

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 10TH DAY OF JULY 2014/19TH ASHADHA, 1936

Crl.MC.No. 1864 of 2014

CC 4202/2009 OF JUDICIAL FIRST CLASS MAGISTRATE COURT-II, KOLLAM

PETITIONER(S)/COMPLAINANT:

**SREELAL, AGED 40 YEARS,
S/O.SREEDHARAN, SREEVIHAR, MULLUVILA,
VADAKKEVILA, KOLLAM.**

BY ADV. SRI.SYAM J SAM

RESPONDENT/ACCUSED:

**1. MURALI MENON, AGED 47 YEARS,
S/O.PADMANABHAN, RESIDING AT FLAT NUMBER 4A, PANTHEON,
EDAPPALLY, COCHIN-682024.**

**2. STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, PIN 682031.**

**R1 BY ADVS. SRI.P.A.SALIM
SRI.BABU CHERUKARA
R2 BY PUBLIC PROSECUTOR SMT.S.HYMA**

**THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION
ON 10-07-2014, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

PJ

Crl.MC.No. 1864 of 2014

APPENDIX

PETITIONER(S)' ANNEXURES

**ANNEXURE-A1: THE PHOTOCOPY OF THE PRIVATE COMPLAINT IN CC 4202/2009,
JFCM-II, KOLLAM.**

**ANNEXURE-A2: THE PHOTOCOPY OF THE CHIEF AFFIDAVIT IN CC 4202/2009, JFCM-II,
KOLLAM.**

RESPONDENT(S)' ANNEXURES

NIL.

/ TRUE COPY /

P.S. TO JUDGE

PJ

CR

K.RAMAKRISHNAN, J.

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CRL.M.C.NO.1864 OF 2014

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Dated this the 10th day of July, 2014

ORDER

This is an application filed by the petitioner, who is the complainant in CC.No.4202 of 2009 on the file of Judicial First Class Magistrate Court-II, Kollam to issue direction to the concerned Magistrate in respect of the above matter under section 482 of Code of Criminal Procedure (herein after called the Code).

2. It is alleged in the petition, that the petitioner is the complainant in CC.4202/2009 on the file of Judicial First Class Magistrate Court-II, Kollam, filed against the first respondent alleging offences under section 138 of the Negotiable Instruments Act. The respondent is the accused therein. It was posted for evidence on 16.01.2014. On that day, the counsel for the accused requested the court for referring the matter for mediation and accordingly, the matter was referred for mediation. In the mediation, the matter was settled for an amount of ₹.4,50,000/- and six months' time was granted for payment of the amount to the accused and in default, complainant was allowed to proceed with the case and if amount was paid, then complainant has to withdraw the case. The mediation agreement was signed by the parties on 17.02.2014, but now the learned Magistrate is insisting the

petitioner who is the complainant to adduce evidence before expiry of the period mentioned in the agreement. So the petitioner has no other remedy except to approach this court seeking the following relief:-

“to direct the learned Judicial First Class Magistrate II, Kollam to adjourn CC4202/2009 for 6 months to facilitate the condition in the mediation proceedings in the interest of justice”.

3. Heard the counsel for the petitioner, counsel for the first respondent and also the learned Public Prosecutor.

4. The counsel for the petitioner submitted that he is even prepared to wait for six months as provided in the agreement, if the respondent is prepared to pay the amount. But so far though five months have already lapsed, no amount has been paid. Even then, he is prepared to wait till the period mentioned in the agreement and wanted the case to be posted after that period and he is prepared to adduce evidence thereafter.

5. On the other hand, the counsel for the respondent submitted that, since an agreement has been entered into between the parties in the mediation, then it will have the effect of an award and the petitioner is not entitled to proceed with the case. His remedy is to execute the agreement as if it is an award passed under the Legal Services Authorities Act as a civil decree.

6. It is an admitted fact that the petitioner herein filed a private complaint against the first respondent alleging offences under section 138 of the Negotiable Instruments Act alleging that the respondent issued a cheque for ₹.5,00,000/- in discharge of his liability which when presented was dishonoured for the reasons funds in sufficient in his account and in spite of notice issued, he had not paid the amount and so he committed the offence punishable under section 138 of the Negotiable Instruments Act. After conducting enquiry under section 200, 202 of the Code of Criminal Procedure, the learned Magistrate has taken cognizance of the case as CC.No.4209/2009 under section 138 of the Negotiable Instruments Act and notice was issued to the first respondent and he appeared through counsel and particulars offence were read over and explained to him and he pleaded not guilty and the case was posted for evidence.

