

Rajesh Vs. State of Kerala

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Court : Kerala

Decided On : Aug-07-2013

Judge : Honourable Mr.Justice K.Harilal

Appellant : Rajesh

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE K.HARILAL WEDNESDAY, THE 7TH DAY OF AUGUST 2013 16TH SRAVANA, 1935 CrI.Rev.Pet.No. 10 of 2013 ()
----- AGAINST THE

JUDGMENT

IN CC 140/2010 of J.M.F.C.-I MUVATUPUZHA, DATED REVISION PETITIONER/ACCUSED:- ----- RAJESH S/O. BHASKARAN, PRATHUSHA VEEDU, KATTAPPUZHA VILLAGE THIRUVALLA TALUK (NOW RESIDING AT SOUTH MANAR CITY APARTMENT RAVIPURAM, ERNAKULAM). BY ADVS.SRI.NIREESH MATHEW SRI.C.C.THOMAS (SR.) RESPONDENT/COMPLAINANT AND STATE:- ----- STATE OF KERALA REP. BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA ERNAKULAM. BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN. THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 01-07-2013, THE COURT ON 07-08-2013 PASSED THE FOLLOWING: "CR" K.

HARILAL, J.

===== CrI.R.P.No. 10 of 2013. ===== Dated this
the 7th August, 2013.

ORDER

This Revision Petition is filed challenging the impugned order passed in CMP.No.147/2012 in CC.No.140/2010 on the files of the Judicial First Class Magistrate Court, Muvattupuzha, dismissing the above petition filed by the Revision Petitioner under Section 239 of the Code of Criminal Procedure, seeking discharge from prosecution. The Revision Petitioner is the sole accused in CC.No.140/2010 on the files of the Judicial First Class Magistrate Court, Muvattupuzha as well as Crime No.14/2009 in CCPS/Kerala, Thiruvananthapuram of Cyber Crime Police Station, Kerala, from which the above Calender Case had been arisen.

2. Originally he was the accused in Crime No.1499/2010 of Muvattupuzha Police Station registered for CrI.RP.No.10/2013. 2 the offence punishable under Section 66 of the Information Technology Act (for short 'IT Act') and the Crime No.399/2009 of the Vanchiyoore Police Station registered for the offence punishable under Section 66 of the IT Act and Section 420, 379 r/w. Section 34 of the Indian Penal Code. These two crimes were registered alleging the same act alleged to have been committed by the accused. But, by the order not D5/76776/2009 issued by the Director General of Police, the above two cases were transferred to Cyber Police Station, SCRB, Thiruvananthapuram. Now, after investigation, a final report has been filed by the Circle Inspector of Police, Cyber Police Station, Thiruvananthapuram before the Judicial First Class Magistrate Court, Muvattupuzha against the Revision Petitioner/accused alleging offence punishable under Section 469 of the IPC alone, after deleting the offence punishable under Section 66 of the IT Act and also all other offences alleged against the Revision Petitioner/accused for the offences punishable CrI.RP.No.10/2013. 3 under the India Penal Code.

3. The prosecution case in brief is as follows: On 3.7.2009, the Revision Petitioner/the accused who is the Assistant Manager of the Zonal Office of the

State Bank of Travancore (SBT, Panampilly Nagar), Ernakulam had used the E-mail address of the Muvattupuzha branch of the State Bank of Travancore and sent a message to CW6, who is the Assistant General Manager and also the Head of the Vigilance Department of SBT, Head Office, Thiruvananthapuram, stating as follows: "Your bank is doing unduly favour to M/s.K C Wood Industries Ltd - Wood manufactures of Muvattupuzha. The project proposal submitted by us is rejected citing various reasons by your regional manager. At the same time the limit enjoyed by K C Wood Industries has enhanced from 25 Lacs to 50 Lacs. We are doing same business and the K C Wood Industries has not doing business for a limit of 50 Lacs. So it's unduly personal favour done by your regional manager. Please enquire about such proposals sanctioned and rejected from Muvattupuzha." It is alleged that the Revision Petitioner had forged and sent CrI.RP.No.10/2013. 4 an electronic record in the name of an enterprenour by name V.K.Ibrahim & Sons, which was not in existence on 3.7.2009, from the internet cafe owned by the Cw4 at Panampilly Nagar, Ernakulam. Thus, the Revision Petitioner/accused had thereby caused a loss of reputation to the Bank and Cw1 by sending the above message using the forged E-mail address and thereby committed the offence punishable under Section 469 of Cr.PC.

