

O.G.Madhanan vs The State Of Kerala on 18 March, 2022

Author: Sunil Thomas

Bench: Sunil Thomas

Crl.R.P.Nos.116, 234 and 590 of 2017

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IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT

THE HONOURABLE MR. JUSTICE SUNIL THOMAS
FRIDAY, THE 18TH DAY OF MARCH 2022 / 27TH PHALGUNA, 1943
CRL.REV.PET NO. 590 OF 2017
AGAINST THE ORDER/JUDGMENT IN SC 68/2016 OF IV ADDITIONAL
SESSIONS COURT, THODUPUZZHA
REVISION PETITIONER/ACCUSED NO.2:

M.M.MANI, AGED 72 YEARS, S/O. LATE MADHAVAN, MUNDACKAL
HOUSE, 20 ACRE, BISON VALLEY, POTTENKADU. P.O, IDUKKI -
685565.

BY ADVS.
SRI.S.SREEKUMAR (SR.)
SRI.P.MARTIN JOSE
SRI.P.PRIJITH
SRI.M.K.THANKAPPAN
SRI.THOMAS P.KURUVILLA

RESPONDENT/COMPLAINANT:

1 THE STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM, PIN-682031.

BY ADVS.
SRI.SUMAN CHAKRAVARTHY, SR. GOVT.PLEADER
BIJU ANTONY ALOOR
ADDL.DIRECTOR GENERAL OF PROSECUTION
SHRI.JOBIN ABRAHAM
SRI.K.P.PRASANTH
SRI.VISHNU DILEEP
SMT.T.S.KRISHNENDU
SMT.ARCHANA SURESH

OTHER PRESENT:

SR.SPL.GP (CRL.) SRI.S.U.NAZAR
Crl.R.P.Nos.116, 234 and 590 of 2017

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THIS CRIMINAL REVISION PETITION HAVING COME UP FOR
ADMISSION ON 17.11.2021, ALONG WITH CrI.Rev.Pet.116/2017,
234/2017, THE COURT ON 18.03.2022 DELIVERED THE FOLLOWING:
CrI.R.P.Nos.116, 234 and 590 of 2017

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IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE SUNIL THOMAS
FRIDAY, THE 18TH DAY OF MARCH 2022 / 27TH PHALGUNA, 1943
CRL.REV.PET NO. 116 OF 2017
AGAINST THE ORDER/JUDGMENT IN SC 68/2016 OF IV ADDITIONAL
DISTRICT COURT, THODUPUZHA / II ADDITIONAL MACT, THODUPUZHA
REVISION PETITIONER/ACCUSED NO.1

KUTTAPPAN @ PAMPUPARA KUTTAN
AGED 58 YEARS, S/O.RAGHAVEN, KAINIKARI HOUSE,
KARUNAKARA COLONY, PARMAMKULAM, UDUMBENCHOLA VILLAGE,
UDUMBENCHOLA TALUK, PIN-685619.

BY ADVS.
SRI.B.RAMAN PILLAI (SR.)
SRI.M.K.THANKAPPAN
SRI.SUJESH MENON V.B.
SRI.T.ANIL KUMAR
SRI.E.VIJIN KARTHIK
SRI.M.SUNILKUMAR
SRI.THOMAS ABRAHAM (NILACKAPPILLIL)
SRI.THOMAS SABU VADAKEKUT
SRI.R.ANIL

RESPONDENT/COMPLAINANT:

1 THE STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM, PIN-682031.

BY ADVS.
SRI.SUMAN CHAKRAVARTHY, SR. GOVT.PLEADER
SINU.G.NATH
SRI.SUJITH MATHEW JOSE
SRI.SIBY CHENAPPADY
ADDL.DIRECTOR GENERAL OF PROSECUTION

SR.SPL.GP (CRL.) SRI.S.U.NAZAR
CrI.R.P.Nos.116, 234 and 590 of 2017

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THIS CRIMINAL REVISION PETITION HAVING COME UP FOR
ADMISSION ON 17.11.2021, ALONG WITH CrI.Rev.Pet.590/2017 AND
CONNECTED CASES, THE COURT ON 18.03.2022 DELIVERED THE
FOLLOWING:
CrI.R.P.Nos.116, 234 and 590 of 2017

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IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE SUNIL THOMAS
FRIDAY, THE 18TH DAY OF MARCH 2022 / 27TH PHALGUNA, 1943
CRL.REV.PET NO. 234 OF 2017
AGAINST THE ORDER/JUDGMENT IN SC 68/2016 OF IV ADDITIONAL
DISTRICT COURT, THODUPUZHA / II ADDITIONAL MACT, THODUPUZHA
REVISION PETITIONER/ACCUSED NO.3:

O.G.MADHANAN, AGED 62 YEARS, S/O.LATE GOPALAN,
OLADETHU HOUSE,RAJAKKAD VILLAGE, N.R.CITY, RAJAKKAD
PO., PIN-685566

BY ADVS.
SRI.S.SREEKUMAR (SR.)
SRI.AJAY BEN JOSE
SRI.R.GITHESH
SRI.K.M.MOHAMMED KUNHI
SRI.MANJUNATH MENON
SRI.P.PRIJITH
SRI.M.K.THANKAPPAN
SRI.THOMAS P.KURUVILLA

