

C.R.

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

THURSDAY, THE 7<sup>TH</sup> DAY OF APRIL 2022 / 17TH CHAITHRA, 1944

CRL.MC NO. 3679 OF 2021

AGAINST THE ORDER DATED 15.02.2021 IN CMP 50/2021 OF JUDICIAL  
MAGISTRATE OF FIRST CLASS -V, KOZHIKODE

**PETITIONER/RESPONDENT:**

MUHAMMED HASHEER POOLAKKAL  
AGED 46 YEARS  
S/O. ALI MUHAMMED P., AL-RUBY PARUTHIPARA,  
FAROOK COLLEGE, KOZHIKODE, PIN-673 632

BY ADV NIREESH MATHEW

**RESPONDENTS/PETITIONER & STATE:**

- 1 THE UNITED ARAB BANK  
P.J.S.C (UAB), UAB TOWER BRANCH,  
HEAD OFFICE AL-BUHAIRA CORNICHE,  
P.O.BOX 25033, SHARJAH, UAE,  
REPRESENTED BY ITS POWER OF ATTORNEY HOLDER,  
PRINCE SUBRAMANIAN, PROPRIETOR, XTREAM INTERNATIONAL  
MANAGEMENT CONSULTANCY, GROUND FLOOR, ANNA ARCADE,  
ST.ALBERT LANE, ERNAKULAM, PIN-682 018
  
- 2 STATE OF KERALA,  
REP BY PUBLIC PROSECUTOR,  
HIGH COURT OF KERALA, ERNAKULAM, KOCHI-682 031

BY ADVS.

JOHNSON GOMEZ  
SANJAY JOHNSON  
SREEDEVI S.  
JOHN GOMEZ  
MOHAMED SHEHARAN  
SRI.RANJIT GEORGE - SR.PUBLIC PROSECUTOR

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON  
08.02.2022, THE COURT ON 07.04.2022 PASSED THE FOLLOWING:

**C . R .**

**ORDER**

The petitioner herein is the respondent in C.M.P. No.50/2021 on the file of the Judicial First Class Magistrate Court - V, Kozhikode. The aforesaid C.M.P. was filed by the 1<sup>st</sup> respondent herein invoking the powers of the court under Chapter VIIA of the Code of Criminal Procedure, wherein the prayer sought was to initiate the proceedings for attachment of the properties of the petitioner herein. The crucial question that arises here is whether the powers of the court under the provisions of the said Chapter can be invoked based on an application submitted by an individual/establishment or is it necessary to submit a request in this regard by the Central Government.

2. The facts leading to the filing of this Crl. M.C. is as follows: The 1<sup>st</sup> respondent is a banking financial institution in Sharjah, U.A.E. The petitioner herein had availed a credit facility from the said bank for the purpose of his business in U.A.E. to the tune of AED 4,698,243.42. Subsequently, the petitioner defaulted repayment of the loan amount and certain cheques issued by the

petitioner towards repayment of the loan were also dishonoured. Accordingly, a criminal prosecution was launched before the U.A.E. court, at the instance of the 1<sup>st</sup> respondent herein and it culminated in Annexure D order. As per Annexure D, the petitioner herein was found guilty, and he was sentenced to undergo imprisonment for three years.

3. On the strength of Annexure D judgment passed by the court in U.A.E., the 1<sup>st</sup> respondent herein submitted Annexure A application before the Judicial First Class Magistrate Court – VII, Kozhikode for initiating proceedings against the petitioner herein, as contemplated under Sections 105C to 105J of Code of Criminal Procedure, 1973. After considering the aforesaid petition, Annexure B order was passed, and a direction was issued by the learned Magistrate to the Station House Officer, Feroke Police Station, to take all necessary steps for tracing and identifying the properties of the respondent which were derived as proceeds of crime, as contemplated under section 105C. This CrI. M.C. is filed by the petitioner challenging the Annexure B order.

4. Heard Sri.Nireesh Mathew, learned counsel appearing for the petitioner, Sri. Johnson Gomez, learned counsel appearing for the 1<sup>st</sup> respondent and Sri. Ranjit George, learned counsel appearing for the State.

5. As mentioned above, the question that arises is whether the learned Magistrate is empowered to pass an order like Annexure B on an application in this regard submitted by the 1<sup>st</sup> respondent herein. The provisions in Chapter VII A were incorporated in the statute by way of Code of Criminal Procedure (Amendment) Act, 1993 (Act No.40 of 1993), and it came into force with effect from 20.07.1994. The aforesaid Chapter deals with the powers of the court and the procedure to be adopted for the reciprocal arrangement for assistance in matters relating to attachment and forfeiture of property. The relevant provisions which apply to this case are Sections 105C to 105E.