4. The Revision Petitioner has filed CMP.No.147/2012, in the above case seeking discharge from prosecution mainly on the ground that Cyber Police Station, Thiruvananthapuram has no authority or power to file a final report to charge sheet him for the offence punishable under the IPC alone, when there is no police charge under the Information Technology Act in the final report. Similarly, the allegations in the charge even if admitted at its entirety, do not disclose the offence alleged CrI.RP.No.10/2013. 5 against him. The learned Magistrate after hearing both parties dismissed the petition by the impugned order. This order is under challenge in this Revision Petition.

5. The learned Senior counsel for the Revision Petitioner Sri.C.C.Thomas advanced arguments based on the grounds raised in the Revision Petition. The learned Senior counsel submitted that in investigation no offence punishable under the IT Act was disclosed and the Revision Petitioner is not charge sheeted thereunder. So, the Station House Officer of the Cyber Police Station,

Thiruvananthapuram has no authority or power to file final report against the Revision Petitioner for an offence punishable under the IPC or any statute other than the IT Act. Thus, the prosecution itself against the Revision Petitioner on the basis of the final report filed by the Cyber Police Station is not maintainable. Secondly, even if the case is admitted at its entirety, the allegations against the Revision Petitioner do not disclose any offence under CrI.RP.No.10/2013. 6 Section 469 of the IPC. The disputed message which is alleged to have been sent, even if admitted, that does not disclose any kind of harm or injury to the reputation of either Cw1 or the Bank. Therefore, the court below ought to have allowed the petition and thereby discharged the Revision Petitioner from prosecution. Thirdly, the Senior counsel contended that even if the allegations are taken at its face value, the Investigating Officer failed to collect any evidence or material objects so as to prove the case against the Revision Petitioner beyond reasonable doubt. Being an offence alleged to have been committed through an electronic media, in the absence of material object by which the alleged message is said to have been sent, no offence alleging fabrication of electronic record can be proved. In short, the prosecution is only an experimental exercise intended to harass the Revision Petitioner by abusing the process of the court. The complaint was filed vindictively by another Officer of the same Bank to wreck-vengience CrI.RP.No.10/2013. 7 against the Revision Petitioner without any basis.

6. Per contra, the learned Public Prosecutor advanced the argument to justify the impugned order. He submits that originally a crime was registered under the IT Act and was transferred to the Cyber Police Station for investigation. In such cases even if the investigation does not disclose the offence under IT Act, since the investigation has already been completed, the Station House Officer of the Cyber Police Station has power and authority to charge sheet the accused for the offences punishable under IPC even in the absence of any offence under the IT Act. Similarly, he straneously contended that the act allegedly done by the Revision Petitioner would constitute forgery and the contents of the message allegedly sent by the Revision Petitioner would harm the reputation of the Bank as well as the Cw1 and thereby offence under Section 369 is attracted. The learned Public Prosecutor cited H.N.Rishbud v. State of Delhi (AIR 195.SC 196), CrI.RP.No.10/2013. 8 Prakash Kumar v. State of Gujarat (2005(2) SCC 409),

Bhanuprasad v. State of Gujarat (AIR 196.SC 1323.and State of Tamil Nadu v. Nalini (AIR 199.SC 2640).

7. I have bestowed my anxious consideration to the rival contentions advanced by the learned Senior counsel for the Revision Petitioner and the learned Public Prosecutor, at the Bar.

8. In view of the rival contentions, the first and foremost question that arises for consideration is whether the Cyber Police Station of Kerala having jurisdiction over the entire State of Kerala, constituted to investigate any offence committed under the Information Technology Act, 2000 have power or authority to file final report charging offences under the India Penal Code or under any penal statute other than the Information Technology Act, in the absence of charge for any of the offences under the Information Technology Act, 2000 in the final report.