RESPONDENT/COMPLAINANT:

THE STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,HIGH COURT OF
KERALA, ERNAKULAM PIN-682031

BY ADVS.
SRI.SUMAN CHAKRAVARTHY, SR. GOVT.PLEADER
ADDL.DIRECTOR GENERAL OF PROSECUTION

SR.SPL.GP (CRL.) SRI.S.U.NAZAR

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON
17.11.2021, ALONG WITH CrI.Rev.Pet.590/2017 AND CONNECTED
CASES, THE COURT ON 18.03.2022 DELIVERED THE FOLLOWING:
CrI.R.P.Nos.116, 234 and 590 of 2017

COMMON ORDER

These revisions are preferred by the first, third and second accused respectively in S.C.No.68 of 2016 of Additional Sessions Court IV Thodupuzha, in Crime No.1196 of 2012 Thodupuzha Police Station for offences punishable under sections 143, 147, 148, 149, 307, 302, 118/302, 120B of 302 IPC and Section 3 r/w 25(1)(a) of the Arms Act.

2. The incident leading to the present case has a chequered history. One Anchery baby was the leader of Congress party in Idukki area. The members of the Marxist party maintained enmity towards him, apprehending that, Baby was attracting the members of their political party to his party. Consequently, few local leaders of Marxist party entered into a criminal conspiracy on 14.10.1982 at 9 p.m, at the Rajakkad area committee office of Marxist party and resolved to commit murder of Baby and another person. In furtherance of the above conspiracy, on 13.11.1982 at about 11 a.m. while Anchery Baby along with PWs.1 to 6 (Johny, Benny, Mathachan, Sekharan, Sebastian and Rajan) were proceeding along an estate footpath, few of the accused, who were hiding behind the cardamom plants fired twice at Baby with an unlicensed country gun. The third shot injured PW2, Benny. They created a terror in the scene of occurrence and scared CrI.R.P.Nos.116, 234 and 590 of 2017 away the persons accompanying Baby and Benny. Baby died at the spot and Benny sustained serious injuries. FIS of PW1, Johny was recorded by the Santhampara Police on the same day at 1.45p.m. and crime was registered as FIR No.118 of 1982. After investigation, final report was laid against nine accused for offences punishable under section 143, 147, 148, 149, 307, 302, 118 of 302, 120B of 302 and S.3 r/w 25(1)(a) of the Arms Act. All the nine accused faced trial in S.C.No.58 of 1984. They were (A1) Panackal Kunjoonju @ Kesavan, (A2) Joseph @ Jose, (A3) Mohandas, (A4) Lekshmanan, (A5) Jose, (A6) Michael, (A7) Sugathan, (A8) Prasad and (A9) Baby. On the side of the prosecution, PWs.1 to 18 were examined, Exts.P1 to P12 were marked and Mos.1 to 18 were identified. On the side of the accused, DW1 was examined and Exts.D1 to D7(a) were marked. Learned Sessions Judge, on an appreciation of the entire evidence, found that the prosecution failed to establish the allegations against the accused and acquitted all the accused.

3. The above acquittal was challenged by the State in CrI.Appeal.411 of 1986 before the High Court. By judgment dated 24.01.1990, the appeal was dismissed confirming the acquittal. The above judgment has become final.

4. Much later, on 25.05.2012 at about 6 p.m., the revision petitioner in R.P.No.590 of 2017 who was the District Secretary of the CrI.R.P.Nos.116, 234 and 590 of 2017 CPI(M) in Idukki, made a speech in a public meeting of the party at Manakkad. In the speech, the revision petitioner is stated to have warned the opposite party to be careful in conducting political actions against the CPI(M). He stated that, during 1982 period, in Santhanpara and Rajakkad area, CPI(M) had released a statement referring to the names of 13 persons. The first 3 named were killed, one after another. He also added that the first named was shot dead, the second person was beaten to death and third person was stabbed to death. On the basis of this speech, crime No.1196 of 2012 dated 28.05.2012 was registered by the Thodupuzha Police Station for offences punishable under section 117(e) of the KP

Act and Section 505(1)(b) of IPC. Final report was laid. On the basis of same speech, Crime No.309 of 2012 dated 04.06.2012 was registered in Rajakkad Police Station for offences punishable under Sections 118 of 302, 120B of 302 and 34 of IPC.

