone. Section 40A was inserted, which empowered the Central Government by notification requiring any person to declare to the Chief Wild Life Warden of any captive animal article, trophy or unsecured trophy derived from animals. Thus, the regulatory regime



was brought into force by Act 16 of 2003 to regulate to seek declaration for insisting captive animals in possession or custody of a person. As noted above, the Rules have already been framed by the State Government. Thus, with effect from 2003 all declarations for animals which were not earlier made under Section 40 are required to be made to the Forest Officer. The most important changes which have been brought by substituting Section 43 by Act 16 of 2003 was that prohibition was imposed in transfer by way of sale or by any other mode of consideration of commercial nature. Thus, Section 43(1) prohibited the following transfer by person having certificate of ownership: (1) by way of sale; or (2) offer for sale; or (3) by any other mode of consideration of commercial nature. Thus, the intendment is clear that sale and purchase of elephant was prohibited. Not only proper sale or offer for sale was prohibited, but any other mode of consideration of commercial nature was prohibited. The object was that elephant need not be subjected to commercial transaction. Sub-section (2) of Section 43, however, contemplates transfers or transportation by a person, who had a certificate of ownership, which obliged him to report within 30 days of the transfer or transport to the Chief Wild Life Warden or the authorised officer within whose jurisdiction the transfer or transport is effected. Sections 43(1) and 43(2) have to be



harmoniously construed, so that purpose and object of both these provisions be served. If it is held that for sale or transfer only, the person having ownership certificate has to report to the Chief Wild Life warden, as held by the learned Single Judge the whole purpose and object of regulation of transfer/restriction of restriction of transfer shall frustrate. Section 43(2) shall be applicable only with regard to those transfers, which are not covered by prohibition under Section 43(1). Thus, those transfers, which are not prohibited under the Act, for them alone report to the Chief Wild Life Warden is contemplated. For example, gift of captive animal is not prohibited by Section 43. Thus, in the event of a person makes a valid gift, he has to report under Section 43(2) to the Chief Wild Life Warden. We however have to sound a note of caution that even if in transfer by gift a commercial transaction is found, the same shall be covered by the provision under Section 43(1).” (*Underline supplied*)

14. From the above decision, it is clear that Section 43(1) prohibited the following transfer by person having certificate of ownership: (1) by way of sale; or (2) offer for sale; or (3) by any other mode of consideration of commercial nature. Thus, the intendment is clear that sale



and purchase of elephant was prohibited. Not only proper sale or offer for sale was prohibited, but any other mode of consideration of commercial nature was prohibited. The object was that elephant need not be subjected to commercial transaction. The above view has also been endorsed by this Court in **Bency Shaji v. State of Kerala [2023 (7) KHC 292]**.

15. In this case, Annexure A8 and A9 are disputed by the petitioner. The ownership of the elephant is prima facie proved in favour of the Mata Amritanandamayi Math as evident by Annexure A1, A2 and A4. Without considering the validity of Annexures A8 and A9, and without considering Annexure A1, A2 and A4, the court below came to the conclusion that the 3rd respondent is in possession of the elephant. I am of the considered opinion that the order passed by the trial court is to be set aside and the matter is to be reconsidered in the light of the observations in this order.



Therefore, this criminal miscellaneous case is allowed in the following manner:

1. Annexure-A10 order is set aside.
2. The Judicial First Class Magistrate Court, Karunagapally is directed to reconsider C.M.P. No.2146/2023, in the light of the observation in this case, as expeditiously as possible, at any rate, within three weeks from the date of receipt of a stamped certified copy of this order.

Sd/-

**P.V.KUNHIKRISHNAN
JUDGE**

DM/JV

**APPENDIX OF CRL.MC 7600/2023**

PETITIONER ANNEXURES

- ANNEXURE A1 TRUE COPY OF THE CERTIFICATE OF OWNERSHIP ISSUED BY THE PRINCIPAL CHIEF CONSERVATOR OF FORESTS (WILDLIFE) & CHIEF WILDLIFE WARDEN, KERALA DATED 30/07/14
- ANNEXURE A2 TRUE COPY OF THE CERTIFICATE OF IMPLANTATION OF MICROCHIP DATED 10/06/08
- ANNEXURE A3 TRUE COPY OF THE AUTHORISATION LETTER ISSUED BY THE JOINT SECRETARY, MATHA AMRITHANANDAMAYI MADOM
- ANNEXURE A4 TRUE COPY OF THE RELEVANT PAGE OF THE DATA BOOK OF CAPTIVE ELEPHANT MAINTAINED BY KERALA FOREST & WILDLIFE DEPARTMENT
- ANNEXURE A5 TRUE COPY OF THE FIR IN CRIME NO 1000/23 OF THE KARUNAGAPPALLY POLICE STATION
- ANNEXURE A6 TRUE COPY OF THE APPLICATION FOR INTERIM CUSTODY AS CMP 2146/2023 IN CRIME NO.1000/23
- ANNEXURE A7 OBJECTION FILED BY THE 3RD RESPONDENT BEFORE THE COURT BELOW.
- ANNEXURE A8 TRUE COPY OF ALLEGED GIFT DEED DATED 18/02/17 ISSUED BY THE MATHA AMRITHANANDAMAYI MADOM IN FAVOUR OF SRI. SADANANDAN
- ANNEXURE A9 TRUE COPY OF THE ALLEGED GIFT DEED DATED 28/02/17 EXECUTED BY SRI. SADANANDAN IN FAVOUR OF THE 3RD



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RESPONDENT

ANNEXURE A10

THE CERTIFIED COPY OF THE ORDER DATED
05/09/23 IN CMP NO. 2146/23 IN CRIME
NO 1000/23 OF KARUNAGAPPALLY POLICE
STATION

RESPONDENTS EXHIBITS : NIL

//TRUE COPY// PA TO JUDGE