***105C. Assistance in relation to orders of attachment or forfeiture of property.--***

*(1) Where a Court in India has reasonable grounds to believe that any property obtained by any person is derived or obtained, directly or indirectly, by such person from the commission of an offence, it may make an order of attachment or forfeiture of such property, as it may*

*deem fit under the provisions of sections 105D to 105J (both inclusive).*

*(2) Where the Court has made an order for attachment or forfeiture of any property under sub-section (1), and such property is suspected to be in a contracting State, the Court may issue a letter of request to a Court or an authority in the contracting State for execution of such order.*

*(3) Where a letter of request is received by the Central Government from a Court or an authority in a contracting State requesting attachment or forfeiture of the property in India, derived or obtained, directly or indirectly, by any person from the commission of an offence committed in that contracting State, the Central Government may forward such letter of request to the Court, as it thinks fit, for execution in accordance with the provisions of sections 105D to 105J (both inclusive) or, as the case may be, any other law for the time being in force.*

**105D. Identifying unlawfully acquired property.--**

*(1) The Court shall, under sub-section (1), or on receipt of a letter of request under sub-section (3) of section 105C, direct any police officer not below the rank of Sub-Inspector of Police to take all steps necessary for tracing and identifying such property.*

*(2) The steps referred to in sub-section (1) may include any inquiry, investigation or survey in respect of any person, place, property, assets, documents, books of account in any bank or public financial institutions or any other relevant matters.*

*(3) Any inquiry, investigation or survey referred to in sub-section (2) shall be carried out by an officer mentioned in sub-section (1) in accordance with such directions issued by the said Court in this behalf.*

**105E. Seizure or attachment of property.--**

*(1) Where any officer conducting an inquiry or investigation under section 105D has a reason to believe that any property in relation to which such inquiry or investigation is being conducted is likely to be concealed, transferred or dealt with in any manner which will result in disposal of such property, he may take an order for seizing such property and where it is not practicable to seize such property, he may make an order of attachment directing*

*that such property shall not be transferred or otherwise dealt with, except with the prior permission of the officer making such order, and a copy of such order shall be served on the person concerned.*

*(2) Any order made under sub-section (1) shall have no effect unless the said order is confirmed by an order of the said Court, within a period of thirty days of its being made.*

Section 105C(1) enables a court in India to make an order of attachment or forfeiture of any property obtained by any person from the commission of an offence, by invoking the provisions under Section 105D to 105J. Section 105C(3) contemplates that, if a letter of request is received by the Central Government from a court or an authority in a contracting State requesting attachment or forfeiture of the property in India, the said request may be forwarded to court by the Government. Section 105D(1) provides that the court shall direct the Police Officer for tracing and identifying the property by invoking powers under Sub Section (1) of Section 105C or on receipt of a letter of request under Sub Section (3) of Section 105C.

6. The contention of the learned counsel for the petitioner is that none of the provisions stipulated above, authorise any individual or an institution to approach the court in India directly by

submitting an application for invoking the aforesaid powers. Learned counsel brought my attention to the Guidelines on Mutual Legal Assistance in Criminal Matters, issued by the Ministry of Home Affairs, Government of India, by virtue of order bearing F No.25016/52/2019-LC dated 04.12.2019. It is contended by the learned counsel that the said guidelines prescribe certain procedures and the matters to be considered when the Government processes such a request. In the light of the above, any individual, whether he is a citizen of India or not, cannot directly approach the court for invoking the said powers, as the same would amount to bypassing the procedure contemplated by the Government and the safeguards to be applied while considering such request.

7. On the other hand, the contention of the learned counsel appearing for the 1<sup>st</sup> respondent is that the stipulation in 105D(1) is to the effect that, in addition to the power to act on a letter of request under Sub Section (3) of Section 105C, the court is given the power to act upon a petition of any person by invoking its powers under Sub Section (1) of Section 105C of Cr.P.C. It is

pointed out that, for initiation of proceedings, Section 105D contemplates two sources. The first one is by invoking Sub Section (1) of Section 105C of Cr.P.C., which empowers the court to initiate the proceedings if it is satisfied that there exist reasonable grounds to believe that the property is obtained by the person concerned from the commission of an offence. Another source of power is derived from Sub Section (3) of the said provision, which contemplates for initiation of proceedings acting upon a request being forwarded to the court by the Central Government that the Government received from a court or an authority in a contracting State. Since both the above sources are separate, there is no sustainability in the argument put forward by the learned counsel for the petitioner, contends the learned counsel for the respondents.