5. Simultaneously, Santhanpara police filed Crl.M.P.No.2604 of 2012 in Crime No.118 of 1982 and Crl.M.P.No.2605 of 2012 in Crime No.65 of 1983 which resulted in S.C.No.33 of 1984 before the Judicial Magistrate, Nedumkandam invoking S.173(8) of Cr.P.C for further investigation in the light of the disclosures allegedly made by the above revision petitioner. It was alleged that the alleged incident referred to the murder of two Congress party workers, from which, Crl.R.P.Nos.116, 234 and 590 of 2017 crime No.118 of 1982 and Crime No.65 of 1983 resulting in S.C.No.58 of 1985 and S.C.No.33 of 1984, respectively arose. The above Crl.M.Ps were allowed by a common order dated 31.05.2012. Prosecution thereafter filed final report in Crime No.309 of 2012 to close the FIR since further investigation was progressing in Crime No.118 of 1982. However, prosecution again filed Crl.M.A.No.5368 of 2012 for further investigation in the crime relating to murder in Crime No.65 of 1983. The above application was filed in Crl.Appeal.No.2010 of 2009, which was pending at that point of time. Rejecting the request the Division Bench hold that the contents of the so called declaration made by the above revision petitioner in his speech did not in any manner give a clear and complete link of any particular person or group of persons having master minded or conveyed planning or executing the incident, which led to the killing of the Congress party leader. Ultimately, the accused therein were acquitted, which judgment was affirmed by apex court in S.L.P.(Crl).No.9817 - 9818 of 2014. After investigation, final report was laid in Crime No.118 of 1982 on 18.11.2015 for offences punishable under Sections 143, 147, 148, 149, 307, 302, 118 of 302, 120B of 302 IPC and Section 3 r/w 25(1)(a) of the Arms Act. Prosecution arrayed 91 witnesses and has produced several documents. The revision petitioners herein and one Varkey Abraham (since deceased) stood arrayed as accused Nos. 1 to 4. Cognizance was Crl.R.P.Nos.116, 234 and 590 of 2017 taken as S.C.No.68 of 2016 by the Additional Sessions Judge-IV, Thodupuzha.

6. The allegation in the above final report in Crime No.118 of 1982 dated 18.11.2015 was that, on 14.10.1982, a procession led by accused Nos. 1 to 3 herein, who were the District leaders of the CPI(M), was attacked by rival party members. A1 to A3 believed that the above assailants were instigated by Anchery Baby. Accordingly, on the same day at 9 p.m., a secret meeting was held by the second and third accused along with few others at local committee office at Rajakkad. Second accused (revision petitioner in Crl.R.P.No.590 of 2017) allegedly informed the participants that they have resolved to retaliate and to settle score with Anchery Baby and others and had entrusted the job to Panackal Kunjoonju and Thadiyanpara Jose. Prosecution further alleged that, in furtherance of the said conspiracy, few accused camped in an estate building and watched the movement of Baby. On 13.11.1982 at 11.a.m, while Baby and others reached the spot along the estate footpath, accused in S.C.No.58 of 1985 along with the present accused Nos.1 and 4 shot Baby twice with a country gun. He sustained fatal injuries. They also shot Benny, who also sustained injury. The first and fourth accused terrorized and scared away others. Subsequently, under the directions of the present second and third accused, the assailants were taken to various places and Crl.R.P.Nos.116, 234 and 590 of 2017 concealed them from the police. Later, they were arrested.

7. After appearance before the court below, accused 1 to 3 filed Crl.M.P.No.1225 of 2016 for discharge in S.C.No.68 of 2016. the fourth accused had died. The application was dismissed, which is challenged by the accused in these separate revisions.

8. Heard the learned senior counsel for the revision petitioners, the Additional Director general of Prosecution and the learned Public Prosecutor.

9. In these Crl.R.Ps', Crl.M.As' were filed by the brother of the deceased Anchery Baby to get himself impleaded and to advance arguments. The counsel for the defacto complainant was heard. Examined the records produced.

10. The prosecution allegation in S.C.No.58 of 1985 of the District and Sessions Judge, Thodupuzha was that, consequent to the enmity maintained by the accused, who belonged to Marxist Communist Party against the deceased and CWs.1 to 6, who were active members of Congress party, the accused entered into a conspiracy on 14.10.1982 to cause death of Anchery Baby and others and in furtherance of that conspiracy, on 13.11.1982, while deceased Baby and CWs.1 to 6 were proceeding from Melechemmannar to Santhanpara, via an estate way, the accused waited in the cardamom plantation and while the party reached the spot, Baby was shot dead Crl.R.P.Nos.116, 234 and 590 of 2017 by accused Nos.1 and 2. CW2 Benny was hit on the forehead from another shot from the first accused. CW2 Benny was admitted in the hospital. All the accused faced charge on the above grounds. After trial, the Sessions Court acquitted all the accused.

11. The Sessions Judge had held that, there was considerable delay in sending the FIR to Court. FIS was recorded on 13.11.1982 at 1.45 p.m and the names of all the accused were mentioned in the FIS itself. It reached the Court only on 16.11.1982 at 10.30 a.m. The scene mahazar, inquest report and other records reached the Court much later. The Court found that, there was no explanation for the considerable delay of 3 days in sending the FIR to the Court. Even though a feeble attempt was made to explain the delay by contending that there were two intervening holidays, that was also brushed aside by the Sessions Judge, holding that, still, there were other working days in between. It was held that the FIS was delayed, probably to fix the names of the accused and to incorporate it in the FIS. Another reason given by the court below was that, though MO1 and MO2 guns were introduced in evidence, the ballistic expert had reported that, MO1 had an ineffective firing mechanism. In the case of MO2, ballistic expert could not say whether it could be used. Though cartridge cases were seized as MO.10, there was no material evidence to show that, they were ejected from MO1 gun. Hence, the Court concluded that, Crl.R.P.Nos.116, 234 and 590 of 2017 there was no reliable evidence to show both that the guns were used to commit the crime and that, gun was usable at the time of its alleged use. It was also held by the court that the evidence regarding recovery of guns was also not reliable.

