

O.P.(Crl.) No. 117 of 2022

..1..



2024:KER:92736

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

MONDAY, THE 9TH DAY OF DECEMBER 2024 / 18TH AGRAHAYANA, 1946

OP (CRL.) NO. 117 OF 2022

CRIME NO.945/2018 OF KANJIRAPPALLY POLICE STATION, KOTTAYAM
AGAINST THE ORDER DATED 20.12.2019 IN CMP NO.6685 OF
2018 OF JUDICIAL MAGISTRATE OF FIRST CLASS -II, KANJIRAPPALLY
PETITIONER/COMPLAINANT:

SUMITH
AGED 36 YEARS, SON OF PADMAKUMAR,
MANAKKAL HOUSE, PONKUNNAM P.O,
CHIRAKKADAVU VILLAGE, KANJIRAPPILLY TALUK,
KOTTAYAM DISTRICT, KERALA, PIN - 686506

BY ADV K.SURESHBABU (KOCHIN)

RESPONDENTS/ACCUSED:

- 1 SEBASTIAN
AGED 81 YEARS, SON OF JOHN,
IDATHINAKKATTU HOUSE, KANNIMALA P.O,
ERUMELI NORTH VILLAGE,
KOTTAYAM DISTRICT,
KERALA, PIN - 686509
- 2 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULUM, PIN - 682031

SEETHA S., SR. PP

THIS OP (CRIMINAL) HAVING COME UP FOR ADMISSION ON
09.12.2024, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

O.P.(Crl.) No. 117 of 2022

..2..



2024:KER:92736

"C.R."

J U D G M E N T

Ext.P3 order passed by the Judicial First-Class Magistrate Court-II, Kanjirappally is under challenge in this Original Petition.

2. The petitioner herein filed a private complaint before the learned Magistrate as CMP No.6685 of 2018 against the 1st respondent. The allegations in the complaint are that Ext.P1 sale agreement has been executed between the petitioner and respondent No.1 whereby the latter agreed to sell, and the former agreed to purchase 04.05 cents of the property comprised in Re-Survey No. 42/2 of Erumeli (N) Village belonging to the latter for a total consideration agreed at the rate of Rs.35,000/- per cent, that the petitioner paid a total advance amount of Rs.2,50,000/- to the 1st respondent, but he failed to execute the sale deed

O.P.(Crl.) No. 117 of 2022

..3..



2024:KER:92736

as agreed and thereby committed the offences punishable under Sections 406 and 420 of IPC.

3. On receipt of the complaint, the learned Magistrate proceeded to conduct an enquiry under Section 202 of Cr.P.C. As part of the enquiry, the petitioner was examined as CW1 and an independent witness was examined as CW2. The petitioner filed a witness list to summon the witness to the agreement, as a witness, as part of enquiry under Section 202 of Cr.P.C. The witness is an Advocate by profession. The learned Magistrate rejected the request of the petitioner to summon the witness as per the impugned order on the ground that the witness is entitled to privilege under Section 126 of the Indian Evidence Act.

4. I have heard Sri.K.Sureshbabu (Kochin), the learned counsel appearing for the petitioner and Smt.S.Seetha, the learned Senior Government Pleader.

5. The petitioner wants to summon the witness to the

O.P.(Crl.) No. 117 of 2022

..4..



2024:KER:92736

sale agreement in question to substantiate his case that there was a valid sale agreement. True, the witness to the agreement, who is sought to be summoned, is an Advocate by profession. But the mere fact that the witness happened to be an Advocate, the prohibition under Section 126 of the Indian Evidence Act will not get attracted. Section 126 reads as follows:

"126. Professional communications. -- No barrister, attorney, pleader or vakil, shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure --

(1) any such communication made in furtherance of any 2 [illegal] purpose,

(2) any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the

O.P.(Crl.) No. 117 of 2022

..5..



2024:KER:92736

commencement of his employment.

It is immaterial whether the attention of such barrister, 3 [pleader], attorney or vakil was or was not directed to such fact by or on behalf of his client.

Explanation. -- The obligation stated in this section continues after the employment has ceased."

6. Going by the above provision, it is clear that the bar to disclosure applies only to confidential communication that is purely professional made to the advocate by his client in the course and for the purpose of his employment. An advocate cannot be asked to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment. But this privilege extends only to all communications between the client and his advocate in the course of and for the purpose of his professional employment. The counsel may be in possession of other facts which had come to his knowledge otherwise than in the course of and for the purpose of his professional employment. Disclosure of such materials is not prohibited by Section 126 of the Evidence Act. To prove such

O.P.(Crl.) No. 117 of 2022

..6..



2024:KER:92736

a fact, the intending party has to summon a counsel as a witness to speak about that fact. If the court feels that the counsel alone is competent to speak about a material fact relevant to the purpose of the decision, there is no bar in the court summoning him as a witness for the opposite party [***Abdhu v. Veeravu*** (1991(1) KLT 116)]. According to the petitioner, the witness signed the sale agreement as a witness, and it was prepared at his office. The purpose of summoning the witness is to prove the fact that he has signed in the agreement as a witness and not to bring on record any professional communication made by the 1st respondent to the witness. The examination of the attesting witness to an agreement is necessary to prove the agreement. The communication, if any, made by the client to his advocate with regard to the attestation made by the advocate as a witness to an agreement executed by his client is not privileged communication protected by Section 126.

O.P.(Crl.) No. 117 of 2022

..7..



2024:KER:92736

7. Hence, I am of the view that the learned Magistrate is not justified in rejecting the request of the petitioner to summon the witness. Accordingly, the impugned order is set aside, and the learned Magistrate is directed to summon the witness.

The O.P.(Crl.) is allowed as above.

Sd/-
DR. KAUSER EDAPPAGATH
JUDGE

APA

O.P.(Crl.) No. 117 of 2022

..8..



2024:KER:92736

APPENDIX OF OP(CRL.) 117/2022

PETITIONER EXHIBITS

- EXHIBITI P1 COPY OF THE SALE AGREEMENT EXECUTED BETWEEN THE PETITIONER AND THE 1ST RESPONDENT
- EXHIBITI P2 COPY OF THE COMPLAINT FILED AS C.M.P. NO. NO.6685/2018 FILED BEFORE THE JUDICIAL MAGISTRATE OF THE FIRST CLASS,II- KANJIRAPPILLY BY THE PETITIONER U/S.190 AND 200 OF THE CODE OF CRIMINAL PROCEDURE
- EXHIBITI P3 CERTIFIED COPY OF ORDER PASSED BY JUDICIAL MAGISTRATE OF THE FIRST CLASS,II- KANJIRAPPILLY DATED 20-12-2019 IN CMP. NO.6685/2018.