

Priya Vinod, vs Bagirathi

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Court : Kerala

Decided On : Feb-06-2023

Judge : Honourable Mr.Justice K. Babu

Appeal No. : Crl.MC/595/2023

Appellant : Priya Vinod,

Respondent : Bagirathi

Judgement :

CRL.MC NO. 595 OF 2023 1

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K. BABU MONDAY, THE 6TH DAY OF FEBRUARY 2023 / 17TH MAGHA, 1944 CRL.MC NO. 595 OF 2023 AGAINST ST 1492/2015 OF CHIEF JUDICIAL MAGISTRATE ,THRISSUR PETITIONERS/ACCUSED: 1 PRIYA VINOD, AGED 43 YEARS D/O GOVINDANKUTTY, KOLOTH HOUSE, OLARIKKARA, ARANATTUKARA P.O, THRISSUR DISTRICT-, PIN - 680006 2 GOVINDANKUTTY, AGED 82 YEARS S/O NANIKUTTYAMMA KOLOTH HOUSE, OLARIKKARA, ARANATTUKARA P.O THRISSUR DISTRICT-, PIN - 680006 BY ADVS. K.M.MUHAMMED HUSSAIN K.V.SREE VINAYAKAN SMIJOSH K.M. RESPONDENTS:

1 BAGIRATHI W/O PRAKASAN.V.S.N, KOLOTH HOUSE, OLARI
P.O.THRISSUR DISTRICT-, PIN - 680012 2 STATION HOUSE
OFFICER THRISSUR TOWN WEST POLICE STATION. THRISSUR,
PIN - 680003 3 THE DISTRICT POLICE CHIEF THRISSUR CITY,
THRISSUR, PIN - 680010 R2 & R3 BY SMT.M.K.PUSHPALATHA-
PUBLIC PROSECUTOR THIS CRIMINAL MISC. CASE HAVING COME
UP FOR ADMISSION ON

06.02.2023, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:
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ORDER

In this Crl.M.C filed under Section 482 of Cr.P.C, the petitioners who are the accused in S.T.No.1492/2015 on the file of the Chief Judicial Magistrate Court, Thrissur (for short the Court below) challenge Annexure A5 common order dated 4.1.2023. Respondent No.1 is the complainant.

2. The complainant instituted a complaint against the accused alleging the offence punishable under Section 499 r/w Section 500 of IPC.

3. The allegation in the complaint is that the accused sent Ext.P1 complaint containing defamatory statements against the complainant to the District Police Chief, Thrissur.

4. The Court below took cognizance of the offence alleged and

proceeded with the trial. During the course of trial, the complainant produced Ext.P1, the copy of the complaint, stated to have been forwarded by the accused to the District Police Chief, obtained under the Right to Information Act.

5. It was later realised that Ext.P1, an information contained in CRL.MC NO. 595 OF 2023 3 an electronic record was not supported by the certification as provided in Section 65B of the Indian Evidence Act.

6. The complainant preferred CrI.M.P.No.5717/2022, a petition under Section 91 of Cr.P.C seeking a direction to the Station House Officer, Town West Police Station to produce the required certification under Section 65B of the Evidence Act. The complainant also filed CrI.M.P.No.5718/2022 under Section 311 of Cr.P.C, to re-open the evidence.

7. The petitions were resisted by the accused on the ground that permitting production of document under Section 65B of the Evidence Act at the fag end of the trial would cause prejudice to the accused.

8. The trial court repelled the contentions raised by the accused and allowed both the petitions by the impugned common order.

9. Heard the learned counsel for the petitioners/accused and the learned Senior Public Prosecutor.

10. The complainant alleges that the accused made defamatory statements in an e-mail communication to the police authorities. During the trial, Ext.P1 ,an information contained in the e-mail communication CRL.MC NO. 595 OF 2023 4 obtained from the relevant electronic record, was marked in evidence. Ext.P1 was obtained by the complainant as per the relevant provisions of the Right to Information Act. Ext.P1 was not supported by the certification under Section 65B of the Evidence Act.

11. On realising the defect in Ext.P1, the complainant filed a

petition under Section 311 of Cr.P.C, to reopen the evidence and another petition under Section 91 of Cr.P.C for the production of the certificate under Section 65B of the Evidence Act.

