

Abbas Beary Vs. the State of Mysore

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Court : Karnataka

Decided On : Nov-14-1963

Reported in : AIR1965Kant35; AIR1965Mys35; 1965CriLJ187

Judge : B.M. Kalagate, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 251-A(1), 251-A(2), 435, 436, 438 and 439; [Indian Penal Code \(IPC\), 1860](#) - Sections 406

Appeal No. : Criminal Revn. Petn. No. 211 of 1963

Appellant : Abbas Beary

Respondent : The State of Mysore

Advocate for Pet/Ap. : Mr. Jagannatha Setty

Judgement :

ORDER

(1) By this Petition, the petitioner has challenged the correctness of the order, dated the 23rd May 1963, passed by the District Magistrate of South Kanara, in Criminal Revision petition No. 3/63 filed by the State in his Court. By that order, he set aside the order of discharge passed by the Additional District Munsiff-Magistrate in C.C. 519/62 and directed him to make further inquiry into the case.

(2) The question raised in this petition relates to the power of the District Magistrate to order to inquiry acting under Section 436 of the Code of Criminal Procedure, into the case of a person accused of an offence who has been discharged by the Magistrate under sub-section (2) of S. 251-A of the Cri. P. C.

(3) The facts leading to this petition may briefly be stated as follows :

(4) The petitioner was charge-sheeted by the Karkal Police for an offence under S. 406, I.P.C. on the allegation that 5th May 1961 and 5th November 1961 he ran a Fund called 'The Kury Chit Fund', and having been entrusted with the monies belonging to the various witnesses towards the Fund to the tune of about Rs.300/- he dishonestly misappropriated the same in violation of the legal contract and thereby committed a criminal breach of trust.

(5) The learned Additional District Munsiff-Magistrate considered the documents referred to in Section 173, heard the Public Prosecutor and the counsel for the accused, and held that the charge against the accused was groundless. Consequently, he discharged the accused under sub-section (2) of Section 251-A of the Cri. P.C.

(6) The State preferred a revision petition in the Court of the District Magistrate of South Kanara at Mangalore. The learned District Magistrate disagreed with the conclusion reached by the trial magistrate as, in his view, there are materials on record sufficient to make out a prima facie case against the accused and the Magistrate was in error in discharging him. He, therefore, acting under Section 436, Cri P.C, directed the Magistrate to make further inquiry into the case. The petitioner has challenged the correctness of this order in this Court.

(7) Mr. Jagannatha Setty, appearing for the petitioner, challenges the validity of the order of the District Magistrate by contending that he had no jurisdiction to make an order of inquiry into the case against the accused who has been discharged by Magistrate under sub-section(2) of Section 251-A of the Cri. P.C. He urges that in effect, what the District Magistrate has done is to order a retrial of the accused which he has no power to do under Section 436,Cri. P.C.. The effect of the order of discharge passed by the Magistrate under sub-section(2) of S. 251-

A is to acquit the accused of the offence with which he was charged. The District Magistrate, therefore, it is urged, is not competent to direct a retrial. If at all the District Magistrate, therefore, it is urged, is not competent to direct a retrial. If at all the District Magistrate finds himself unable to agree with the conclusion reached by the trial Magistrate on the materials in the case, all that he could do was to act under Section 435, Cri. P.C. and make a reference to the High Court under Section 438, Cri P.C. for necessary orders but he himself has no power to direct an inquiry into the case which has the effect of asking the Magistrate to frame a charge against the accused and proceed with the trial.

(8) In support of his contention, the learned counsel essentially relied, in the first instance, on the provisions of Section 251-A of Cri P.C. itself and then on the decisions to which I shall make a reference at the appropriate place.

(9) Now, what is contended is that S. 251-A appears in Chapter XXI of the Code of Criminal Procedure which deals with the trial of warrant cases by Magistrates. Section 251 provides that

'In the trial of warrant-cases by Magistrates, the Magistrate shall :

(a) in any case instituted on a police report, follow the procedure specified in S. 251-A; and

(b) in any other case, follow the procedure specified in the other provisions of this Chapter'.

