(2008) 09 KL CK 0047

High Court Of Kerala

Case No: Criminal M.C. No. 2403 of 2007

Kuriland (P) Ltd. and Another	APPELLANT
Vs	
P.J. Thomas and Another	RESPONDENT

Date of Decision: Sept. 5, 2008

Acts Referred:

- Constitution of India, 1950 - Article 20(3)
- Criminal Procedure Code, 1973 (CrPC) - Section 244(2), 245, 482, 91, 91
- Evidence Act, 1872 - Section 119, 121, 122, 123, 124
- Penal Code, 1860 (IPC) - Section 417, 420
- Prize Chits and Money Circulation Schemes Banning Act, 1978 - Section 3, 4, 5

Citation: (2009) 3 ALT(Cri) 128 : (2009) CriLJ 763 : (2008) 4 ILR (Ker) 646 : (2009) 5 RCR(Criminal) 710

Hon'ble Judges: V. Giri, J

Bench: Single Bench

Advocate: C.M. Kammappu, Public Prosecutor, P. Santhosh Poduval and R. Rajitha, for the Appellant; V. John Sebastian Ralph and Preethy Karunakaran, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

1. The question involved in this case is a fairly interesting interplay of- Section 91 of the Code of Criminal Procedure (for short "the Code"} and Sections 131, 139 and 165 of the Evidence Act - in the context of the protection available to a person under Article 20(3) of the Constitution of India. Elaborate arguments were addressed by learned Counsel for the petitioner Sri. Santhosh P. Poduval and Sri. John S. Ralph, appearing for the party respondent.

2. The petitioners are accused 1 and 2 in C.C. No. 198/00 on the file of the Chief Judicial Magistrate, Thrissur, involving offences under Sections 3, 4 and 5 of the

Prize Chit and Money Circulations Banning Act, 1978 {for short ''the Act''}.

3. It is the complainant''s case that he is a share holder in the 1st accused company. Accused 2 to 12 are the Directors and 13th accused is the Manager of the 1st accused. Accused 2 to 13 are responsible for the conduct of the business of the company and its day to day affairs. That the accused, with the dishonest intention to cheat the public and cause wrongful loss to them and thereby to achieve illegal gain to the company, decided to conduct 15th monthly chit to be started on 15.12.1998; that the accused had published this in the Malayala Manorama daily dated 5.11.1998. That, after referring to the manner in which the chit was proposed to be conducted, it is alleged, it was conducted as a conventional chit. In other words, the accused have been carrying on a banned activity; that there was a dishonest intention on the part of the accused to cheat the subscribers; to deceive them and to make illegal gain. That the petitioner was a Director. He had raised his voice against the illegal activities of accused 2 to 13, who are responsible for the conduct of the affairs of the company and their actions amounted to offences punishable under Sections 3 to 5 of the Act as also under Sections 417 and 420 of the Indian Penal Code.

4. The court below took cognizance of the complaint and the accused were summoned and proceedings were initiated. Annexure B application was then filed by the complainant u/s 244(2) of the Code, requiring and summoning the attendance of three persons including the Accountant of the 1st accused company and its practising Company Secretary. The 1st witness was also directed to produce certain documents which are: the Kuri Ledger from 15.12.1998 to 31.12.2000, the Monthly Kuri Auction Book, the Monthly Kuri Prizing book and Sitting Fee Register of Board of Directors, Kuri Subscription Address Register, Minutes of the Board of Directors from 1.4.1998 to 31.3.1999 and 1.4.1999 to 31.3.2000 and Auction/Closed Chitty Pass Books of the Kuri.

5. Annexure C counter affidavit was filed by the accused essentially taking up a contention that the prayer made in the application, if allowed, will violate the fundamental right of the accused under Article 20(3) of the Constitution; that essentially the persons sought to be summoned are being compelled to produce documents which are not in their custody and this they cannot be compelled. There was also a contention that the court cannot entertain such an application u/s 245 of the Code.

