

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V
WEDNESDAY, THE 19TH DAY OF JULY 2023 / 28TH ASHADHA, 1945

CRL.MC NO. 4280 OF 2023
AGAINST THE ORDER/JUDGMENT IN CMP 1733/2023 OF JUDICIAL
MAGISTRATE OF FIRST CLASS -I, KANJIRAPPALLY

PETITIONER/S:

DOTTY SHIBY
AGED 43 YEARS
W/O SHIBY,
ILAMTHURUTHIYIL HOUSE, ELAMKADU P.O,
VALIYENTHA, KOTTAYAM DISTRICT, PIN - 686514

BY ADVS.
ANAND KALYANAKRISHNAN
C.DHEERAJ RAJAN

RESPONDENT/S:

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, PIN - 682031
- 2 THOMAS P MATHEW (SOUGHT TO BE IMPLEADED)
S/O. MATHEW MATHAI, RESIDING AT PULIYILETHU HOUSE,
MANARCADU P.O, KOTTAYAM (SOUGHT TO BE IMPLEADED)

BY ADVS.
ENOCH DAVID SIMON JOEL
S.SREEDEV
RONY JOSE
LEO LUKOSE
KAROL MATHEWS SEBASTIAN ALENCHERRY
DERICK MATHAI SAJI

SRI. VIPIN NARAYAN, SR. PP

THIS CRIMINAL MISC. CASE HAVING COME UP FOR
ADMISSION ON 19.07.2023, THE COURT ON THE SAME DAY PASSED
THE FOLLOWING:

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ORDER

The petitioner herein has approached this Court challenging the order dated 10.04.2023 passed by the Judicial Magistrate of the First Class-I, Kanjirappally.

2. I have heard Sri. Dheeraj Rajan, the learned counsel appearing for the petitioner and the learned Public Prosecutor.

3. The records reveal that the petitioner filed a complaint under Section 156(3) of the Code of Criminal Procedure, 1973 ("the Code" for the sake of brevity), seeking initiation of prosecution proceeding under Section 379 and Section 414 of the Indian Penal Code and Section 4/21 of the Mines and Minerals (Development and Regulation Act). In his complaint, he alleged that the accused in the complaint was running a quarry in the name and style as M/s Petra Crusher at Vallyentha, Elamkadu, in the land owned and possessed by the accused. The said quarry is functioning on the strength of a lease agreement which is dated 20.03.2012. The specific case of the petitioner herein is that in terms of the lease agreement, the accused was permitted only to operate a quarry within a stipulated area. His grievance is that the

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accused has quarried granite stones from outside the quarry area. He has given details of the quantum of granite stones quarried by the accused in excess of the agreement and the permissible limit. It is contended that quarrying of granite outside the permissible limits would amount to an offence under section 379 of the IPC. It is on these allegations that the complaint was lodged with the following prayer:

"In such scenario, it is humbly prayed that this complaint may be taken to file and forward it to the SHO for investigation and necessary action."

4. Along with the complaint, he had also filed an affidavit in terms of the law laid down in **Priyanka Srivastava and another vs. State of Uttar Pradesh and others** [(2015) 6 SCC 287] before the learned Magistrate. The learned Magistrate, after considering the facts and circumstances, passed the following order dated 10.04.2023.

"Heard and perused the complaint and documents. Considering the allegations and averments in the complaint it is seen that an investigation by the police is not needed in this matter. Hence for sworn statement - 06.05.2023"

5. The contention of the learned counsel appearing for the petitioner is that the lessee is extracting granite stones from outside the

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permissible area. It is his specific contention that a proper investigation with the assistance of officers from the Geology Department is necessary. It is also contended by the learned counsel that during the investigation, the Investigating Officer may have to mark the boundaries and assess the exact amount of the granite stones quarried above the prescribed limit. It is his contention that all these matters can be carried out only by the Investigating Officer, and would not be possible for the petitioner herein to adduce evidence on this aspect. The learned counsel would refer to the law laid down by this Court in **Femeena E. v. State of Kerala** [2023 (1) KLT 919] and it is argued that the test to be applied while considering the question of whether a complaint is to be preferred to Police for investigation is the need for Police investigation. In the case on hand, the need for the Police investigation is clearly made out, states the learned counsel.

6. The learned Public Prosecutor, on instructions, submitted that he has no objection to setting aside the order passed by the learned Magistrate as, according to him, the allegations in the complaint call for an investigation by the police.

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7. I have considered the submissions advanced and I have gone through the complaint lodged by the petitioner herein and also the observations of this Court in **Femeena E.** (supra) and also in **N. Sundaresan v. State of Kerala & Another** [Neutral Citation No. 2023:KER:24434] [2023 ICO 195]. I have also taken note of the observations of this Court in **Shybi C.J. v. State of Kerala and Ors.** [2021 KHC 275], wherein this Court had held that extracting granites in excess of permissible quantity would amount to theft.

Having considered the facts and circumstances and the submissions made across the bar, I am of the considered opinion that the allegations in the complaint warrant an investigation by the police going by the principles laid down in **Femeena** (supra).

In that view of the matter, the order passed by the learned Magistrate is set aside. The learned Magistrate shall reconsider the matter in the light of **Femeena** (supra) and take an appropriate decision in accordance with law.

Sd/-

**RAJA VIJAYARAGHAVAN V
JUDGE**

avs

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APPENDIX OF CRL.MC 4280/2023

PETITIONER ANNEXURES

- Annexure1 THE TRUE COPY OF CMP 1733/2023 DATED 10.04.2023 ON THE FILES OF JUDICIAL MAGISTRATE OF FIRST CLASS I, KANJIRAPPALLY
- Annexure2 THE CERTIFIED COPY OF THE ORDER DATED 10.04.2023 IN CMP 1733/2023 PASSED BY JUDICIAL MAGISTRATE OF FIRST CLASS I, KANJIRAPPALLY
- Annexure 3 THE TRUE COPY OF THE STATEMENT DATED 24.09.2021 FILED BY THE GEOLOGIST IN WPC NO. 10387/2021 PENDING BEFORE THIS HON'BLE COURT
- Annexure 4 THE TRUE COPY OF THE JUDGMENT REPORTED IN 2021 KHC 275 (SHYBI C.J. V. STATE OF KERALA) WHICH IS THE 3RD DOCUMENT IN ANNEXURE 1 COMPLAINT
- Annexure 5 THE TRUE COPY OF THE RECEIPT OF THE COMPLAINT FILED BEFORE SUPERINTENDENT OF POLICE, KOTTAYAM DATED 03.04.2023
- Annexure 6 THE TRUE COPY OF THE COMPLAINT DATED 03.04.2023 FILED BY THE PETITIONER BEFORE THE SUPERINTENDENT OF POLICE, KOTTAYAM