12. The trial court allowed C.M.P.No.5718/2022 and ordered re- opening of the evidence. In C.M.P.No.5717/2022, a modified relief was granted directing the District Police Chief, Thrissur to produce the printout of Ext.P1 along with the certificate under Section 65B of the Evidence Act.

13. The learned counsel for the petitioners/accused contended that

the complainant had enough opportunity to cure the defect in Ext.P1. It was further contended that it was after knowing the defence of the accused, the complainant came out with the application to re-open evidence and sought direction to the police authorities concerned to produce the certificate under Section 65B of the Evidence Act.

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14. The object underlying Section 311 of Cr.P.C is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The significant expression that occurs is at any stage of any inquiry or trial or other

proceeding under this Code. However, the discretionary power conferred on the court under Section 311 of Cr.P.C has to be exercised judiciously. (Vide V.N.Patil v. K.Niranjan Kumar and others [(2021)3 SCC 661].

15. In Vijay Kumar v. State of U.P [(2011)8 SCC 136], the Apex Court held that the discretionary power should be exercised consistently

with the provisions of the Code and the principles of criminal law. The Apex Court observed that the discretionary power conferred under Section 311 of Cr.P.C has to be exercised judiciously for the reasons stated by the Code and not arbitrarily or capriciously.

16. The learned counsel for the petitioners relied on Vijayadas K.V v. State of Kerala (2017(4) KHC 91) to contend that the prosecution ought not be allowed to fill up any lacuna during the trial. CRL.MC NO. 595 OF 2023 6

17. In Central Bureau of Investigation v. R.S.Pai and another

(2002(5)SCC 82), the Supreme Court held that the only exception to this general rule is that the prosecution should not be allowed to fill up any lacuna during a trial. If the prosecution had mistakenly not filed a document, the said document can be

allowed to be placed on record. In CBI (supra), the Apex Court held thus:

7. From the aforesaid sub-sections, it is apparent that normally, the Investigating Officer is required to produce all the relevant documents at the time of submitting the charge-sheet. At the same time, as there is no specific prohibition, it cannot be held that the additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the report or charge-sheet, it is always open to the Investigating Officer to produce the same with the permission of the Court. In our view, considering the preliminary stage of prosecution and the context in which Police Officer is required to forward to the Magistrate all the documents or the relevant extracts thereof on which prosecution proposes to rely, the word 'shall' used in sub-section (5) cannot be interpreted as mandatory, but as directory. Normally, the documents gathered during the investigation upon which the prosecution wants to rely are required to be forwarded to the Magistrate, but if there is some omission, it would not mean that the remaining documents cannot be produced subsequently. Analogous provision under Section 173(4) of the Code of Criminal Procedure, 1898 was considered by this Court in *Narayan Rao v. The State of Andhra Pradesh* [(1958) SCR 283 at 293] and it was held that the word 'shall' occurring in sub-section 4 of Section 173 and sub-section 3 of Section 207A is not mandatory but only directory. Further, the scheme of sub-section (8) of Section 173 also makes it abundantly clear that even after the charge-sheet is submitted, further investigation, if called for, is not precluded. If further investigation is not precluded then there is no question of not

CRL.MC NO. 595 OF 2023 7 permitting the prosecution to produce additional documents which were gathered prior to or subsequent to investigation. In such cases, there can not be any prejudice to the accused. Hence, the impugned order passed by the Special Court cannot be sustained.

18. The lacuna in a case need not be confused with the error that

occurred due to an oversight committed by a lawyer during the trial in eliciting relevant answers from the witnesses. Such an error or an omission cannot be understood as lacuna, which a Court is not expected to allow the parties to fill up. The lacuna can only be interpreted as an intrinsic weakness of the case of a party. The principle of fair trial demands that no party in a trial can be denied the opportunity to correct errors. The Court should be magnanimous in allowing such mistakes to be corrected. The function of a criminal Court is the administration of criminal justice and not to concentrate on omissions and errors. This view gets support from the decision of the Apex Court in *Rajendra Prasad v. Narcotic Cell* (AIR 1999 SC 2292).

19. The learned counsel for the petitioners relying on *Sarath Kumar v. State of Kerala and another* (2019(5) KHC 298) contended that no court can issue a summons to any person under Section 91 of Cr.P.C to produce a document after preparing it. In the present case, CRL.MC NO. 595 OF 2023 8

admittedly, the document had been transmitted to the police authorities concerned through e-mail. The Court below has directed production of a computer generated print of the same with necessary certification as provided under Section 65B of the Evidence Act.

