

Abdul Basheer Vs. Abdul Khader

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Court : Kerala

Decided On : Feb-26-2015

Judge : Honourable Mr. Justice K.Ramakrishnan

Appellant : Abdul Basheer

Respondent : Abdul Khader

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN THURSDAY, THE 26TH DAY OF FEBRUARY 2015 7TH PHALGUNA, 1936 CrI.Rev.Pet.No. 1738 of 2014 ()
----- AGAINST THE

ORDER

IN CRL.M.P.NO.1973/2014 IN C.C.NO.217/2011 OF C.J.M., MANJERI REVISION PETITIONER/1ST RESPONDENT/ACCUSED: -----
ABDUL BASHEER, S/O.ALAVIKUTTY MOLLA, MACHINGAL HOUSE, PULPATTA POOKALATHUR. BY ADVS.SRI.P.VENUGOPAL SRI.M.REVIKRISHNAN RESPONDENTS/PETITIONER/DEFACTO COMPLAINANT & STATE: ----- 1. ABDUL KHADER, S/O.HASSANKUTTY HAJI, DESATHUPARAMBIL, OLAMATHIL MANJERI - PSL.-676121.

2. STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR HIGH COURT OF KERALA, ERNAKULAM-682031. R1 BY ADV. SRI.BABU S. NAIR R1 BY ADV. SRI.K.RAKESH R2 BY PUBLIC PROSECUTOR SRI. N. SURESH THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 26-02-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:
Crl.Rev.Pet.No. 1738 of 2014 () ----- APPENDIX
PETITIONER'S ANNEXURES: ANNEXURE A TRUE COPY OF THE COMPLAINT PREFERRED BY R1 HEREIN BEFORE THE DEPUTY SUPERINTENDENT OF POLICE, MALAPPURAM AND THE CONSEQUENTIAL F.I.R REGISTERED IN THE CRIME. ANNEXURE B TRUE COPY OF THE

ORDER

DATED 25.2.2014 IN C.C.NO.217 OF 2011 PASSED BY THE COURT OF THE CHIEF JUDICIAL MAGISTRATE, MANJERI. ANNEXURE C TRUE COPY OF THE APPLICATION ALONG WITH THE AFFIDAVIT PREFERRED BY THE R1. ANNEXURE D TRUE COPY OF THE COUNTER STATEMENT FILED BY THE REVISION PETITIONER HEREIN/R1 /TRUE COPY/ P.S TO JUDGE cl K. RAMAKRISHNAN, J.

..... Crl.R.P.No.1738 of 2014
..... Dated this the 26th day of February, 2015.

ORDER

The first respondent/accused in Crl.M.P.No.1973/2014 in C.C.No.217/2011 on the file of the Chief Judicial Magistrate Court, Manjeri is the revision petitioner herein.

2. The case was charge sheeted by the Sub Inspector of Police, Manjeri in Crime No.465/2011 of Manjeri police station, which was registered on the basis of a complaint given by the defacto complainant before the Deputy Superintendent of Police, Malappuram, which was forwarded to the concerned Station House Officer through proper channel, against the revision petitioner alleging an offence under section 420 of the Indian Penal Code.

3. After investigation, final report was filed and the case was taken on file as C.C.No.217/2011 on the file of the Chief Judicial Magistrate Court, Manjeri. When the revision petitioner appeared, after hearing both sides charge was framed for the offence under section 420 of the Indian Penal Code and the same was read over and explained to him and he pleaded not CrI.R.P.No.1738 of 2014 2 guilty. Thereafter the case was posted for evidence and summons was issued on Cws 1 to 3. At that time, the complainant came to understand that expert opinion on the handwriting of the revision petitioner was not obtained. So he earlier filed CrI.M.P.No.998/2014 for sending the document for expert opinion alleging that the case cannot be proved without that evidence. But that petition was dismissed on the ground that the application is not maintainable as the application can be filed only by the Public Prosecutor concerned and also observed that in view of the bar under section 311A of the Code of Criminal Procedure (hereinafter referred to as 'the Code' for short) since he was not in custody during the course of investigation, such a petition cannot be entertained and dismissed the application. Thereafter, the complainant filed CrI.M.P.No.1973/2014 for further investigation under section 173(8) of the Code for enabling the investigating officer to conduct investigation in respect of the letter said to have been given by the revision petitioner and that application was allowed, which is being challenged by the revision petitioner by filing this petition.

4. Heard the counsel for the revision petitioner and the CrI.R.P.No.1738 of 2014 3 learned counsel for the first respondent.

5. The counsel for the revision petitioner submitted that the purpose for which further investigation was ordered was agitated by the petitioner by filing CrI.M.P.No.998/2013 which was dismissed earlier and the present petition is also filed for the same purpose which should not have been allowed by the court below. Further, even during further investigation, in view of the bar under section 311A of the Code, the investigating agency cannot compel the petitioner to give his handwriting or signature. So the court below was not justified in ordering further investigation under such circumstances.