8. It is true that Section 105C(1) enables the court to invoke the powers upon satisfaction of the existence of reasonable grounds that the property was obtained from the commission of a crime and Section 105C(3) empower the court to act, on the receipt of a letter of request from the Central Government. But when the



purpose of Chapter VIIA as a whole is considered, the provisions stipulated in Sub Section (1) of Section 105C cannot be read in isolation. It is true that while considering 105C(1) along with Section 105D(1), it may create an impression that the court can act upon the application of any person, being satisfied with the existence of reasonable grounds for the same. However, the crucial aspect to be noticed in this regard is that, even in Sub Section (1) Section 105C, it is contemplated that the powers to be invoked are, as provided under Section 105D to 105J. This would indicate that, while considering the scope of the power of the courts, all the stipulations contained in Chapter VIIA as a whole are to be taken into consideration.

9. The guidelines stipulated by the Government on 04.12.2019 vide F.N0.25016/52/2019-LC issued by the Ministry of Home Affairs, in this regard, is also a document of crucial importance. Clause H of the said guidelines specifically mentions the types of requests the Government can entertain. Sub Clause 1.13, which comes under Clause H of the aforesaid guidelines, deals with the

same and Sub Clause (vii) thereof deals with matters relating to taking measures to identify, locate, attach, freeze, restrain, confiscate or forfeit the proceeds and instrumentality of crime. This is the provision that is specifically applicable to this case. Clause (I) of the said guidelines deals with the grounds for refusal or postponement of a request for assistance. The relevant clause in this regard comes under sub-clause 1.14 of clause (I). Sub Clause (i) thereof contemplates that a request for assistance shall be refused if the execution of the request would *impair the sovereignty, security, public order and essential public interest of India or a foreign country*. Several other factors are also stated in the other Sub Clauses, providing the circumstances under which the request for assistance can be refused. For easy reference clause (I) of the said guidelines are extracted hereunder.

**“(I) Grounds for Refusal or Postponement of Request for Assistance**

- 1.14 *The request for assistance is generally refused if:*
- (i) *the execution of the request would impair sovereignty, security, public order and essential public interest of India or foreign country.*
  - (ii) *the request for assistance has been made for the purpose of investigating and prosecuting a person on account of that person’s sex, race, religion,*

*nationality, origin or political opinions or that person's position may be prejudiced for any of those reasons.*

- (iii) the request is made for conduct or offence which is is an offence under military law but not an offence under ordinary criminal law in India or foreign country.*
- (iv) the request relates to an offence in respect of which the accused person has been finally acquitted or pardoned.*
- (v) de minimis request is made i.e. the request is trivial or disproportionate in nature.*
- (vi) the request seeking restraint, forfeiture or confiscation of proceeds and instrumentalities of crime or seizure of property is in respect of conduct/activity which cannot be made the basis for such restraint, forfeiture, confiscation or seizure in the Contracting States.*

*1.15 The execution of request may be postponed if it would interfere with an ongoing criminal investigation, prosecution or proceedings in the Contracting States. Such request may be executed subject to conditions determined necessary after consultations with the Central Authority of the Requesting Country.*

*1.16 The execution of request shall not be refused solely on the ground of the bank secrecy or because the request for assistance does not include all the information if it can otherwise be executed in accordance with the laws of Contracting State.”*

When all the aforesaid aspects are considered, providing assistance for attachment and forfeiture of property as contemplated under Chapter VIIA of Cr.P.C. is to be exercised only regarding certain matters and upon satisfying certain conditions. It is also a relevant factor to notice that Sub Section (1) of Section 105C does not

specifically mention about submission of an application by an individual or an institution for invoking the powers contemplated under the said Chapter. Therefore, whether such a petition can be maintained at the instance of an individual or institution, in the absence of specific authorisation in this regard, is the crucial question that arises. In my view, the aforesaid question can be decided only if the actual purpose behind the incorporation of Chapter VIIA in Cr. P.C is ascertained.

10. To understand the real purpose behind the introduction of Chapter VIIA in the statute book, a perusal of objects and reasons for the same is also relevant which reads as follows:

*“The Government of India has signed an agreement with the Government of United Kingdom of Great Britain and Northern Ireland for extending assistance in the investigation and prosecution of crime and the tracing, restraint and confiscation of the proceeds of crime (including crimes involving currency -transfer) and terrorist funds, with a view to check the terrorist activities in India and the United Kingdom. For giving full effect to this agreement, it is proposed to amend the Code of Criminal, 1973 to provide for-*

*(a) the transfer of persons between the contracting States including persons in custody for the purpose of assisting in investigation or giving evidence in proceedings;*

*b) attachment and forfeiture of properties obtained*

*or derived from the commission of an offence that may have been or has been committed in the other country; and*

*(c) enforcement of attachment and forfeiture orders issued by a Court in the other country.*

*(2) The Bill seeks to achieve the above object.”*

11. The honourable Supreme Court in **State of Madhya Pradesh v. Balram Mihani and Others [(2010) 2 SCC 602]** considered the scope of the provisions of the aforesaid Chapter. It was concluded that the said provision is applicable only for offences having international ramifications or related to terrorist activities. The honourable Supreme court while taking this view, considered the intention of legislature in enacting the same and cleared the confusion that arose from the fact that there is no specific provision in the said Chapter excluding the other offences with no international ramifications or offences not related to terrorist activities, from the purview of the same.