7. It is an admitted fact that on 16.01.2014, when the case was posted for evidence, at the request of the accused, the matter has been referred for mediation, and it is also an admitted fact that in the mediation, the matter has been discussed between the parties and the parties have come to an agreement that if the first respondent pays ₹.4,50,000/- within six months in instalments, then the petitioner will withdraw the complaint and the agreement was signed by the parties and

countersigned by their counsel as well. Thereafter, the agreement was sent to court. It is seen from the report of the learned Magistrate that, after referring the matter for mediation, the case was adjourned by notification to 22.5.2014. Thereafter, the mediation agreement was received in court on 22.02.2014 and there was a clause in the agreement that if the accused failed to pay the amount within the period, the complainant can proceed with the case against the accused on the basis of the cheque. The grievance of the petitioner is that the Magistrate is insisting for taking evidence as the case is of the year 2009, before the expiry of the time mentioned in the agreement.

8. There are lot of questions arise for consideration in such cases and there are doubts in the minds of the Magistrates also, regarding the effect of mediation agreement in cases under section 138 of the Negotiable Instruments Act.

9. It is an admitted fact that section 89 of Code of Civil Procedure provides mediation as one of the Alternative Disputes Resolution process for settling the issues between the parties in an efficacious and expeditious manner in respect of pending matters. In the decision reported in (**Afcons Infrastructure Limited and another V Cherian Varkey Constructions Company Private Limited**) 2010 KHC 4498,

the Hon'ble Supreme Court has held that normally, the following cases are fit for any one of the Alternative Disputes Resolution process provided under section 89 of the Code of Civil Procedure

"All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special Tribunals/Forums) are normally suitable for ADR processes:

- (i) All cases relating to trade, commerce and contracts, including
 - disputes arising out of contracts (including all money claims);
 - disputes between suppliers and customers;
 - disputes between bankers and customers;
 - disputes between developers/builders and customers;
 - disputes between landlords and tenants/licensor and licensees;
 - disputes between insurer and insured;
- (ii) All cases arising from strained or soured relationships, including
 - disputes relating to matrimonial causes, maintenance, custody of children;
 - disputes relating to partition/division among family members/co-parceners/co-owners; and
 - disputes relating to partnership among partners .
- (iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including
 - disputes between neighbours (relating to easementary rights, encroachments, nuisance etc);
 - disputes between employers and employees;
 - disputes among members of societies/associations/ Apartment owners Associations;

- (iv) All cases relating to tortious liability including
 - claims for compensation in motor accidents/other accidents; and
- (v) All consumer disputes including
 - disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or 'product popularity.

The above enumeration of 'suitable' and 'unsuitable' categorization of cases is not intended to be exhaustive or rigid. They are illustrative, which can be subjected to just exceptions or additions by the court/Tribunal exercising its jurisdiction/discretion in referring a dispute/case to an ADR process".

10. At the same time, the Hon'ble Supreme Court also observed in the same decision that the following types of cases are not fit for the ADR process

The following categories of cases are normally considered to be not suitable for ADR process having regard to their nature:

- (i) Representative suits under O.1 R.8 CPC which involve public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance)
- (ii) Disputes relating to election to public officers (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association etc.)
- (iii) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.
- (iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.
- (v) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against government.

- (vi) Cases involving prosecution for criminal offences.

11. It is clear from the above dictum, that normally criminal cases are not fit to be referred for Alternative Disputes Resolution process. But under the Legal Services Authorities Act, criminal cases of compoundable nature, can be referred for Adalath and if the matter is settled in the Adalath, the Adalath is entitled to pass orders on that matter, as though, it is a Criminal Court constituted for that purpose. So normally, cases under section 138 of the Negotiable Instruments Act, being a criminal offence of a compoundable nature is not a case to be referred for mediation. But, if the parties are interested in referring the matter for mediation, that can be referred for mediation only for the limited purpose of arriving at the amount for which the dispute can be settled, and also allowing the parties to pay the amount and thereafter, withdraw the complaint under section 257 of Code of Criminal Procedure or after payment for filing an application for compounding under section 147 of the Negotiable Instruments Act.

12. Then, the question is what is to effect of mediation agreement in a criminal matter. Admittedly, if the matter is referred for mediation, the mediator is not acting neither as Adalath nor as an Arbitrator or Conciliator to resolve the disputes by passing an award either under the provisions of

Legal Services Authorities Act or under the provisions of the Arbitration and Conciliation Act. Even if, the matter is referred in a civil case for mediation under section 89 of the Code of Civil Procedure, even then, the mediator is not passing any judgment, but he is only facilitating the parties to arrive at the settlement and help them to draw the mediation agreement and after the agreement is signed by the parties, and counter signed by the Advocates, then, it will be forwarded to the Court which referred the matter and that Court will pass a decree on the basis of the agreement applying the principle under Order 23 Rule 3 of Code of Civil Procedure accordingly. Till, the seal of the court is affixed on the agreement, and a decree is passed on that basis that agreement, it has no legal effect in the eye of law. So, even if a mediation agreement reaches the criminal court, agreeing to settle the issue on certain terms, the criminal court cannot rely on that agreement and pass a civil decree, relegating the parties to get the amount realized by filing execution petition before the Civil Court and it can only on the basis of the evidence either convict or acquit the accused and if the case is compounded, if it is a compoundable offence, then it can record compounding and that compounding will have the effect of an acquittal under section 320(8) of Code of Criminal Procedure.