12. Learned Session Judge at page 11 of the judgment specifically held that, no evidence was available to establish the allegation of conspiracy to form an unlawful assembly. Regarding the alleged role played by the accused, the Court noted that, there were inconsistencies in the versions of PWs.1 to 3 who were projected as crucial eye witnesses to the incident. Pws.1 to 3 had asserted that, they have seen the first and second accused with guns. They had also asserted that, they saw all

the nine accused at the spot. The court held that the version of the witnesses that, two persons who were standing at some distance apart, behind two separate trees, fired at the same moment simultaneously, was impossible to be believed. The Court held that the versions of PWs.1 to 3 were inconsistent. The Court also found that the recovery of the guns from the party office was also not believable. To conclude, the court held that the prosecution versions regarding murder of Baby was unbelievable and acquitted all the accused. Though this was challenged in Crl.Appeal.No.411 of 1986, the Division Bench of the High Court concurred with the findings and dismissed the appeal by judgment dated 24.01.1990. That judgment Crl.R.P.Nos.116, 234 and 590 of 2017 has become final and conclusive.

13. The present prosecution in S.C.No.68 of 2016 had its origin consequent to few revelations allegedly made in the course of a public speech made thirty years after the murder of Baby by the present second accused. In the course of his public speech, he referred to a concerted and planned murder of several political opponents including Anchery Baby by his party. He stated that, his party had released a statement referring to few political opponents. The first person in the list was beaten to death and the second was shot dead. This speech led to the further investigation in Crime No.118 of 1982 of Santhanpara Police Station and laying of final chargesheet dated 18.11.2015. In the present charge, the prosecution allegation has two limbs. One is that, present accused No.2 and 3, along with the original accused had entered into a criminal conspiracy to commit murder of Anchery Baby and others and in prosecution of the criminal conspiracy, committed murder of Baby. Chargesheet further alleges that, consequent to the attack on the procession dated 14.10.1982 conducted by the Marxist party, at the alleged instance of Anchery Baby and others, a secret meeting was urgently convened at 9 p.m on 14.10.1982 at the Rajakkad Area Committee Office. Second part of the allegation was that, at the local committee office of the party at Rajakkad on 14.10.1982 A2 and A3 are stated to have informed few Crl.R.P.Nos.116, 234 and 590 of 2017 other reliable members of the party that, Baby and others were creating problems for the party and hence, the above accused have engaged the first and second accused, Panackal Kunjoonju and Thadiyanpara Jose, for certain action. Persons who were present were informed to be cautious and warned that, in that connection, if any crime was registered implicating them, they should be careful and should protect the others. In furtherance of that conspiracy, the accused on 28.10.1982 at 9.30 a.m., attacked the congress party office and hurled bombs at the office. Thereafter, they kept watch on the movement of Baby and on 13.11.1982 at 11.30 a.m. the accused who were acquitted in S.C.No.58 of 1985 along with accused Nos.1 and 4 in the present crime, under the instructions of present second and third accused and opened fire at Baby and others, which led to the death of Anchery Baby .

14. Chargesheet in S.C.No.68 of 2016 is based on the further investigation conducted in Crime No.118 of 1982, pursuant to the speech made by the second accused. In the present case, accused Nos.2 and 3 are alleged to be persons who have master minded the conspiracy and after execution of the crime, took steps to screen the offenders. The crux of the prosecution allegation is that, in pursuance of the conspiracy, accused Nos.1 to 9 in S.C.No.58 of 1985 along with accused Nos.1 and 4 in S.C.No.68 of 2016 committed murder of Baby Crl.R.P.Nos.116, 234 and 590 of 2017 and inflicted injuries on Benny. The fundamental improvement in the present prosecution case is that the newly arrayed accused Nos.1 Pampupara Kuttappan @Kuttappan and fourth accused Varkey Abraham along with the same 9 accused in S.C.No.58 of 1985, who stands acquitted, also participated in the

murder. The further main allegation is that the present accused 2 and 3 were the main conspirators.

15. In this regard, the findings arrived at by the court below in S.C.No.58 of 1985 regarding the involvement of all accused in that sessions case assumes significance. As referred to in paras 11 and 12, the findings of the Sessions Court on the appreciation of all crucial eye witnesses to the incident was that the version regarding simultaneous firing from two guns by two assailants apart, at a distance was impossible, that there was total lack of expert evidence that, MO1 and MO2 were in working condition, that there was no evidence to establish conspiracy and that, there was delay in sending the FIR to Court completely demolished the prosecution case. All the findings on evidence, regarding the commission of offence, were fundamental in nature affecting the very substratum of the prosecution case. Now the very same set of witnesses are sought to be arrayed to implicate the present first and fourth accused, who are stated to have participated in the action. When the very edifice on which the entire prosecution case CrI.R.P.Nos.116, 234 and 590 of 2017 was set up has crumbled down, in the earlier round, I find it nearly impossible to built up the prosecution case again as now alleged, with any number of new witnesses.