20. The certificate required under Section 65-B (4) is a condition

precedent to the admissibility of evidence by way of electronic record. Oral evidence in the place of such certificate cannot suffice as the section is a mandatory requirement of the law. (vide : *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal* (2020)7 SCC 1, *Anvar P.V v. P.K.Basheer* (2014(10) SCC 473)

21. When this is the legal position, the certificate as required

under Section 65-B of the Evidence Act which was not procured along with the electronic record is to be permitted to be produced later as it is essential for the proper disposal of the case. Such a certificate may be given even long after the electronic record had actually been generated from the computer. (vide : *Arjun*

Panditrao Khotkar v. Kailash Kushanrao Gorantyal [(2020)7 SCC 1] and State represented by Inspector of Police, Central Bureau of Investigation v. Rev. Fr.Varghese Thekkekkara [2023 (1) KHC 432])

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22. Therefore, the ratio in Sarath Kumars case (Supra) is no way

applicable to the present facts. In Anwar P.Vs case (Supra) on the scope of Section 91 of Cr.P.C, the Apex Court held that whenever any Court considers that the production of any document is necessary or desirable for the purposes of any trial under the Code by or before such court, such court may issue a summons, to the person in whose possession or power such document is believed to be, requiring him to attend and produce it and therefore a wide discretion has been conferred on the court enabling it during the course of trial to issue summons to a person in whose possession or power, a document is believed to be, requiring him to produce before it, if the court considers that the production of such document is necessary or desirable for the purpose of

such trial. The Apex Court added that such power can be exercised by the court at any stage of the proceedings before the judgment is delivered and the court must exercise such power if the production of such document is necessary or desirable for the proper decision of the case.

23. In the given case, the crucial document relied on by the complainant as the foundation of the pleadings is Ext.P1, an e-mail communication containing defamatory statement forwarded to the police CRL.MC NO. 595 OF 2023 10

authorities concerned. He applied for getting a copy of the same, but mistakenly failed to sought for a certification as provided in Section 65B of the Evidence Act. Now, the trial court has directed production of the printout of Ext.P1 along with the certification under Section 65B of the Evidence Act. I am unable to find any ground that would cause prejudice to the accused due to the production of Ext.P1 along with the

certification as required. The Court below recorded the finding that the matter would come under the second part of Section 311 of Cr.P.C and the court shall exercise its discretion positively. I am unable to find any irregularity or illegality in the findings of the Court below. The petitioners have not succeeded in establishing any grounds to succeed in

this Crl.M.C. It is made clear that the Court below shall give a copy of the document to the accused before the same is sought to be admitted in evidence. It is also made clear that the Court below shall decide the case uninfluenced by any of the observations made by this Court. The Crl.M.C is dismissed as above. Sd/- K. BABU JUDGE ab CRL.MC NO. 595 OF 2023 11 APPENDIX OF CRL.MC 595/2023 PETITIONER ANNEXURES Annexure A1 A TRUE COPY OF THE S.T NO.1492 OF 2015 ON THE FILE OF CHIEF JUDICIAL MAGISTRATE COURT THRISSUR Annexure A2 THE TRUE COPY OF THE CRL.MP.NO 5717 OF 2022 IN

S.T NO.1492 OF 2015 ON THE FILE OF CHIEF JUDICIAL MAGISTRATE COURT THRISSUR FILED UNDER SECTION SECTION 91 OF CR.PC Annexure A3 THE TRUE COPY OF THE CRL.MP .NO 5718OF 2022 IN S.T NO.1492 OF 2015 ON THE FILE OF CHIEF JUDICIAL MAGISTRATE COURT THRISSUR FILED UNDER SECTION SECTION 311 OF CR.PC Annexure4 THE TRUE COPY OF THE OBJECTION FILED BY THE PETITIONERS ON ANNEXURE A2 Annexure A5 THE TRUE COPY OF THE COMMON ORDER DATED 04-

01-2023 IN CRL.MP .NO 5718OF 2022 AND CRL.MP .NO 5717 OF 2022 IN S.T NO.1492 OF 2015 ON THE FILE OF CHIEF JUDICIAL MAGISTRATE COURT THRISSUR RESPONDENTS ANNEXURES: NIL

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