12. In such circumstances, while interpreting the provisions contained in Chapter VIIA for understanding the power of the courts to initiate the proceedings under section 105C also, the purpose behind the enactment thereof and the intention of the

legislature while bringing the said amendment into force is to be taken into consideration. While interpreting the stipulations contained in Chapter VIIA, particularly the provisions in 105C(1) as well as 105D(1), I am of the view that the intention of the legislature is to enable the court to initiate proceedings for attachment and forfeiture of the properties which are proceeds of crime only based on a request or application being made by the Government or any other competent authorities in this regard. This is mainly because, from the objects and reasons of the enactment, it is evident that the provisions in this Chapter have been introduced based on international treaties. The guidelines formulated by the Government as per F.No.25016/52/2019-LC dated 04.12.2019 contemplates specific circumstances and conditions upon which the request made in this regard are to be processed and allowed. Therefore, entertaining any request in this regard by the courts in India directly from any parties without conducting the exercise as contemplated under the above guidelines would defeat the object behind the enactment. This view is fortified because, the guidelines

prescribed in this regard also contain the right of the Central Government to refuse the request on the ground of sovereignty, security, public order and essential public interest of India or a foreign country in this regard. In my view, the competent authority to examine the question as to whether the request made has an impact on the matters such as *sovereignty, security, public order, and essential public interest of India or a foreign country and such other matters incidental to it*, can only be the Central Government or the authorities specifically authorised by the Central Government in this regard. In such circumstances, allowing any individual or any institution to approach the court directly by way of an application would be against the interest of the State. This is because, in case of allowing an application directly to the court, the question whether the matter requested has an impact on the *sovereignty, security, public order, and essential public interest of India or a foreign country* will have to be decided by the court, which may not have the relevant inputs necessary for adjudicating the same. The absence of specific words in Section 105C(1) to entertain an application to

invoke the powers, at the instance of any individual or institution is also a crucial aspect to be taken into consideration for understanding the true purport behind the same. If the legislature intended to empower the court to initiate such proceedings at the instance of any individual or establishment, the same would have been mentioned explicitly in the provision itself. In the absence of such a specific enabling provision, I am of the view that permitting any individual or establishment to file such an application would amount to reading into the said provision something which was never intended to be contemplated therein. This is especially when the objects and reasons of the enactment clearly indicate that the introduction of the said Chapter was based on international agreements with certain countries. There can be no dispute that such agreements are in the exclusive domain of the Central Government.

13. In such circumstances, I am of the view that Annexure A petition was not maintainable before the Judicial First Class Magistrate Court VII, Kozhikode, as the same was filed by an institution, namely a banking company, without the same being



forwarded by the Central Government or any other authorities in this regard. The unavoidable consequence of such finding is that the order passed by the learned Magistrate in C.M.P. No.50/2021 dated 15.02.2021, marked as Annexure B herein, is without jurisdiction and therefore liable to be set aside.

Accordingly, this Crl. M.C. is allowed and Annexure B order is hereby set aside. However, it is made clear that this will not preclude the 1<sup>st</sup> respondent from approaching the Central Government or any appropriate authority for invoking the provisions in Chapter VIIA after complying with the procedure contemplated in this regard.

**Sd/ -**

**ZIYAD RAHMAN A.A.  
JUDGE**

SCS

**APPENDIX OF CRL.MC 3679/2021**

**PETITIONER ANNEXURES**

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|------------|---|
| Annexure A | CERTIFIED COPY OF THE PETITION,<br>C.M.P.NO.50/2021 FILED BY THE 1ST<br>RESPONDENT BEFORE THE JUDL.FIRST<br>CLASS MAGISTRATE COURT-V, KOZHIKODE |
| Annexure B | CERTIFIED COPY OF THE ORDER DATED<br>15.02.2021, PASSED BY THE JUDL.FIRST<br>CLASS MAGISTRATE COURT-V, KOZHIKODE                                |
| Annexure C | CERTIFIED COPY OF THE DIARY EXTRACT<br>IN CMP NO.50/2021 ON THE OF THE<br>JUDL.FIRST CLASS MAGISTRATE COURT-V,<br>KOZHIKODE                     |
| Annexure D | CERTIFIED COPY OF THE JUDGMENT PASSED<br>BY THE SHARJAH COURT OF FIRST<br>INSTANCE ALONG WITH ITS TRANSLATION                                   |