16. Another fundamental flaw in S.C.No.68 of 2016 is that, though all the accused in S.C.No.58 of 1985 are stated to have acted along with accused Nos.1 and 4 in present case, in committing the murder, the persons who stood arrayed earlier as accused Nos. 3, 4, 5, 6 and 8, now stand transposed as prosecution witnesses CW Nos.9, 12, 13, 14 and CW11 respectively. Among them, the then third accused Mohandas is now projected as the crucial witness regarding the conspiracy that allegedly took place on 14.10.1982 at the Rajakkad Local Office.

17. As mentioned above, the crux of the prosecution allegation in the present crime is that, all the accused in S.C.No.58 of 1985 along with accused Nos.1 and 4 in S.C.No.68 of 2016, participated in the murder. The role attributed to the present accused Nos.1 and 4 is that, they had joined the action, in firing gun shot at Baby and the injured. Strangely, several among those accused who were acquitted now stand arrayed as the prosecution witnesses, inspite of the specific allegation in S.C.No.68 of 2016 also that they had actually participated in the murder of Baby along with present accused 1 and 4. The original third accused now stands as CW9, fourth accused as CW12, fifth accused as CrI.R.P.Nos.116, 234 and 590 of 2017 CW13, sixth accused as CW14 and eighth accused as CW11. Thus, while the prosecution reiterate that the accused in the original crime remain as the assailants along with present accused Nos.1 and 4 in the present crime, some of the previous accused are now arrayed as prosecution witnesses.

18. As mentioned earlier, CWs.1 to 6 were projected as the crucial witnesses in S.C.No.58 of 1985. Among them, CW1 was examined as PW1. CW2 was examined as PW2 and CW4 was examined as PW3. CW3 was not examined. CW6 who was examined as PW4, was declared hostile. Same set of witnesses are now relied on by the prosecution to establish the crime as against first and fourth accused (since deceased). CW1 is Benny, who was earlier examined as PW2. CW1 in his evidence has essentially relied on the motive and the enmity between the Congress Party members as against the Marxist party. The only improvement now made by him is that, along with the first and second accused in S.C.No.58 of 1985, he had seen Pampumpara Kuttan who is at present arrayed as the first accused. At the same time, he has reiterated and affirmed presence of Kottayam Prasad among the

accused. He had stated that, Kottayam Prasad was among the assailants. According to him, though he had seen Pampupara Kuttan along with the accused and had disclosed it to the investigating officer, when his statement was earlier recorded in CrI.R.P.Nos.116, 234 and 590 of 2017 S.C.No.58 of 1985, it was not added. However, neither his present version that Kuttan was among the assailants or that, he had mentioned about Kuttan to the investigating officer is not seen spoken in the Court, when he was examined in Court. The non reference of name of Pampupara Kuttan in the original statement given by CW1 is explained by him in the above circumstances. CW2 Benny was questioned on 09.07.2012 and his further statement was recorded. He merely reiterated this earlier version, referring to the enmity between both the groups. A further statement of him was recorded on 04.12.2012. In that, he affirmed that at the time of incident, he had seen Pampupara Kuttan along with the remaining accused. However had added that, he came to know about the presence of Pampupara Kuttan only later, thereby affirming that his version regarding the presence of the present accused is based on subsequent confirmation.

19. CW3 in his version had stated that, he had seen Pampupara Kuttan along with the 6 th accused in S.C.No.68 of 2016. CW3 did not know his name at that point of time. Non reference to the name of Kuttan by CW2 and CW3 or that, they saw the presence of an identifiable person in the S.161 Cr.P.C statement casts serious doubt on the versions of CW2 and CW3.

20. When CW3 was examined in Court, he deposed that the CPM members had threatened him. Statement of Dasan was recorded CrI.R.P.Nos.116, 234 and 590 of 2017 on 04.12.2012. He had referred to the enmity between both the political parties and that, CPM had decided to kill Anchery Baby and others and in furtherance of that, they had fired at and threw country bombs at him. He specially attributed the role of Pampupara Kuttan by stating that, he had seen Kuttan standing behind the bushes. He further stated that, Kuttan took country bombs from a bucket and threw it. However, there is nothing to show that, in the earlier round of litigation, such a version was spoken when he was examined in Court or the scene mahazar prepared in S.C.No.58 of 1985 disclosed that, bombs were recovered from the scene of occurrence. He explained that, he did not mention Kuttan's name earlier, since he was threatened by the Marxist party members.

21. CW4 is another crucial witness now projected by the prosecution as the witness to the incident. In his statement, he has referred to the enmity between both the political parties and the attempt of Marxist party to cause death of Anchery Baby and others. He had stated that, there were more than 9 members present at the time of incident. This was contrary to the earlier prosecution case that there were only 9 assailants. He specifically asserted that, he had seen Kottayam Prasad, Mohandas and Lekshmanan among the assailants. The most crucial aspect of the version of CW4 is that, the above three persons who were arrayed as accused Nos.8, 3 and 4 CrI.R.P.Nos.116, 234 and 590 of 2017 respectively in S.C.No.58 of 1985, now stand arrayed as witnesses on the prosecution side as CW11, CW9 and CW12. Thus, when the prosecution alleges that, Prasad Mohandas and Lekshmanan were wrongly arrayed in the earlier case and that, they are now projected as the prosecution witness, another crucial eye witness to the prosecution affirms that, these three persons were present among the assailants. This is a self contradictory and mutually damaging version to the prosecution case itself.