6. The learned Chief Judicial Magistrate considered all these contentions and insofar as the plea of testimonial compulsion is concerned, the court below went on to hold that the witnesses are not accused, though the first witness is the Accountant, an employee in the 1st accused and that, at any rate, testimonial compulsion under Article 20(3) of the Constitution would not arise in the instant case. The court below found that there was nothing in Section 245 of the Code which stands in the way of the complainant seeking production of documents and seeking the attendance of

the witnesses, if it is necessary for the purpose of an effective prosecution. By Annexure D order, the application Annexure B filed by the complainant was, therefore, allowed. This Crl.M.C has been filed challenging the said order.

7. The contentions taken up by Sri. Santhosh P. Poduval, learned Counsel for the petitioners/accused are essentially two fold:

(1) The witnesses directed to attend the court and produce documents, as sought for in Annexure B application cannot be considered to be in custody of the document, since those are Kuri Registers which are maintained by the accused company in the normal course of business; it is the accused who must be deemed to be in custody of the documents and therefore, the directions to produce the accounts of the company would, therefore, amount to testimonial compulsion prohibited under Article 20(3) of the Constitution.

(2) Once the above position is accepted, then it could be seen that there is no provision in the Code or any other substantive law, which enables the court to direct the accused to produce the documents, Section 91 of the Code; the provision which enables the court to direct a person to attend the court and produce documents has been construed by the Supreme Court in Shyamlal Mohanlal Vs. State of Gujarat, as to exclude an accused from the purview of the Section and in these circumstances, essentially the court had acted without jurisdiction in directing the production of the documents, which in law, should be deemed to be in the custody of the accused as such.

8. He further submits that though Section 165 of the Evidence Act enables the Court to issue an order to the party before it or any of the witnesses to produce any document, the said provision must be construed as excluding an accused. He submits that this is the interpretation adopted by the Supreme Court while construing the scope of Section 91 of the Code in Shyamlal Mohanlal Vs. State of Gujarat, .

9. Per contra, Mr. John S. Ralph submitted that mere production of document has been construed as not amounting to testimonial compulsion under Article 20(3) of the Constitution by the larger bench of the Supreme Court in The State of Bombay Vs. Kathi Kalu Oghad and Others, .

10. The summons sought to be issued in the present case is not to the accused, but to a witness and it is not open to the accused to take up a contention that the Accountant of the company cannot be summoned to the court as a witness. The question as to what is the procedure the court should follow if the 1st witness, the Accountant, pleads helplessness in production of the document, is not a matter which should deter the court from exercising its powers u/s 91 of the Code in causing attendance of a person before the court.

11. Even going by Shyamlal Mohanlal Vs. State of Gujarat, , Section 91 of the Code has been construed as excluding only an accused and an Accountant in a company, which is arrayed as the 1st accused, would obviously not be excluded from the purview of Section 91 of the Code.

12. There is a substantial difference between the power exercisable by a court u/s 91 of the Code and Section 165 of the Evidence Act. There is a difference in the terminology as well. Section 91 of the Code comprehends even a police officer. Section 165 of the Evidence Act is a power which is exercisable only by a court. An analogy from Shyamlal Mohanlal Vs. State of Gujarat, would therefore be inappropriate in considering the scope of Section 165 of the Evidence Act, he contends.

13. The first and foremost issue to be considered in the context of the contentions raised by the parties is whether, even if a direction issued by the court is construed as a direction to the accused to produce the document, whether the same by itself will amount to testimonial compulsion prohibited under Article 20(3) of the Constitution. The concept of testimonial compulsion is relatable to the protection given to an accused from being a witness against himself. The larger Bench of the Supreme Court in The State of Bombay Vs. Kathi Kalu Oghad and Others, considered this aspect elaborately. One of the aspects considered by the larger bench was the correctness of the reasoning given by the Supreme Court in an earlier judgment in M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others, . The scope and ambit of Article 20(3) of the Constitution was considered by the Supreme Court in M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others, and the same merits reproduction:

Broadly stated the guarantee in Article 20(3) is against "testimonial compulsion". It is suggested that this is confined to the oral evidence of a person standing his trial for an offence when called to the witness-stand. We can see no reason to confine the content of the constitutional guarantee to this barely literal import. So to limit it would be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions. The phrase used in Article 20(3) is "to be a witness". A person can "be a witness" not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (see Section 119 of the Evidence Act) or the like". "To be a witness" is nothing more than "to furnish evidence", and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes. So far as production of documents is concerned, no doubt. Section 139 of the Evidence Act says that a person producing a document on summons is not a witness. But that Section is meant to regulate the right of cross-examination. It is not a guide to the connotation of the word "witness", which must be understood in its natural sense, i.e., as referring to a person who furnishes evidence. Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial

compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the Court room. The phrase used in Article 20(3) is "to be a witness" and not to "appear as a witness": It follows that the protection afforded to an accused in so far as it is related to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the Court room, but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. Whether it is available to other persons in other situations does not call for decision in this case.

14. The court then went on to find that the guarantee against testimonial compulsion is also extended to a statement in writing which incriminated a witness when figuring as an accused person. In the words of the court "put a witness" means "to furnish evidence". After referring to the said view taken by the Supreme Court in M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others, , the larger bench said that the substantial view taken by the court earlier seems to be correct, but went on to find in paragraph 11 of the judgment as follows:

The matter may be looked at from another point of view. The giving of finger impression or of specimen signature or of handwriting, strictly speaking, is not "to be a witness." ''To be a witness" means imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation. A person is said ''to be a witness'' to a certain state of facts which has to be determined by a court or authority authorised to come to a decision, by testifying to what he has seen, or something he has heard which is capable of being heard and is not hit by the rule excluding hearsay, or giving his opinion, as an expert, in respect of matters in controversy. Evidence has been classified by text writers into three categories, namely (1) oral testimony; (2) evidence furnished by documents and (3) material evidence. We have already indicated that we are in agreement with the Full Court decision in M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others, that the prohibition in Clause (3) of Article 20 covers not only oral testimony given by a person accused of an offence, but also his written statements which may have a bearing on the controversy with reference to the charge against him. The accused may have documentary evidence in his possession which may throw some light on the controversy. If it is a document which is not his statement conveying his personal knowledge relating to the charge against him, he may be called upon by the Court to produce that document in accordance with the provisions of Section 139 of the Evidence Act, which, in terms, provides that a person may be summoned to produce a document in his possession or power and that he does not become a witness by

the mere fact that he has produced it; and therefore, he cannot be cross-examined. Of course, he can be cross-examined if he is called as a witness who has made statements conveying his personal knowledge by reference to the contents of the document or if he has given his statements in Court otherwise than by reference to the contents of the documents. In our opinion, therefore, the observation of this Court in M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others, that Section 139 of the Evidence Act has no bearing on the connotation of the word ''witness'' is not entirely well-founded in law. It is well established that Cl. (3) of Article 20 is directed against self-incrimination by an accused person. Self-incrimination must mean conveying information based upon the personal knowledge of the persons giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge.

15. In effect, therefore, the larger bench of the Supreme Court specifically referred to the Section to hold that a person summoned to court does not become a witness by the mere fact that he produces a document and cannot be examined or cross-examined unless and until he is called as a witness. Therefore, if the accused is called upon to produce a document, he does not become a witness by reason of the same. Obviously, the accused cannot be compelled to testify against himself, and therefore, the order passed by the court directing the accused to produce a document does not by reason of the said order impute the status of a witness and consequently, mere production of the document will not amount to testimonial compulsion within the meaning of Article 20(3) of the Constitution. The conclusions of the larger bench in paragraph 16 of the judgment is relevant and with respect, merits reproduction:

To be a witness'' is not equivalent to ''furnishing evidence'' in its widest significance, that is to say, as including not merely making of oral or written statements, but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.