9. Let us have look at the general law provided under CrI.RP.No.10/2013. 9 Cr.PC for investigation. Section 156 of the Cr.PC deals with the Police Officer's power to investigate cognizable case. According to this Section, any officer in charge of any Police Station may, without order of a Magistrate, investigate any cognizable case which a court having jurisdiction over a local area within the limits of such Station would have power to enquire into or try under the provisions of Chapter XIII. According to Section 177 of the Cr.PC, every offence ordinarily be enquired into and tried by a court within whose local jurisdiction it was committed. According to Section 4 of the Cr.PC, all offences under IPC shall be investigated and enquired into, tried and otherwise dealt with according to the provisions hereinafter contained in Cr.PC. But, according to sub section 2 of Section 4, all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions but, subject to any enactment for the time being in force regulating the manner or place of investigating, CrI.RP.No.10/2013. 10 inquiry into, trying or otherwise dealing with such offences. Thus, according to the general law, the investigation of an offence under IPC is vested with the Police Station having local jurisdiction over the area within which the offence has been committed and special procedure or power or jurisdiction can be prescribed for investigation of an offence under any special enactment for the time being in force.

Section 5 saves special or local law for the time being in force or special jurisdiction or power conferred or any special form of procedure prescribed by any other law, for the time being in force.

10. Going by the GO.No.909/2004/Home dated 15.4.2004, it could be seen that the Government of Kerala under sub Section 2(s) of the Cr.PC and Section 78 of the Information Technology Act, 2000, constituted and declared Cyber Police Station known as 'Cyber Police Station Kerala' having jurisdiction over the entire State of Kerala to investigate any offence committed under the Information Technology Act, 2000. An explanatory note is also appended to this notification. Though, the explanatory note does not form a part of the notification it says that the explanatory note is intended to explain the purport of the notification. The explanation clarifies that Cyber Police Station is sanctioned in view of the upsurge in cyber crimes including the criminal intimidation on internet, Hate mail, Cyber stalking, website hacking, theft in internet hours, credit card frauds, child pornography, internet sexual harassment, internet bank frauds and all other crimes where computers are instrumental to crime. The explanatory note further clarifies that "Cyber Police Station shall investigate any offence committed under the Information Technology Act, 2000 and this notification is intended to achieve the above object." To sum up, by the notification, investigation of the offences falling under the Information Technology Act, has been carved out from the general law applicable for investigation as provided under Cr.P.C. and given to Cyber Police Station, Kerala.

11. But, on an analysis of the said notification, I am of the opinion that the scope and extent of the jurisdiction and power of the 'Cyber Police Station, Kerala' constituted under the above notification is confined to and regulated by the Rule that emerges from the legal maxim "*Expressio unius est exclusio alterius*" i.e., the express mention of one thing implies exclusion of another. The Law Lexicon explains the maxim - whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative viz., that the thing shall not be done otherwise. This Rule had been adopted in various judicial precedents from *Taylor v. Taylor* (1875(1) Ch D

426) to GVK Industries Ltd. and another v. Income Tax Officer and another (2011(4) SCC 36). This Rule adopted in Taylor v. Taylor is well recognised and is founded on sound principle. The court took the view that if a statute has conferred a power to do an act and has laid down the method in which CrI.RP.No.10/2013. 13 that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than which has been prescribed. This view has been adopted in Nazir Ahmed v. King Emperor (AIR 193.PC 253(2)). In GVK Industries Ltd. and another v. Income Tax Officer and another (2011 (4) SCC 36), the Supreme Court applied the said Rule as shown below: "In this case it is the territory of India that is specified by the phrase "for the whole or any part of the territory of India". Expressio unius est exclusio alterius - the express mention of one thing implies the exclusion of another. In this case Parliament has been granted powers to make laws "for" a specific territory - and that is India or any part thereof, by implication, one may not read that Parliament has been granted powers to make laws "for" territories beyond India." 12. When we apply the Rule of "Expressio unius est exclusio alterius" in the instant case, it can be held that when a special notification expressly confers power and jurisdiction to investigate offences falling under a Special CrI.RP.No.10/2013. 14 Statute only to a special investigating agency or to a particular Police Station, the Rule making authority is deemed to have intentionally excluded Power and Jurisdiction to investigate all other offences, falling under any Statute other than that Special Statute. To sum up: An implied exclusion of the investigation of all other offences from the purview or authority of the Cyber Police Station Kerala is inherent in the notification itself.

