
(1994) 11 KL CK 0052

High Court Of Kerala

Case No: Criminal M.C. No. 1703 of 1994

R. Balakrishna Pillai

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision: Nov. 17, 1994

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 173, 207, 238, 239, 482

Citation: (1995) CriLJ 1244 : (1995) 1 ILR (Ker) 821

Hon'ble Judges: K.P. Balanarayana Marar, J

Bench: Single Bench

Advocate: T.V. Prabhakaran and S. Rajeev, for the Appellant; Director General of Prosecutions, M. Ratna Singh, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

K.P. Balanarayana Marar, J.

Petitioner is the first accused in C.C. 1 of 1991 on the file of Special Judge for the trial of Idamalayar Investigations, Ernakulam. Petitioner moved that court by CrI. M. P. 64 of 1994 requesting the court to discharge him u/s 239 Criminal Procedure Code as there are no material to connect the case with any of the offences alleged. Another petition was filed to consider the validity and legality of the sanction produced. During the pendency of these two petitions. Shri V.S. Achuthanandan, the Leader of the Opposition in the Kerala Legislative Assembly filed a counter statement dated 10-10-1994 requesting the court that petitioner shall not be discharged and Criminal M. P. 64 of 1994 should be dismissed. A copy of the counter statement was- served on petitioner also. By order dated 26-10-1994 the Special Judge held that the objection filed by the third party to the discharge petition filed by the first accused is entertainable and the third party must be given an opportunity for being heard while hearing the case u/s 239, Criminal Procedure Code. The first accused

challenged that order in this criminal miscellaneous case presented u/s 482 of the Code of Criminal Procedure.

2. Notice was given to the Public Prosecutor. Heard counsel for petitioner and Director General of Prosecutions.

3. Drawing attention to Section 239 of the Code of Criminal Procedure Shri. T. V. Prabhakaran, learned counsel for petitioner strongly contends that a third party cannot be permitted to be heard while the court considers the question whether the accused is liable to be discharged under that Section. Section 239 reads:

When accused shall be discharged:-- If upon considering the police report and the documents sent with it u/s 173 and making such examination, if any of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless he shall discharge the accused, and record his reasons for so doing.

Before an order for discharge is passed under this section the Magistrate is required to (i) consider the police report and the documents sent along with it u/s 173 of the Code (ii) examine the accused if it is considered necessary and (iii) give the prosecution and the accused an opportunity of being heard. In other words, the Magistrate has to ascertain whether the statements and the circumstances if accepted make out a prima facie case and a charge could be framed against the accused. If a prima facie case is made out the Magistrate has to proceed with the trial of the offence after framing charge. If not, the accused shall be discharged after recording reasons. The documents on which the Magistrate can depend either for the purpose of discharging the accused or for framing charge are the documents referred to in Section 207, compliance of which has to be satisfied by the Magistrate u/s 238. Apart from those documents the Magistrate can also make such examination of the accused and rely on the submissions made by the prosecution and the accused. The hearing referred to in the section is an oral hearing and does not include the examination of anyone as a witness at that stage. Examination of any witness is not contemplated u/s 239 of the Code. In other words, the Magistrate has to confine the enquiry within the parameters of Section 239 of the Code.

4. Learned counsel for the petitioner has pointed out that the Special Judge had overstepped his powers u/s 239 of the Code by permitting a third party to take part in the proceeding. In the very same case the Leader of the Opposition had challenged an order of this Court granting consent to the Public Prosecutor to withdraw the prosecution in respect of one of the accused before the Supreme Court. The Supreme Court allowed the appeal and the impugned order of this Court was set aside where by the order of the Special Judge declining the consent for withdrawal of the prosecution was restored. This court had taken the view that the Leader of the Opposition in the State Legislative Assembly had no locus standi in the

matter. The Supreme Court did not go into that question because no counsel appearing before the Supreme Court disputed that the appellant therein who is an acknowledged public figure of the State has sufficient locus in the matter. That principle according to the learned counsel for petitioner cannot be applied to the present case. That was in connection with the withdrawal of the complaint. That may create public opinion according to counsel and this can be brought under the category of public interest litigation. But a third party cannot be permitted to trespass into the region of the rights of the accused, according to the counsel and the discharge contemplated u/s 239 of the Code is a statutory right to be exercised by the Magistrate confining to the materials directed to be considered as per that section. I see much force in this contention. Sections 238 and 239 are a complete code in the matter of the procedure to be followed for the purpose of discharging the accused or for framing the charge in any warrant case instituted on a police report. A third party cannot have any say in the matter. The question of any third party being permitted to take part in the proceedings while the court considers the materials on record in order to ascertain whether a charge should be framed or the accused should be discharged does not therefore arise.

5. The question whether a third party can be permitted to challenge the correctness of the conviction and sentence imposed by a court after a regular trial came up for consideration before the Supreme Court in [Simranjit Singh Mann Vs. Union of India and another](#),). The Supreme Court held that neither under the provisions of the Code nor under any other statute is a third party stranger permitted to question the correctness of the conviction. In that connection the Supreme Court referred to the following observation in [S.P. Gupta Vs. President of India and Others](#), .

But we must be careful to see that the member of the public, who approaches the court in cases of this kind, is acting bona fide and not for personal gain or private profit or political motivation or other oblique consideration. The Court must not allow its process to be abused by politicians and others....

The Supreme Court has also referred to the following observations contained in paragraph 45 of the judgment in [Janata Dal Vs. H.S. Chowdhary and Others](#),).

Even if there are million questions of law to be deeply gone into and examined in a criminal case of this nature registered against specified accused persons, it is for them and them alone to raise all such questions and challenge the proceedings initiated against them at the appropriate time before the proper forum and not for third parties under the garb of public interest litigants.

In the light of the observations of the Supreme Court aforementioned and on a proper understanding of the provision contained in Section 239 of the Code of Criminal Procedure there can be no doubt that Shri Achuthanandan, the Leader of the Opposition in the Kerala Legislative Assembly has no locus standi to take part in the proceeding before the Special Judge while considering the question of discharge

u/s 239 of the Code. The Special Judge has therefore committed an illegality in holding that an opportunity can be given to Shri Achuthanandan for being heard while hearing the case u/s 239, Criminal Procedure Code. Annexure-I order is therefore unsustainable.

For the aforesaid reasons the criminal miscellaneous case is allowed and annexure-I order is set aside.