16. Once this position is accepted, mere production of a document without compelling the accused to be a witness as such, will not amount to testimonial compulsion within the meaning of Article 20(3) of the Constitution, even if it is assumed that the direction to the Accountant of the 1st accused company to attend and produce the documents would amount to a direction to the accused to produce the documents because they are actually, in law, deemed to be in custody of the documents. The direction to the Accountant to produce the documents by itself cannot be considered as illegal.

17. This brings me to the next question urged by the learned Counsel for the petitioner. The power available to the court to summon the witnesses in criminal proceedings is expressly conferred by Section 91 of the Code and Section 91 of the

Code has been construed as excluding an accused therefrom Shyamlal Mohanlal Vs. State of Gujarat, . It is true that the Supreme Court has in Shyamlal''s case considered the scope of Section 94(1) of Code of Criminal Procedure, 1898 [in pari materia with Section 91 of the present Code] and has held that Section 94 should exclude the accused from its purview. With utmost respect, to an extent, the view taken by the Supreme Court in the latter decision, would be inconsistent with the view taken in the judgment of the majority of the Judges in Shyamlal Mohanlal Vs. State of Gujarat, and to that limited extent, there is a conflict, as has been held by the Supreme Court in V.S. Kuttan Pillai Vs. Ramakrishnan and Another, . Assuming that there is such a conflict, this Court is obviously bound by the view taken by the larger bench in The State of Bombay Vs. Kathi Kalu Oghad and Others, which was decided by a bench consisting of 11 learned Judges whereas the latter decision was by a Constitution Bench of 5 Judges. Further, even if Section 91 is considered as excluding the accused from the purview as such, the present direction is only to the Accountant and not to the accused as such.

18. Mr. Santhosh then referred to the judgment of the Bombay High Court in The State of Maharashtra Vs. The Nagpur Electric Light and Power Co. Ltd. and Another, to contend for the position that summons to an employee of an accused to produce a document will have to be treated as summons to the accused himself and such summons would, therefore, be comprehended by the bar of testimonial compulsion under Article 20(3) of the Constitution. No doubt, the Division Bench judgment supports this contention. But with respect, I am unable to agree with the said reasoning for more than one reason. Firstly, mere production of a document itself has been construed as not amounting to testimonial compulsion under Article 20(3) of the Constitution and secondly, if an Accountant of a Company, by himself is not an accused in a criminal proceedings, but he is only cited as a witness, there is nothing in Article 20(3) of the Constitution or Section 91 of the Code or any other provision of law which would entitle him to claim a privilege of being an accused or for that matter be burdened with the responsibility of defending himself in a criminal case. After all, the protection against testimonial compulsion is a fundamental right adumbrated in Part III of the Constitution and it operates qua a person who is identifiable in the context of his specific status that is attributed to him viz., that he is an accused in a criminal proceedings. A company is a juristic entity, and an employee in a company would not be an accused merely because the company is an accused. The employee may be responsible for the conduct of the affairs of the company. But obviously, he cannot be imputed with the status of an accused unless he is arrayed as an accused in a criminal proceedings. Therefore, the fundamental right which could be claimed by an individual or even by an incorporeal person like an incorporated company always operates as a shield qua an accused person and this is specifically attributable to the status of the person as an accused in the criminal proceedings as such. In such circumstances, the direction to the Accountant of an accused company to produce the documents which are stated

to be in his custody would not be comprehended by Article 20(3) of the Constitution. I am afraid, I am unable to agree with the Division Bench of the Bombay High Court in this regard.

19. Sri. Santhosh then contended that essentially the direction issued by the court to the Accountant of the Company to produce the documents will have to be treated as unenforceable firstly because the documents should be deemed, under law, to be in the custody of the company or at least the Directors of the company, who are responsible for the conduct of the affairs of the company viz., accused 2 to 13 that such persons would be, in law, entitled to refuse to hand over the documents; and in such circumstances the order issued by the court would be in contravention of Section 131 of the Act, which reads as follows:

Production of documents or electronic records which another person, having possession, could refuse to produce: No one shall be compelled to produce documents in his possession or electronic records under his control, which any other person would be entitled to refuse to produce if they were in his possession, or control, unless such last-mentioned person consents to their production.