(10) Section 251-A provides for the procedure to be adopted in cases instituted on police report. These two sections were substituted by Act 26 of 1955.

(11) Sub-section (1) of S. 251-A provides:

'When, in any case instituted on a police report, the accused appears or is brought before a Magistrate at the commencement of the trial, such Magistrate shall satisfy himself that the documents referred to in Section 173 have been furnished to the accused, and if he finds that the accused has not been furnished with such documents or any of them, he shall cause them to be so furnished.'

(12) Sub-section (2) provides:

'If, upon consideration of all the documents referred to in Section 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 him.'

(13) If, however, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which he is competent to try and pass an adequate sentence, he shall then frame a charge in writing against the accused, under sub-section(3) and then follow the procedure prescribed by subsections (4) to (11); and if he finds the accused not guilty, he shall record an order of acquittal under sub-section (11) of the said section: If, however, he finds the accused guilty, then he shall pass sentence upon him according to law under sub-section(12).

(14) Thus we find that, in the first instance, the trying Magistrate must see that the documents referred to in Section 173 have been furnished to the accused as required by sub-section (1); subsection (2) of section 251 A empowers him to pass an order of discharge after due compliance with the provisions contained therein. Sub-section (3) empowers him to frame a charge if he does not discharge the accused under sub-section (2) and then, following the procedure, to pass an order either of acquittal under sub-section (II), or on finding the accused guilty, to pass a sentence upon him according to law.

(15) The legislature has used the word 'discharge' in sub-section (2) and the word 'Acquittal' in sub-section (II). Therefore it cannot reasonably be contended that the order of discharge passed under sub-section (2) amounts also to an order of acquittal which could be passed under sub-section (II) of the said section.

(16) However, what is contended by the learned counsel is that the word 'at the commencement of trial' appearing in sub-section (I), viz., where in a case instituted on a police report the accused is brought before a Magistrate 'at the commencement of the trial,' such Magistrate shall follow the procedure laid down

by the said section, indicate that the trial of the accused commences the moment he is brought before the Magistrate and, if so, the only order that the Magistrate can pass against him in such trial is either of an acquittal or conviction and, therefore, even though the Magistrate acting under sub-section (2) discharges the accused, it amounts to an acquittal.

(17) Now, it is true that, to some extent, the words 'at the commencement of the trial' appearing in sub-section(1), support the contention of the learned counsel for the petitioner, viz., that the trial commences the moment the accused is brought before the Magistrate. The word 'Trial' has not been defined in the Code of Criminal Procedure.

(17a) Sub-section (1) of section 4 of the Cr.P.C. states:

'In this Code the following words and expressions have the following meanings, unless a different intention appears from the subject or context x x x x'

(17b) Section 4 (1)(k) defines 'inquiry' as follows :

"Inquiry' includes every inquiry other than a trial conducted under the Code by a Magistrate or Court';

(18) Therefore it is obvious from this definition that 'inquiry' is not the same thing as 'trial'. Mr. Jagannatha Setty contends that when the District Magistrate acting under section 436 Cr. P.C. directs the Magistrate to inquire into the case against the accused obviously he is not right because the trial of the accused has already commenced the moment he is brought before the Magistrate under sub-section (1) and when the Magistrate discharges him under sub-section(2) the trial comes to an end and there is no scope for an inquiry.

(19) As already stated, the word 'trial' has not been defined in the Code of Criminal Procedure. Their Lordships of the Supreme Court had occasion to consider the import of this word in the case reported in State of Bihar v. Ram Naresh, (S) : 1957 CriLJ567 , and this is what has been stated at p. 394:

'The word 'trial' is not defined in the Code, 'Trial' according to Stroud's Judicial Dictionary means 'the conclusion, by a competent tribunal, of questions in issue in legal proceedings, whether Civil or Criminal.' (Stroud's Judicial Dictionary; 3rd Edn. Vol. IV P. 3092), and according to Wharton's Law Lexicon, means 'the hearing of a cause, civil or criminal, before a judge who has jurisdiction over it, according to the laws of the 'land' (Wharton's Law Lexicon, 14th Edn. P.1011). The words 'tried' and 'trial' appear to have no fixed or universal meaning. No doubt in quite a number of sections in the Code, to which our attention has been drawn the words 'tried' and 'trial' have been used in the sense of reference to a stage after the inquiry. That meaning attaches to the words in those sections having regard to the context in which they are used. There is no reason why where these words are used in another context in the Code, they should necessarily be limited in their connotation and significance. They are words which must be considered with regard to the particular context in which they are used and with regard to the scheme and purpose of the provision under consideration'.