6. The counsel for the first respondent submitted that if the court feels that for the purpose of proper administration of justice further investigation is required, the court can order further investigation. That power cannot be curtailed. Further, if further investigation is ordered, the investigating agency can adopt all legal methods for collecting the handwriting and that can be sent for expert opinion and that will only aid the investigating agency to come to a correct conclusion as to whether the offence alleged has been established or not and no prejudice will be caused to the CrI.R.P.No.1738 of 2014 4 revision petitioner as well.

7. The learned Public Prosecutor supported the submission of the counsel for the first respondent.

8. The case of the defacto complainant was that there was some transaction between the revision petitioner and the first respondent, in which some amount was obtained from the defacto complainant by the revision petitioner and he did not pay the amount and so he filed a complaint before the Deputy Superintendent of Police, Malappuram which was forwarded to the Station House Officer, Manjeri for proper action, on the basis of which, Annexure -A crime was registered as Crime No.465/2011 of Manjeri police station against the revision petitioner alleging an offence under section 420 of the Indian Penal Code. It is also an admitted fact that, after investigation, final report was filed and it was taken on file as C.C.No.217/2011 on the file of the Chief Judicial Magistrate Court, Manjeri. Summons was issued to the accused/revision petitioner and he appeared and charge was framed under section 420 of the Indian Penal Code and when summons was issued to the witnesses, the defacto complainant filed CrI.M.P.No.998/2013 for sending the alleged letter said to CrI.R.P.No.1738 of 2014 5 have been given by the revision petitioner for receipt of the amount for expert opinion and that petition was dismissed by the learned Magistrate by Annexure-B order dated 21.5.2014 where it has been observed that the petitioner has no right to file an application for sending the document for expert opinion by filing a petition through private counsel and only the Assistant Public Prosecutor of the court can do the same and since final report is filed, the power under section 311A of the Code cannot be invoked as the accused was not in custody earlier. It is thereafter that the petitioner filed the present application CrI.MP.No.1973/2014

for further investigation under section 173(8) of the Code and the revision petitioner filed Annexure-B objection and the learned Magistrate by the impugned order allowed the application, which is being challenged by the revision petitioner.

9. Section 173(8) of the Code reads as follows: Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports CrI.R.P.No.1738 of 2014 6 regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).

10. Sections 311 and 311A of the Code read as follows:

311. Power to summon material witness, or examine person present:- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case. 311A. Power of Magistrate to order person to give specimen signatures or handwriting:- If a Magistrate of the first class is satisfied that, for the purposes of any investigation or proceeding under this Code, it is expedient to direct any person, including an accused person, to give specimen signatures or handwriting, he may make an order to that effect and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in such order and shall give his specimen signatures or handwriting: Provided that no order shall be made under this section unless the person has at some time been arrested CrI.R.P.No.1738 of 2014 7 in connection with such investigation or proceeding.

11. Sections 73 and 45 of the Evidence Act read as follows:

73. Comparison of signature, writing or seal with others admitted or proved:- In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose. The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

45. Opinion of experts: when the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts. Such persons are called experts. CrI.R.P.No.1738 of 2014 8 12. Sections 160 of the Code reads as follows: Section 160. Police officer's power to require attendance of witnesses: (1) Any police officer making an investigation under this Chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise, appears to be acquainted with the facts and circumstances of the case. And such person shall attend as so required: Provided that no male person under the age of fifteen years or above the age of sixty five years or a woman or a mentally or physically disabled person shall be required to attend at any place other than the place in which such male person or woman resides. (2) The State Government may, by rules made in this behalf, provide for the payment by the police officer of the reasonable expenses of every person, attending under sub-section (1) at any place other than his residence.

13. The defacto complainant has the right to file an application for further investigation, if the investigation was not proper and material evidence has not been collected and if the court is satisfied that further investigation is required for proper administration of justice, the court can allow the CrI.R.P.No.1738 of 2014 9 application as well. The locus standi in respect of filing the application for further investigation was considered by the courts in Anayara Rajendran v. State of

Kerala (Laws (KER) 2013-5-99) and Achuthanadhan v. State of Kerala (Laws (KER) 2013-8-125). Further, once investigation is ordered for the purpose of collecting additional material to prove the prosecution case, then the police will get all the power of conducting investigation even for applying for custody of the accused for that purpose for further questioning and collecting materials. Further, in the decision reported in Prem Vijayan v. State of Kerala (2012 (4) KLT330, this Court has observed that acceptance of a final report will not oust the jurisdiction of the Magistrate to take cognizance of the offences on the basis of a complaint filed by the defacto complainant. Further in the decision reported in Reeta Nag v. State of West Bengal and others (2009 (9) SCC129 the Supreme Court has only held that the court cannot order reinvestigation and reinvestigation can be ordered only in exceptional circumstances. Once an objection has been filed to the final report by the complainant, the court can either treat that objection as complaint and proceed with that or order further Crl.R.P.No.1738 of 2014 10 investigation under section 173(8) of the Code.