13. When an act is prescribed to be done in a specific way or when a power or authority is conferred to another with a direction to exercise power or authority for the performance of a specific thing or purpose, such act shall be done or performed in such a way only and such power or authority shall be exercised for the purpose for which the power has been conferred only and nothing more or nothing less than that. Going by the notification, in the light of explanatory note, I am of the opinion that obviously, the Cyber Police Station Kerala having sphere of authority over CrI.RP.No.10/2013. 15 the entire State of Kerala is constituted for investigating offences coming under the Information Technology Act, 2000 only and nothing more than that. On a combined reading of notification and explanation

thereunder, it is very clear that Cyber Police Station has the power to investigate offences coming under the Information Technology Act only and no other offences can be investigated by them. Necessarily, it follows that Cyber Police Station has no power or authority to file final report in the absence of any offence under the Information Technology Act in the final report. When none of the offences under Information Technology Act had been disclosed in investigation, the Station House Officer, Cyber Police Station should have sent back the case to the Police Station under which the offences under the Indian Penal Code had allegedly been committed. Therefore, I find that the final report has been filed without power or authority conferred by the notification and no prosecution can be launched on the Crl.RP.No.10/2013. 16 basis of that final Report.

14. But here, indisputably no offence has been disclosed in investigation under the Information Technology Act. Consequently, the Revision Petitioner has not been charge sheeted for any of the offences under the Information Technology Act in the final report. The present final report is filed charging offence under the Indian Penal Code alone for which the Cyber Police Station has no power or authority. Whether the Cyber Police Station has power to investigate offences coming under the penal code or any other penal statute other than the Information Technology Act along with offences coming under the Information Technology Act and to file final report charging such offences under other statutes also along with the offences under the Information Technology Act? Considering the facts of the instant case, this question does not arise for consideration and both parties did not address on that issue as it is not necessary. So, I leave it open there. Crl.RP.No.10/2013

15. The decision in *Prakashkumar v. State of Gujarat* [(2005) 2 SCC 409] is not applicable to the instant case. Thereby interpretation of Sec.12(1) and (2) of the TADA, the Apex Court held that once the other offences under other Statutes are connected with the offence under the TADA, if the accused is charged with all the offences, the designated court is empowered to convict the accused for the offence under any law notwithstanding the fact that no offence under the TADA is made out. Here the question is entirely different. There, the Section 12(1) of the TADA empowers the designated court to try the offences under different Statutes

other than the TADA along with the TADA. But here the notification does not permit so. The Cyber Police Station cannot file charge sheet under the Indian Penal Code. I have considered the decisions reported in Bhanuprasad v. State of Gujarat (AIR 196.Supreme Court 1323); State v. Nalini [(1999) 5 SCC 253.and State of Tamil Nadu v. Nalini (AIR 199.SC 2640). CrI.RP.No.10/2013. 18 But these decisions do not render any assistance to justify the lack of power involved in this case. The learned Public Prosecutor further points out that the decision in H.N. Rishbud v. State of Delhi (AIR 195.SC

196) a defect or illegality in investigation, however, serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. I am of the opinion that the said proposition cannot be imported to the case where the Police Officer who has no power or authority, has filed a final report, which is incurable in all respects.

16. The next point for consideration is whether there is any material documents to prove that the offence had been committed by the revision petitioner. What is revealed in the investigation is that the message had been sent from the Internet Cafe of Cw4 on 3/7/2009, using the IP address allotted to Cw4. Admittedly on 3/7/2009, 11 persons had visited the Internet Cafe and used the facilities on hire. Since 45 days have already been elapsed, video CrI.RP.No.10/2013. 19 clippings had been deleted automatically. Besides, Cw4 himself had effected formatting and also wiped off several times through wiping tools. The video clippings of those who visited the Cafe as customers on 3/7/2009 are not available according to Cw4 and it cannot be decoded again as already wiped off by automatic deletion. The statement of Cw4 is supported by the statement of his employees Cw7 and Cw8 also. Thus, the crucial material object is not available in the hands of prosecution. Instead of video clippings of the customers on 3/7/09, the prosecution has seized C.Ds. containing visuals of those who visited the Cafe on 9/10/09 and 16/10/09 merely on the reason that the Revision Petitioner had visited the Cafe on those days ie., after three months. Indisputably, these C.Ds. will not serve the purpose of proving the prosecution case. I am of the opinion that the material evidence to show the person who sent the message is not available with the prosecution.