13. Further, the counsel for the respondent relied on the decision reported in **(Govindankutty Menon V.Shaji) 2011 (4) KLT 857** and argued that since the matter is referred for mediation and the parties have settled the dispute in the mediation, then it will have the effect of a civil decree and the complainant can not proceed with the criminal case and he can only execute the award as though it is a civil decree. It is true that in the decision relied on by the counsel for the respondent namely, **Govindankutty Menon's case (supra)**, the Hon'ble Supreme court has held that if the case under section 138 of the Negotiable Instruments Act is referred to Adalath by a criminal court and if the matter is settled in the Adalath, then by virtue of the deeming provision, an award passed by the Adalath based on the compromise has to be treated as a decree capable of execution by a civil court. In that case, a case under section 138 of the Negotiable Instruments Act was referred to Adalath constituted under the Legal Services Authorities Act by a Criminal Court and in the Adalath, parties have agreed on terms and provided time for payment of the amount and that compromise was recorded and accordingly an award was passed in the Adalath and the criminal case was closed. When, the complainant filed an execution petition before the Munsiff's Court for realisation of the amount and the Munsiff dismissed

the execution petition on the ground that Criminal Court cannot pass a civil decree even in Adalath which was affirmed by this court but when that was challenged before the Hon'ble Supreme Court, the Hon'ble Supreme Court reversed the finding and held that by virtue of the deeming provision under section 21 of the Legal Services Authorities Act, even, in cases under section 138 of the Negotiable Instruments Act if a compromise was accepted and an award has been passed in the Adalath, then that will have the effect of a civil decree and that can be executed through civil court as though it is a decree of a civil court. The facts are different in this case as already discussed, the mediation cannot be treated at par with Lok Adalath as mediator has no power to pass any award as provided under the Legal Services Authorities Act. So the dictum is not applicable to the facts in this case.

14. Then, the question is whether the agreement entered into between the parties in a mediation can be treated as evidence in a criminal matter. It may be mentioned here, unless the agreement is accepted by the court and a decree is passed under section 89 of the Code of Criminal Procedure r/w Order 23 Rule 3 of Code of Civil Procedure, that will have no effect, unless that has been converted into a conciliation agreement based on which an award is passed by the

Conciliator under the provisions of the Arbitration and Conciliation Act. Further, it is the cardinal principle in the mediation that whatever transpired in the mediation cannot be disclosed even before the court of law and that cannot be called upon to be produced as evidence as well as it will affect the confidentiality of the things transpired in the process of mediation. So the party who did not honour the settlement which was effected in the process of mediation, then, is not entitled to use the same as evidence before the court and agreement also cannot be marked in evidence as it has no legal effect unless it is accepted by the court and a decree is passed under section 89 r/w Order 23 Rule 3 of the Code of Civil Procedure. That cannot be possible in a Criminal Court. Further even if the party had agreed to settle the matter for a lesser amount than the amount mentioned in the cheque in the mediation, it cannot be said that, that was the amount payable as in the mediation, parties can forgo so many things for the purpose of achieving harmony between the parties and restore their relationship. So the amounts arrived in a mediation also cannot be used as evidence for coming to the conclusion that the amount mentioned in the cheque is not the real amount due, and the complainant is not entitled to maintain the action on the basis of that cheque. The court has to allow the parties

to adduce evidence ignoring the mediation agreement and dispose of the case on the basis of evidence adduced by parties as it should not be put in evidence in view of the bar under rules 20, 21 and 22 of the Civil Procedure (Alternative Disputes Resolution) Rules Kerala 2008 which reads as follows:-.

Rule 20:- Confidentiality, disclosure and inadmissibility of information

- (1) The mediator shall not disclose confidential information concerning the dispute received from any party to the proceedings unless permitted it writing by the said party.
- (2) Parties shall maintain confidentiality in respect of events that transpired during mediation and shall not rely on or introduce the said information in any other proceedings as to:
 - (a) views expressed by a party in the course of the mediation proceedings;
 - (b) documents obtained during the mediation which were expressly required to be treated as confidential or other notes, drafts or information given by parties or mediators;
 - (c) Proposals made or views expressed by the mediator.
 - (d) Admission made by a party in the course of mediation proceedings.
 - (e) The fact that a party had or had not indicated willingness to accept a proposal.
- (3) There shall be no stenographic or audio or video recording

of the mediation proceedings.