(20) Thus it is obvious from the observations of their Lordships that the word 'trial' has got to be understood with reference to the context in which it occurs. This is also clear from sub-section (1) of section 4, Cr.P.C. When we look to the scheme of section 251A, it appears that the provisions of sub-sections (1) and (2) are in the nature of an inquiry before the trial. If the Magistrate after due compliance with the provisions of sub-section(2) discharges the accused, it cannot be said that the discharge has the effect of an acquittal. The trial really commences when a charge is framed against the accused under sub-section(3) and all proceedings preceding the framing of the charge under sub-section (3) are in nature of an inquiry. The words appearing in sub-section (1) viz., 'at the commencement of the trial' must be understood or interpreted with reference to the context in which they appear; and when so interpreted, they only mean that the proceeding preceding the order of discharge is not a trial but is only in the nature of an inquiry.

If so, the contention of the learned counsel for the petitioner that the trial really commences when the accused is brought before the Magistrate under sub-section (1) of Section 251A is not warranted by the provisions of the section. The order of discharge of an accused under sub-section(2) of section 251A is merely the result

of an inquiry and, if so, then, in my opinion, it would be reasonable to hold that the District Magistrate acting under section 436 Cr.P.C. has got power to direct further inquiry into the case of the person accused of an offence who has been discharged by a Magistrate under sub-section (2) of section 251A Cr.P.C. Thus the contention of the learned counsel for the petitioner that the District Magistrate has got no power or jurisdiction to direct a further inquiry into the case of a person accused of an offence who has been discharged by a Magistrate under sub-section (2) of section 251A must be rejected.

(21) The view which I am taking is also the view taken by the following High Courts (vide *Fakruddin v. State Police, Nirmal*, : AIR 1962 AP236 ; *In re Pakkirisamy Pillai* : AIR1962 Mad142 ; *Kanbi Bechar Lala v. State*, : AIR1962 Guj316 and *Ganesh v. State*, 1963 (2) Cr. LJ 109(Raj)).

(22) However, there are two decisions on which reliance has been placed by the learned counsel for the petitioner viz., *Govindaswamy v. State*, : AIR 1960 AP391 and *Tabarak Ali v. Mantaj Ali*, 1961 (2) Cr. LJ 460 (Assam).

(23) The decision reported in the first case is of a single judge of that High Court and the learned Judge has taken the view that in regard to warrant cases instituted on police reports, the trial commences as soon as the stage of sub-section (1) of section 251A is passed. And, therefore, if the trial has really commenced when the accused is brought before the Magistrate, then there is no scope for an inquiry and the Sessions Judge or the District Magistrate has no power to interfere in cases of discharge under sub-s.(2) of S. 251A, Cr.P.C. With respect, I find myself unable to agree with the view taken by the learned Judge has been subsequently overruled by a Division Bench of the said Court in the case reported in : AIR 1962 AP236 which has taken the same view which I am taking.

(24) The other case is of Assam High Court which, following the decision of a single Judge of the Andhra Pradesh High Court in : AIR 1960 AP391 , has held that the trial really commences when the person charged for an offence is brought before a Magistrate, and that the District Magistrate acting under section 436 has no power to direct a further inquiry. According to their Lordships, since the trial has commenced, there is no scope for an inquiry which the District Magistrate can

direct under section 436 Cr.P.C. In that case, it appears that the trying Magistrate framed a charge against only one accused after discharging the others under sub-section(2) of section 251A of the Code of Criminal Procedure. Against the order of discharge, a revision application was filed before the Sessions Judge under section 436 Cr.P.C. who directs a further inquiry into the case. Their Lordships took the view that once a trial has commenced, there is no scope for a further inquiry.