22. CW4 Mathew @ Mathachan was examined as PW3 earlier. He has asserted that, first accused Kesavan @ Kunjunju had shot Baby. He had referred to the presence of Lekshmanan, Mohandas, Jose and Kottayam Prasad among the assailants. This is also contrary to the present specific version of the prosecution. CW6 is one Sekharan who was examined as PW4 earlier, but was declared as hostile. In the statement given by him to the police in the present case, he stated that, he had accompanied Baby at the time of incident. He affirmed that, he had seen Panackal Kunjoonju, local committee member Lekshmanan, Kottayam Prasad and Kuttan among the assailants. He asserted that, Kuttan had thrown bombs at the injured. However, there was no finding by the trial court in S.C.No.58 of 1985 that bombs were thrown at or that evidences of bombs were found at the spot.

23. The above suffers from another serious and basic flaw. The CrI.R.P.Nos.116, 234 and 590 of 2017 present CW1 has specifically stated in his S.161 Cr.P.C. statement, recorded in the further investigation, that he had seen Kottayam Prasad among the assailants. Kottayam Prasad who was the original 8th accused now stands arrayed as CW11 among the prosecution witnesses. Further, CW4 has also stated that, among the assailants, he had seen Kottayam Prasad. Thus, when the prosecution alleges that present A1 and A4 along with all the earlier accused committed crime, some of the earlier accused are proposed now as prosecution witness. However, the present witnesses have reiterated the presence of such earlier accused along with the present accused. CW3 Dasan had stated that, there were more than 9 persons among the accused. Again, the situation is made more complex by the evidence of witnesses CW1, CW3 and CW4 who have asserted that, some of the present prosecution witnesses were seen by them among the accused. The present prosecution witnesses have specially stated that, they have seen CW9, CW11 and CW12 among the assailants. Further, when the prosecution eye witnesses were examined in S.C.No.58 of 1984, all of them referred to the presence of 9 accused at the spot and did not depose about presence of any other assailants. None of the above eye witnesses had referred to presence of any person other than the 9 accused at the time of incident. This has resulted in a very complex situation, by which, diametrically opposite materials are brought on CrI.R.P.Nos.116, 234 and 590 of 2017 record.

24. An evaluation of these materials show that in so far as the prosecution tries to now project the incident, leading to the death of Anchery Baby, mutually contradictory and self damaging materials touching the substratum of the prosecution are available on record. Definitely, prosecution will find it nearly impossible to get over those materials on record.

25. To establish the second major limb of the prosecution case, which is the theory of conspiracy, by second and third accused, on 14.10.1982 at the office of the Rajakkad area committee, prosecution specifically relies on the versions of CW9 Mohandas and CW15. As indicated earlier, CW9 faced the trial in the earlier round of trial as an accused. In the statement now given by him to the investigating officer, he has specifically referred to the conspiracy involving second and third accused. He stated that, few days prior to the murder of Baby, he was called to the Rajakkad area committee office. Jeep was sent to him and was taken to the local committee office. Jeep was driven by one Sadan, who was the son in law of District Committee Member Secretary A.K Damodaran. He stated that, when he reached the office, he was taken to a room, wherein, present second and third accused were present, along with few others. The second accused is stated to have informed them that, congress party and police were CrI.R.P.Nos.116, 234 and 590 of 2017 creating obstructions to

the functioning of the party. Baby and Ponnappan Pillai were behind them. Hence, it was informed by the second accused, that they have taken certain decisions to handle Baby and Ponnappan Pillai. Kunjoonju and Jose have been instructed. He further added that, some of the party members may be arrayed as accused and they should take care that the party was completely protected. 10-20 days thereafter, Baby was murdered. According to him, police implicated several party members in that murder. This version of CW9 along with the versions of PWs.1 to 6 are now essentially relied by prosecution to establish the conspiracy. Notwithstanding that the above witness has faced the trial earlier as accused and now has become prosecution witness, even now, few crucial prosecution eye witnesses have affirmed the presence of CW9 among the accused. As indicated earlier, this has resulted in a very complex situation.