14. The counsel for the revision petitioner submitted that, the purpose for which further investigation is now sought for was considered by the court below while considering the application for sending it for expert earlier and it cannot overcome that by ordering further investigation and it is barred under Section 311A of the Code of Criminal Procedure as well. But it may be mentioned here that if the court has felt that further investigation is required in the interest of justice and further material has to be collected to adjudicate the matter in the proper manner, for that purpose further investigation can be ordered and unless it is illegal, the same cannot be interfered by the Hon'ble High Court while exercising the power under Section 397 of the Code of Criminal Procedure. It is the prerogative of the trial court to consider whether there is any defect in the investigation or whether further materials sought for by the investigation if any by the defacto-complainant is required for proper adjudication of the case and after considering those aspects if court below is satisfied that further investigation is required, then court has got power under Section 173(8) of the Code of Criminal Procedure to order further Crl.R.P.No.1738 of 2014 11 investigation, as it is prerogative of the trial court magistrate on this aspect. See Hasanbhai Valibhai Qureshi v. State of Gujarat and others (AIR 2004 SC2078 15. Further the application filed under section 311A of

the Code was earlier dismissed on the ground that, the petitioner has no right to file an application and it has to be filed by the Public Prosecutor and also he was not arrested earlier and as such by virtue of Proviso to Section 311A of the Code of Criminal Procedure, after final report is filed, the application cannot be filed for the purpose mentioned. This was so held in the decision reported in Radhakrishnan B.C. and Others v. Saju Thuruthikunnel and Another (2013(4) KHC705. In the same decision relying on the decision of the Hon'ble Supreme Court in State Delhi Administration v. Pali Ram (1979 (2) SCC158, this Court has observed that, the power of the court under Section 73 and 45 of the Evidence Act is not taken away by virtue of incorporation of Section 311A of the Code of Criminal Procedure and it is for the court to consider as to whether that is required for proper adjudication. Further in the same decision, it has been observed that, the direction can be given to enable the same to be compared by the handwriting expert as well. Crl.R.P.No.1738 of 2014 12 16. Further, once further investigation is ordered, the investigating agency will be getting all the powers conferred under the code for the purpose of conducting investigation so as to probe into the materials to be collected, for which purpose the further investigation is ordered. They can issue notice to the accused to answer the questions for that purpose. See M.N. Sreedharan and others v. State of Kerala (1981 CrL.J.119) That may include getting the signature and handwriting of the accused as part of the investigation and it was settled by the Hon'ble Supreme Court and that will not affect the right of the accused under Article 20 of the Constitution of India. Further, since once final report has already been filed and court has taken cognizance of the case and accused appeared and charge has been framed, they can apply to the court under Section 73 of the Evidence Act to get the hand writing and signature either for comparison by court or sent the same for expert opinion as well invoking the power under section 73 of the Evidence Act. They can also collect admitted hand writings available from other sources during the relevant period and forward the same along with disputed document to expert for getting opinion through court as well. Crl.R.P.No.1738 of 2014 13 17. So merely because an application under Section 311A of the Code of Criminal Procedure was earlier dismissed on technical ground, is not a bar for the investigating agency to proceed with further investigation in accordance with law and collect materials required for

adjudication of the case and file supplementary report under Section 173(2) read with Section 173(8) of the Code of Criminal Procedure and it is for the court to consider as to whether that supplementary report has to be acted upon or not. Sending the disputed letter for expert opinion as part of the investigation cannot be said to affect the right of the accused also, as if the opinion of the expert is obtained and if it is in favour of the accused, that may be helpful for him to prove his innocence as well. So under the circumstances, there is no merit in the submission made by the counsel for the revision petitioner that the court below was not justified in ordering further investigation for the purpose mentioned in the petition and the same lacks merits and the same is liable to be rejected. There is no illegality committed by the court below in passing the impugned order directing further investigation under Section 173(8) of the Code of Criminal Procedure and the order does not call for any interference. So the revision lacks CrI.R.P.No.1738 of 2014 14 merits and the same is liable to be dismissed. In the result, the revision petition is dismissed. Interim order of stay is vacated and CrI.M.A.No.6269/2014 is dismissed. Office is directed to communicate a copy of this order to the concerned court immediately. Sd/- K. RAMAKRISHNAN, JUDGE cl /true copy/ P.S to Judge CrI.R.P.No.1738 of 2014 15

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