

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

WEDNESDAY, THE 12TH DAY OF OCTOBER 2022 / 20TH ASWINA, 1944

CRL.MC NO. 5610 OF 2022

AGAINST THE ORDER/JUDGMENTLP 82/2019 OF CHIEF JUDICIAL
MAGISTRATE ,KOTTAYAM

CRMC 817/2022 OF CHIEF JUDICIAL MAGISTRATE ,KOTTAYAM

PETITIONER/S:

VISHNU.M,
AGED 22 YEARS
KRISHNAKRIPA, KUTTANPETHOOR,
MANNAR, ALAPPUZHA, PIN - 689622
BY ADV M.R.SARIN

RESPONDENT/S:

- 1 STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM, KOCHI, PIN -
682031
- 2 . THE ICICI BANK LIMITED ,
SHYLINE CITADEL COMPLEX,
KANJIKUZHY BRANCH , KOTTAYAM 686004
REPRESENTED BY MANAGER ., PIN - 686004

ADV SREEJA V -SR PP

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION
ON 12.10.2022, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

ORDER

Dated this the 12th day of October, 2022

The petitioner is the son of the accused in S.T. No.91/2008 on the file of the Chief Judicial Magistrate's Court, Kottayam. The grievance of the petitioner is that, the proceedings against his father were transferred to Long Pending Register as L.P. No.82/2019 by the Chief Judicial Magistrate's Court, Kottayam and consequently the property having an extent of 4.04 Ares comprised in Re.Sy. No.374/12-3 situated in Nooranad Village was happened to be attached. After the death of his father when he approached the revenue authorities, he came to know about it. Accordingly, he submitted Crl.M.P. No.817/2022 before the Chief Judicial Magistrate's Court, Kottayam seeking for release of the property from attachment. He also produced the death certificate of his father to show that he is no more. However, the learned Magistrate dismissed the aforesaid application as per Annexure-A3 order. This Crl.M.C. is filed challenging the aforesaid order.

2. Heard Sri. M.R. Sarin, the learned counsel appearing for the petitioner and Smt. Sreeja V., the learned Senior Public Prosecutor for the State.

3. The specific contention put forward by the learned counsel for the petitioner is that, neither the petitioner nor his father were aware of the proceedings pending before the Chief Judicial Magistrate's Court and no summons was ever received by them. As far as the reasons stated by the learned Magistrate while rejecting the application submitted by the petitioner is concerned, it is pointed out that, the said dismissal was only because of the reason that, the application seeking for release of the property was submitted after the period of two years. Therefore, it was found that the same cannot be entertained by virtue of the stipulation contained in sub Section 3 of Section 85 of the Cr.P.C.

4. It is pointed out that, the petitioner could not have submitted the aforesaid application, within the time frame stipulated, in view of the fact that, he was not aware of such proceedings. Moreover, the father of the petitioner passed away in the year 2017 and consequent to the same, entire proceedings against his father now stand abated. Therefore, there is no

purpose in continuing the attachment over the properties and hence the same is liable to be released.

5. On the other hand, the learned Public Prosecutor would contend that, the CrI.M.C. is not at all maintainable mainly because of the reason that as against the order of dismissal of application to restore the attachment of the property, an appeal is contemplated under Section 86 of Cr.P.C. It was also pointed out that since the application to restore the attached property was submitted beyond the statutory period of two years contemplated under Section 85(3) of Cr.P.C., the property already stands vested with the Government, and the remedy of the petitioner is to move the Government for getting the said property released.

6. I have gone through the materials placed on record and considered the contentions. In this regard, a recent decision rendered by this Court in **Transsafe Refrigeration Private Ltd. (M/s.) and another v. State of Kerala and another** [2022 (6) KLT 258] is relevant. In the said decision, the question considered by this court was whether the learned Magistrate can entertain an application at the instance of the accused after the period of two years as stipulated in 85(3) of Cr.P.C. After considering all the

relevant statutory provisions, it was observed that even after expiry of the said period, an application at the instance of the accused can be entertained. The relevant observations of this Court are as follows:

“13. Thus when the proclaimed person does not appear within the time specified in the proclamation, the property under the attachment shall be at the disposal of the State Government and as per Section 85(3), if any person whose property has been attached and at the disposal of the State Government appears voluntarily or arrested and proved within a period of two years and he proves to the satisfaction of the Court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, such property be delivered to him after satisfying all costs incurred in consequence of the attachment. Thus as per Section 85(3), the Court has power to deliver the property to the accused, if the accused surrenders or brought before the Court within two years from the date of attachment. However, it is not safe to hold that even after expiry of two years, the Court has no power to order release of attachment and delivery of the property to the accused. If so, the hardships and ordeals to be faced by the accused in cases where the accused could not appear after attachment of the property under Sections 82 and 83 of Cr.P.C. within two years on justified grounds, say, for example, for want of knowledge of the attachment, is a matter of serious concern. In order to address the grievance of an accused, who appears after two years of attachment of property under Sections 82 and 83 of Cr.P.C., for justified reasons, it is absolutely necessary in the interest of justice, to take note of the unfortunate consequences if two years period mentioned in Section 85(3) as interpreted as mandatory. Therefore, the period of two years referred in Section 85(3) to be read as directory in nature and not mandatory. So that the power of the Court to be ensured in considering an application lifting attachment even after two years from the date

of attachment. Accordingly, it is held that even after two years mentioned in Section 85(3) of the Cr.P.C., the Court has power to lift the attachment in an application filed under Section 85(3) and the release of attachment shall be considered by the Court for the reasons stated in Section 85(3) after satisfying the expenses incurred by the Government.

14. In the case on hand, after appearance of the accused, the entire proceedings to secure his presence for trial came to an end and in such cases, hairsplitting technicalities shall not stand in the way of getting the attachment released and the Court is duty bound to release the attachment. Therefore, dismissal of the application filed by the accused to lift the attachment cannot be justified so as to put the accused, who had paid the amount involved in the cheque and settled the matter involving a deemed offence under Section 138 of Negotiable Instruments Act, in dilemma and darkness from enjoying his property. Therefore, the order impugned is liable to be set aside, subject to payment of reasonable cost to the Government. Since no materials available to find the actual cost, Rs.2,000/- (Rupees Two thousand only) is fixed as cost.”

7. In the light of the observations made by this Court in the said decision, it is clear that there is no absolute prohibition in entertaining an application at the instance of the accused even after the expiry of the statutory period. When the principles laid down by this Court in the said decision are applied in this case, it has to be noted that the petitioner is the son of the deceased accused. When it is held that an accused is entitled to submit an application even after the period of limitation stipulated under section 85, nothing will preclude the legal heir of the accused from submitting an application in this regard when the accused is

no more. It is evident that the petitioner got the right over the property in question by way of inheritance upon the death of his father in the year 2020. The attachment was ordered in the year 2009, and therefore, the petitioner got the right over the property after the period stipulated in the said provision. Thus, under no circumstances, the opportunity to submit an application to the petitioner can be denied. This is mainly so, since the petitioner could not have submitted the said application within the statutory period of two years from the date of attachment. It is also relevant that the accused is no more, and the proceedings stand abated.

8. As regards the objection raised by the learned Public Prosecutor about the maintainability of the petitioner due to the existence of alternative remedy, I am of the view that, though an appeal is contemplated against the order passed under Section 85 of Cr.P.C., in the peculiar facts and circumstances of the case, this CrI.M.C. can be entertained. This is particularly in view of the fact that the application of the petitioner was rejected without considering the same on merits and was rejected merely because it was not maintainable. On the other hand, as per the decision in

Transsafe Refrigeration Private Ltd.(M/s.) (supra), this Court has held otherwise. Therefore, I am of the view that even though there was an alternative remedy available to the petitioner, I do not intend to relegate the petitioner to avail the same in the peculiar facts and circumstances of the case.

In such circumstances, this Crl.M.C. is allowed, Annexure-A3 order passed by the Chief Judicial Magistrate's Court, Kottayam is set aside, the matter is remitted back to the learned Magistrate to take up the application submitted by the petitioner and consider the same afresh, in the light of the observations made in this order. It is further ordered that the said application be considered by the learned Magistrate as expeditiously as possible, at any rate, within one month from the date of production of copy of this order.

**Sd/-
ZIYAD RAHMAN A.A.
JUDGE**

APPENDIX OF CRL.MC 5610/2022

PETITIONER ANNEXURES

- AnnexureA 1 THE TRUE COPY OF THE DEATH CERTIFICATE
OF LATE SOBANAN NAIR ISSUED BY THE
REGISTRAR OF BIRTH AND DEATH
AMBALAPUZHA NORTH GRAMA PANCHAYAT
DATED ON 04-10-2013
- Annexure A2 THE TRUE COPY OF THANDAPEER REGISTER
ISSUED BY THE VILLAGE OFFICER,
NOORANAD VILLAGE OFFICE
- Annexure A3 . THE CERTIFIED COPY OF ORDER IN CRL.
M.P NO. 817/2022 IN L.P NO. 82/2019
BEFORE THE HON'BLE CHIEF JUDICIAL
MAGISTRATE COURT, KOTTAYAM DATED ON
22.06.2022