26. CW9, in his statement had stated that the driver who had taken him to the Rajakkad area committee office was one Sadan @ Sadananan. The above Sadan @ Sadananan was arrayed as CW15 in the present final report. His statements were recorded on 19.06.2012 and on 30.07.2012. In both the statements, he had asserted that, Rajakkad area committee had a jeep No.KL-1850, but did not have a permanent driver. Whenever required, he was called to drive the CrI.R.P.Nos.116, 234 and 590 of 2017 vehicle. He specifically reiterated that, he had taken CW9 and other party leaders in that jeep to different places. Referring to the incident of 1982, in which, the procession led by the present second and third accused was attacked allegedly by the congress party members under the leadership of Anchery Baby, CW15 stated that, he had taken accused 2 and 3 in the jeep to the place of commencement of procession. He followed procession in the jeep till it reached Vatapara. He parked the vehicle there. After sometime bombs were hurled. Accused 2 and 3 were thereafter taken to the Santhanpara police station. He has specifically asserted that, he had not gone to Udampanchola, Rajakkad and few other named places on that day. In both the statements of CW15 recorded by the police, he had not even referred to the prosecution case that he had taken CW9 to the Rajakkad local committee office on that day. Clearly, the version of CW9 that he had proceeded to the local committee office wherein the conspiracy took place on the relevant day in the jeep of PW15 is not supported by CW15 itself. Essentially, this should cut at the very root of the prosecution case. It is also pertinent to note that, this version of conspiracy was not projected at point of time in the earlier round of trial. Definitely, prosecution cannot make such an allegation at different point of time long thereafter, unless some new materials are unearthed. However, in the present case, though the prosecution has CrI.R.P.Nos.116, 234 and 590 of 2017 a specific allegation of conspiracy in S.C.No.58 of 1985, no material was placed before the prosecution and trial court had specifically held that conspiracy was not established. In the present case, evidence let in by the prosecution is insufficient to direct the accused to face the trial. Definitely, they are entitled for discharge.

27. Vehemently, contending that the accused are entitled for the discharge, learned senior counsel for the accused referred to the decisions reported in *P.Vijayan v. State of Kerala and Others* [(2010)2 SCC 398], *State of Karnataka v. L.Muniswamy and Others* {1977 SCC (CrI). 404] and *Abdul Rasak @ Abu Ahmed v. Union of India and Others* [2021(5) KHC 181 (DB)]. Learned counsel for the impleading petitioner on the other hand relied on the decisions reported in *Sankaran v. Ambulakshan Nair* [1989 KHC 473], *Central Bureau of Investigation v. Mukesh Pravinchandra Shroff and Others* [2009 KHC 6291]. All those decisions refer to the parameters to be followed by the Court while considering the discharge application.

28. While exercising jurisdiction under Section 239 of Cr.P.C., the trial court is bound to look into the entire materials on record, which the prosecution proposes to rely on. On an evaluation of the available materials, if it is found that, there is no ground for presuming that the accused has committed the offence, the charge must be CrI.R.P.Nos.116, 234 and 590 of 2017 considered to be groundless and the accused is entitled for discharge. The Hon'ble Supreme Court in Century Spinning and Manufacturing Co.Ltd. v. The State of Maharashtra (AIR 1972 Supreme Court 545) had held that, if there is no ground for presuming that the accused has committed an offence, the charges must be considered to be groundless which is the same thing as saying that there is no ground for framing the charges. The Apex Court further held that, this necessarily depends on the facts and circumstances of each case and the Magistrate is entitled and indeed has a duty to consider the entire material referred to in sub section (2) of Section 251A Cr.P.C. 1898.

29. Essentially, this exercise means that, from the available materials either offence alleged as such has not been made out or the crucial ingredients for constituting the offence have not been made out. It has to be distinct from a case where there is insufficiency of evidence which definitely cannot lead to a conclusion that charge was groundless. However, incidently, cases may arise wherein the materials gathered by the investigating agency may either be absolutely inconsistent to each other or self destructive to the prosecution case or may be mutually contradictory with other materials gathered by the investigating agency. Hence, if the materials gathered by the investigating agency and relied on by them, CrI.R.P.Nos.116, 234 and 590 of 2017 contradict each of the other materials, so as to affect the substratum of the case, though materials indicate offence but, as a whole, when both are let in contradict itself thereby strike at the very root of the prosecution case, there is no reason as to why the prosecution should be permitted to proceed with such a trial, which would end in failure. In the case at hand, it is clear that, few witnesses have deposed touching on the complicity of the newly arrayed accused. At the same time, they themselves reaffirmed the presence of some of the present prosecution witnesses, who earlier stood arrayed as accused. This not only strike at the very base of the prosecution case but tells upon the credibility of them. With these material, a trial of accused is not possible.

In the result, CrI.R.Ps are allowed. Impugned orders are set aside and the discharge application stands allowed. All the revision petitioners/accused stand discharged.

Sd/-

SUNIL THOMAS JUDGE Sbna/ CrI.R.P.Nos.116, 234 and 590 of 2017 PETITIONERS ANNEXURES ANNEXURE A : TRUE COPY OF FIR AND FI STATEMENT IN CRIME NO.118 OF 1982 OF SANTHANPARA POLICE STATION ANNEXURE B : TRUE COPY OF JUDGMENT IN S.C.NO.58 OF 1985 OF SESSIONS COURT, THODUPUZHA DTD 21.03.1986 ANNEXURE C : TRUE COPY OF JUDGMENT IN CRL.APPEAL.NO.411 OF 1986 AGAINST S.C.NO.58/1985 DATED 24.01.1990 OF HIGH COURT OF KERALA ANNEXURE D : TRUE COPY OF FINAL REPORT IN CRIME NO.1196 OF 2012 OF THODUPUZHA POLICE STATION ANNEXURE E : TRUE COPY OFCOMMON ORDER IN CRL.M.P.2604/2012 AND CRL.M.P.2605/2012 IN RESPECT OF CRIME NO.118/1982 AND CRIME NO.65/1983 OF SANTHANPARA POLICE STATION DATED 31.05.2012 OF JUDICIAL FIRST CLASS MAGISTRATE, NEDUMKANDOM ANNEXURE F : TRUE COPY OF