But the trial had really commenced against only one accused since a charge was framed against him and the others had been discharged. In such circumstances, it is rather difficult to understand how it can be stated that the trial has commenced against the discharged accused also. However, the learned Judges agreeing with the view taken by a single Judge of the Andhra Pradesh High Court, took the view that the trial really commences when the accused is brought before the Magistrate under sub-section(1) of section 251-A. Cr.P.C. With very great respect, I am unable to agree with the view taken by the learned judges of the Assam High Court.

(25) In my opinion, for the reasons given by me, it would be right to hold that the District Magistrate has got power to direct a further inquiry into the case of a person accused of an offence who has been discharged by a Magistrate acting under sub-section(2) of section 251-A Cr.P.C. But, he can do so only in cases where the discharge of a person by the trial Magistrate under sub-section (2) is not in conformity with the provisions of the said section. The Magistrate must, before he passes an order under sub-section(2) consider all the documents referred to in section 173 Cr.P.C. and also give an opportunity to the prosecution and the accused of being heard, the examination of the accused being left to his discretion. And if, after such compliance, he considers the charge against the accused to be groundless, then he is competent to pass an order of discharge.

But, if the District Magistrate, while acting under S.436 Cr. P.C, finds himself unable to agree with the conclusion of the trial Magistrate as to discharge of the accused, then in such circumstances, the District Magistrate cannot direct a further inquiry into the case. He can direct an inquiry into the case of a person discharged

only when the Magistrate has not either considered the documents referred to in section 173 or has considered only some of the documents and has not given an opportunity to the prosecution and the accused of being heard. As already said, if after due compliance with the requirement of sub-s.(2) of sec.251A the trial Magistrate discharged the accused, then in my opinion, there is no point in directing a further inquiry into the case by the District Magistrate. The import of such an order in my opinion, is to ask the trial Magistrate to frame a charge and proceed with the trial and this, he is not competent to do under S.436, Cr.P.C.

If that is not the import, then there is no meaning in asking the trial Magistrate to inquire into the case further when he has discharged the accused after due compliance with the requirements of sub-section (2) of section 251A Cr.P.C.. It is still open for the trial Magistrate on being asked by the District Magistrate to make further inquiry to take the same view which he had already taken viz., of discharging the accused. Therefore, in such circumstances, the order of the District Magistrate to hold a further inquiry is futile. Hence, in my view, the District Magistrate can direct a further inquiry into the case of a person who has been discharged by the Magistrate under sub-s. (2) of S. 251A, Cr.P.C. only when the accused has been discharged by the trial Magistrate in disregard of the provisions of sub-section (2) of Section 251-A, Cr.P.C.

(26) In this case, as I have already stated, the District Magistrate has found himself unable to agree with the order of discharge passed by the trial Magistrate after due compliance with the provisions of sub-section(2) of Section 251A Cr.P.C. On merits, he disagreed with the conclusion reached by the Magistrate and held that the evidence disclosed a prima facie case against the accused. In such circumstances, the direction of the learned District Magistrate to hold a further inquiry into the case amounts only to a direction to frame a charge and proceed with the trial. This, in my opinion, he is not competent to do. The only course open to the District Magistrate is to act under sec.435 Cr.P.C. and make a reference under section 438 of the said Code to the High Court for appropriate orders. For these reasons, I hold that the order of the District Magistrate directing a further inquiry into the case is not valid and the same is set aside.

(27) Mr. Govt. Pleader, however, asks me, in exercise of my powers under section 439 Cr.P.C. to direct the trial Magistrate to frame a charge and proceed with the trial. I do not think that, in this case, I should direct the trial Magistrate to frame a charge and proceed with the trial.

(28) Consequently, this revision petition is allowed and the order of the District Magistrate is set aside and that of the trial Magistrate is restored.

(29) Petition allowed.

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