17. Similarly, the statements of Cw4 and two CrI.RP.No.10/2013. 20 employees Cw7 and Cw8, show that even in the log book the number and details of each cabin which was used by each customer including the accused on 3/7/09 is not available in the log book as that column is left blank by omission. Therefore, even if the revision petitioner visited the Cafe on 3/7/09, the computer which is said to have been used by the revision petitioner is not identifiable. In the final report, it is also stated that since the video clippings containing the visuals of the persons who visited the Cafe on 3/7/09 are not available, the computer and its hard disc have not been seized and taken into custody by the police as Material Objects.

18. The last point raised by the learned Senior counsel is that the contents of the message do not cause any harm to the reputation of either Cw1 or the Bank. It is pertinent to note that the allegation is that the project proposal of one V.K. Ibrahim was rejected on various reasons. But at the same time, the credit limit enjoyed by CrI.RP.No.10/2013. 21 K.C. Wood Industries has been increased from Rs.25 lakhs to Rs.50 lakhs. It is also alleged that the same is an undue personal favour done by the Regional Manager. It is to be noted that no kind of undue pecuniary benefit, ill-will, ulterior motive or mala fides had been attributed against the said Regional Manager. In short, the allegation is that the attitude shown by the Regional Manager was discriminatory or, at the most, he has violated the norms or showed some undue favour. The allegation is thus confined to an act done in discharge of the official duty and nothing more than that. More pertinently, the message was intended to make an enquiry on his complaint as obviously the same is the concluding request. I am of the opinion that the message can be depicted as a complaint and if the allegation is not true, it is only a false complaint. It is to be noted that Cw6 Job Abraham, the Asst.Manager, Vigilance Wing as well as the recipient of the message had given a statement that no independent vigilance enquiry had been CrI.RP.No.10/2013. 22 conducted so far by the Vigilance Department of the State Bank of Travancore, as he believed the statement of Branch Manager and Zonal Manager, despite the receipt of this message indicating discrimination in granting loan. I am of the opinion that the message does not disclose an intend to harm the reputation of the Bank or Cw1, the essential ingredient constituting the offence under Sec.369 Indian Penal Code; but intended for embarking an enquiry.

19. More interestingly, the Deputy Manager, State Bank of Travancore, Muvattupuzha Branch, has given a statement that K.C. Wood Industries had submitted an application for enhancing their credit limit from Rs.25 lakhs to Rs.50 lakhs and that application is being kept in the office and he is ready to produce it. No independent investigation has been made by the police to find out whether the allegations in the message are true? No such materials are available in the final charge except the statements of complainants. CrI.RP.No.10/2013

20. Thus, the crucial Material Objects on which the prosecution case rests are not available, even according to the prosecution. Thus, there is no material to connect the revision petitioner with the alleged offence. So, I am of the opinion that not only the charge in the final report but also the materials produced along with the final report do not disclose the offence said to have been committed by the accused even if the uncontroverted prosecution case is admitted. Thus, there are no sufficient grounds to prosecute the revision petitioner even if the uncontroverted prosecution case is admitted. If the prosecution is allowed to continue with trial, certainly it will be a futile experimental exercise as well as abuse of the process of the Court.

21. Consequently, the impugned order under challenge passed by the court below is set aside and C.M.P.No.147/12 in C.C.No.140/10 on the files of the Judicial First Class Magistrate's Court, Muvattupuzha, will CrI.RP.No.10/2013. 24 stand allowed. In the result, the revision petitioner is discharged from the prosecution for the offences alleged against him in the above Calendar Case. Sd/- K. HARILAL, (JUDGE) Kvs/- -// true copy //- PA TO JUDGE.

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