20. The submission would rest on the premise that the Accountant, any way, will have to ask the Managing Director or other Directors of the first accused company and they are entitled to refuse to produce the same, inasmuch as they are entitled to take up the stand that production of the documents, as such, would amount to testimonial compulsion as far as they are concerned. I am not inclined to accept this submission for more than one reason. Firstly, the question as to whether the witness will be in a position to produce the document as such when he is summoned to attend the court is not really a matter which arises for consideration at this stage. But it is open to the Accountant, as a witness to come and say that he is not in possession of the document and the accused are in possession of the same. It is open to him to come to the court and say that he is not in possession of the document and the accused have taken the stand that they cannot be compelled to produce the document before the court. If that be the stand taken by the accused and here I am really speculating as to what could be the stand taken by the witness in this regard; is the court powerless to direct the accused to produce the document as such? The question of inability of the witness shall be dealt with at the next stage. But, with regard to the question as to whether it will be competent for the court to direct the production of the document, I am inclined to answer in the affirmative. If mere production of the documents by itself does not amount to testimonial compulsion, as has been held by the larger Bench in The State of Bombay Vs. Kathi Kalu Oghad and Others, , then the latter part of Section 131 of the Evidence Act cannot be cited as a reason to stultify what otherwise would legitimately be possible for the court. The latter part of Section 131 would be applicable to a person who is legitimately entitled to refuse to produce the document in court as such.

21. This possibly would apply in the case of a person who would be entitled to claim a privilege in terms of Sections 121 to 131 of the Evidence Act. No doubt, the right of the accused against testimonial compulsion under Article 20(3) of the Constitution is a greater right, in content, then the right of a person, who is entitled to claim privilege. But in circumstances where mere production will not amount to testimonial compulsion, it may not be open to the accused to resist a direction to a witness to attend the court and produce the documents and say that Section 131 stands in the way of the court in summoning the witness and requiring the production of the document.

22. It takes me to the next aspect regarding the power of the court to issue a direction to the accused to produce the document as such. Sri. Santhosh points out in Shyamlal Mohanlal Vs. State of Gujarat, , the Supreme Court has construed Section 91 of the Code as an exclusive source of power to summon the accused and sans Section 91 of the Code, there is no provision in the Code which enables the court to summon a document to be produced by a party as such.

23. Sri. John, on the other hand, submits that Section 91 may have been construed as excluding an accused, but there are still powers available to the court u/s 165 of the Evidence Act to issue summons to any party for production of a document. I am inclined to accept the submission made by Sri. John in this regard. There is nothing in Section 165 of the Code, on an ex facie reading, as to necessarily suggest exclusion of an accused from its purview. But, it is obvious that a direction to produce a document could be issued u/s 165 of the Act only if the Judge is of the opinion that the production of the document is necessary to discover the relevant facts and such opinion could be arrived at by the Judge by reference to the materials already on record. I may also hasten to make it clear that if the Judge is called upon to direct the accused to produce the document by invoking the power u/s 165 of the Evidence Act, it is always open to the accused, even at that stage, to raise a contention that the document the production of which is sought for, would be self-incriminatory and in that circumstance the production of the document will amount to testimonial compulsion within the meaning of Article 20(3) of the Constitution. In such circumstances, it is open to the court to pass a reasoned order by invoking the power u/s 165 of the Act. But, this safeguard which the court will have to adopt, is no reason to adopt an interpretation that Section 165 of the Evidence Act should be construed as to exclude an accused from its purview.

24. For all these reasons, I am of the view that the order passed by the court below directing and summoning the Accountant of the 1st accused-Company for production of the document as sought for, does not suffer from any illegality; nor does it warrant interference by this Court u/s 482 of the Code.

For the reasons mentioned above, Crl.M.C. is found to be bereft of merits and the same is accordingly dismissed. I place on record my appreciation for the extremely studious manner in which both the counsel have prepared their case and have

addressed the court.