FIR DATD 04.06.2012 AND FINAL REPORT DTD 27.06.2012 IN CRIME NO.309/2012 OF RAJAKKAD POLICE STATION ANNEXURE G : TRUE COPY OF ORDER IN CRL.M.A.NO.5368/2012 AND 7232/2014 IN CRL.APPEAL.NO.2010/2009 DTD 24.11.2014 OF THIS HON'BLE COURT ANNEXURE H : TRUE COPY OF ORDER IN SLP (CRL) NOS.9817-9818/2014 DTD 06.01.2015 OF HON'BLE SUPREME COURT OF INDIA ANNEXURE I : TRUE COPY OF FINAL REPORT IN CRIME NO.118/1982 DTD 18.11.2015 FILED BEFORE THE JUDICIAL FIRST CLASS MAGISTRATE COURT, NEDUNGANDAM CrI.R.P.Nos.116, 234 and 590 of 2017 PETITIONERS ANNEXURES ANNEXURE A : TRUE COPY OF FIR AND FI STATEMENT IN CRIME NO.118 OF 1982 OF SANTHANPARA POLICE STATION ANNEXURE B : TRUE COPY OF JUDGMENT IN S.C.NO.58 OF 1985 OF SESSIONS COURT, THODUPUZHA DTD 21.03.1986 ANNEXURE C : TRUE COPY OF JUDGMENT IN CRL.APPEAL.NO.411 OF 1986 AGAINST S.C.NO.58/1985 DATED 24.01.1990 OF HIGH COURT OF KERALA ANNEXURE D : TRUE COPY OF FINAL REPORT IN CRIME NO.1196 OF 2012 OF THODUPUZHA POLICE STATION ANNEXURE E : TRUE COPY OF COMMON ORDER IN CRL.M.P.309/2012 OF RAJAKKAD POLICE STATION DTD 04.06.2012 ANNEXURE F : TRUE COPY OF REPORT IN CRIME NO.309/2012 OF RAJAKKAD POLICE STATION ANNEXURE G : TRUE COPY OF ORDER IN CRL.M.A.NO.5368/2012 AND 7232/2014 IN CRL.APPEAL.NO.2010/2009 DTD 24.11.2014 OF THIS HON'BLE COURT ANNEXURE H : TRUE COPY OF ORDER IN SLP (CRL) NOS.9817-9818/2014 DTD 06.01.2015 OF HON'BLE SUPREME COURT OF INDIA ANNEXURE I : TRUE COPY OF FINAL REPORT IN CRIME NO.118/1982 DTD 18.11.2015 FILED BEFORE THE JUDICIAL FIRST CLASS MAGISTRATE COURT, NEDUNGANDAM CrI.R.P.Nos.116, 234 and 590 of 2017 PETITIONERS ANNEXURES ANNEXURE A : TRUE COPY OF FIR AND FI STATEMENT IN CRIME NO.118 OF 1982 OF SANTHANPARA POLICE STATION ANNEXURE B : TRUE COPY OF JUDGMENT IN S.C.NO.58 OF 1985 OF SESSIONS COURT, THODUPUZHA DTD 21.03.1986 ANNEXURE C : TRUE COPY OF MEMORANDUM OF CRL.APPEAL NO.411/1988 AND JUDGMENT IN CRL.APPEAL.NO.411 OF 1986 AGAINST S.C.NO.58/1985 DATED 24.01.1990 OF HIGH COURT OF KERALA ANNEXURE D : TRUE COPY OF FINAL REPORT IN CRIME NO.1196 OF 2012 OF THODUPUZHA POLICE STATION ANNEXURE E : TRUE COPY OF COMMON ORDER IN CRL.M.P.2604/2012 AND CRL.M.P.2605/2012 IN RESPECT OF CRIME NO.118/1982 AND CRIME NO.65/1983 OF SANTHANPARA POLICE STATION DATED 31.05.2012 OF JUDICIAL FIRST CLASS MAGISTRATE, NEDUMKANDAM ANNEXURE F : TRUE COPY OF FIR DATD 04.06.2012 AND FINAL REPORT DTD 27.06.2012 IN CRIME NO.309/2012 OF RAJAKKAD POLICE STATION ANNEXURE G : TRUE COPY OF ORDER IN CRL.M.A.NO.5368/2012 AND 7232/2014 IN CRL.APPEAL.NO.2010/2009 DTD 24.11.2014 OF THIS HON'BLE COURT ANNEXURE H : TRUE COPY OF ORDER IN SLP (CRL) NOS.9817-9818/2014 DTD 06.01.2015 OF HON'BLE SUPREME COURT OF INDIA ANNEXURE I : TRUE COPY OF FINAL REPORT IN CRIME NO.118/1982 DTD 18.11.2015 FILED BEFORE THE JUDICIAL FIRST CrI.R.P.Nos.116, 234 and 590 of 2017 CLASS MAGISTRATE COURT, NEDUNGANDAM