Rule 21:- Privacy

Mediation sessions and meetings are private; only the concerned parties or their counsel or authorised representatives can attend. other persons may attend only with the permission of the parties or with the consent of the mediator.

Rule 22:- Immunity

No mediator shall be held liable for anything bona fide or omitted to be done by him during the mediation proceedings for civil or criminal action nor shall he be summoned by any party to the suit to appear in a court of law to testify in regard to information received by him or action taken by him or in respect of drafts or records prepared by him or shown to him during the mediation proceedings.

15. So, that cannot be used in evidence in a court of law as well, unless, it was accepted by the parties and the terms of the agreements were put into effect by the parties.

16. Then, the question is what the Criminal Court will have to do in such cases namely whether the Court has to wait for the period mentioned in the agreement so as to enable the parties to fulfil the terms of the agreement and if it is not fulfilled proceed with the case. It is true that it is a difficult position to be answered in cases under section 138 of Negotiable Instruments Act . The cases under this Act has to be disposed of within six months from the date of filing of the

complaint as per Section 143(3) of the Act. Further, this aspect was considered by the Hon'ble Supreme Court in the decision reported in (**Indian Banks Association & Others V. Union of Indian & Others**) **ILR 2014(2) KERALA 469**, and gave guidelines as to how the criminal courts have to proceed with the cases filed under section 138 of the above Act. So, it is clear from the above decision that the effort must be made by the Magistrate to dispose of the cases expeditiously. Further, in the decision reported in (**Damodar S.Prabhu V. Sayed Babalal.H**)**2010(2) KHC 428**, the Hon'ble Supreme Court has held that in cases where the accused in cases under section 138 are unnecessarily prolonging the case, though, it is a compoundable offence and if the compounding was not done at the earliest point of time, then the Court can record compounding at the subsequent stages before the Magistrate court by imposing 10% of the cheque amount as costs and if it is allowed in the Sessions Court or High Court 15% of the cheque amount to be imposed as costs and if it is before the Supreme Court 20% has to be imposed as costs to be paid and to be deposited with the Legal Services Authority. Further, in the same decision, some discretion was given to the courts to reduce the amount to be imposed as cost or even dispense with payment of the costs in appropriate cases. This was intended to

prevent the unnecessary delay in disposing the case filed under section 138 of the Negotiable Instruments Act by the accused in the case.

17. So, under the said circumstances, if the unreasonable longer periods were provided in the agreement for payment of the amount, then the court cannot be blamed for insisting for adducing evidence by the complainant in view of the dictum laid down in the above decisions. But, at the same time, in order to promote mediation as a process for an Alternative Disputes Resolution in monetary transactions as in the cases under section 138 of the Act as it was really a civil dispute which was converted into a criminal prosecution with a view to make the drawer of the cheque to honour the cheque than to send him to prison as mentioned in the decision reported in **Damadar S.Prabhu's case (supra)**, Court can allow reasonable time to parties to fulfil the terms of the agreement so as to avoid prolonged litigation for realisation of the amount. So, under the said circumstances, in order to promote the settlement arrived at in the mediation if a reasonable time is provided in the mediation agreement namely, up to 6 months and if the parties are willing to abide by the condition, then it is always better that court can wait for that much time to allow the parties to honour the settlement

that has been arrived in the mediation and the purpose of the mediation is to restore the relationship between the parties and that can be achieved by that and that will give a boost for a process of mediation to be used by the parties to resolve their disputes amicably. If the accused did not pay the amount and it was referred for mediation at the request of the accused only as a method of delaying the matter, then the court must take it as a serious one and later in the course of trial, if he wants to compound a case on the basis of the settlement agreement and even if, the complainant is prepared for the same, that can be allowed only strictly in accordance with the guidelines provided by the Hon'ble Supreme Court in **Damodar.S.Prabhu's case (supra)** as it will, give a message to the defaulting accused and making him to understand that if he has agreed to pay the amount within the particular time as a party to the settlement in the mediation, he should honour the same in letter and spirit of the agreement, otherwise he will have to pay the penalty for the same. So, under the circumstances, this court feels that since six months period is provided will be over by 17.08.2014, the learned Magistrate is directed to keep the case till that date without insisting for evidence so as to allow the parties to honour the settlement which has been arrived in the mediation process and if the amount is not paid and the application for

compounding is not filed within that time, then the learned Magistrate is directed to proceed with the case, considering the principles laid down in this decision regarding the mediation agreement which has not been honoured by the accused and dispose of the case in accordance with law. If a compounding application is filed on the basis of the same agreement later, then that can be taken only as a delaying process by the accused and it can be accepted only in terms of the guidelines provided in **Damodar S.Prabhu's case (supra)**

With the above directions and observations this petition is disposed of. Office is directed to communicate this order to the concerned court immediately.

Sd/-

K.RAMAKRISHNAN, JUDGE