

Thomas Vs. Vijayakumari

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Court : Kerala

Decided On : Jan-14-2002

Reported in : 2002(1)ALT(Cri)358; I(2003)BC309; 2002CriLJ3108

Judge : G. Sasidharan, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 243(2) and 254(2)

Appeal No. : Crl. M.C. No. 302 of 2002

Appellant : Thomas

Respondent : Vijayakumari

Advocate for Def. : Noorji Noushad, Public Prosecutor

Advocate for Pet/Ap. : Siby Mathew,; Philip J. Vettickattu and; George Johnson

Disposition : Application dismissed

Judgement :

ORDER

G. Sasidharan, J.

1. This petition is filed by the accused in C.C. 805 on the file of the JudicialMagistrate of the First Class-I, Pathanamthitta. The above case was taken on file onthe basis of a complaint given by the first respondent stating that the

petitioner committed the offence punishable under Section 138 of the Negotiable Instruments Act (for short 'the Act'). Learned counsel for the petitioner submits that a witness schedule was filed by the petitioner showing the name of the first respondent also as one of the witnesses to be examined. The grievance of the petitioner is that the court refused to issue summons to the complainant, the first respondent for being examined. This petition is filed for giving direction to the Magistrate to permit the petitioner to examine the complainant, the first respondent as a witness.

2. The question whether the accused in a case in which the allegation is that he committed the offence punishable under Section 138 of the Negotiable Instruments Act has any right to get examined the complainant as witness came up for consideration before this Court in *Kamarudheen v. Shoukkathali* (2001 (3) KLT 476). In the above decision it was held by this Court that it is not just and proper to compel a person to be a witness against him and as a matter of right a party cannot have the opposite party examined as a witness. That was a case in which the allegation against the accused was that he committed the offence punishable under the Act. The Court referred to Sub-section 2 of the Section 243 Cr.P.C. and observed that through a prosecution witness can be re-summoned under Section 243 at the instance of the accused, a complainant cannot be resummoned. In taking a decision as to whether the accused in a case in which the allegation is that he committed the offence under Section 138 of the Act can get the complainant examined in court as his witness even though the learned single Judge of this Court referred to Section 243 Cr.P.C. the decision appears to be on the basis of the principle that it is not just and proper to compel a person to be a witness against him and that as a matter of right a party cannot have the opposite party examined as a witness.

3. Learned counsel for the petitioner would submit that the provision which applies to the present case is Section 254(2) Cr.P.C. The above clause says that the Magistrate may, if he thinks fit, on the application of the prosecution or the accused, issue a summons to any witness directing him to attend or to produce any document or other thing. Whereas in Section 243(2) what is said is that the Magistrate shall issue such process unless he considers that such application

should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice what is said in Section 254(2) is that the Magistrate may, if he thinks fit, on the application of prosecution or the accused issue summons to any witness. The above fact would indicate that when a summons case is being tried, the Magistrate has the wide discretion to decide whether summons to any witness has to be issued on the application of the prosecution or the accused. On the other hand, under Section 243(2) the request for issuing summons to a witness can be refused only on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.

4. In the decision of the learned single Judge of this Court in Kamarudheen's case (2001 (3) KLT 476) the words 'any witness' used in Sub-section 2 of Section 243 was interpreted and this Court said that 'any witness will not include the complainant. In Section 254(2) Cr.P.C. also the words 'any witness' are used. The term 'any witness' used in the above clause can have the same meaning of the term 'any witness' used in Sub-section 2 of Section 243 Cr.P.C. and that term would not include the complainant. As of right, the accused in a case cannot get the complainant examined as his witness.

5. The learned counsel for the petitioner cited the decision in Janardhanan Pillai v. State (1999 (1) KLT 618). That was a decision rendered by this Court on interpreting Section 243 Cr.P.C. and explaining the circumstances in which the Court can refuse to issue summons to a witness who is requested to be examined in the case. This Court said that the Court can refuse to issue summons to a witness in the circumstances mentioned in Sub-section 2 of Section 243 Cr.P.C. and that there is no discretion to refuse issue of process to compel the attendance of any witness cited by the accused for any other reason.

6. In Sreedhar Pillay v. P.J. Alexander (1992 (2) KLT 349) this Court held that power under Section 254(2) conferred on the Magistrate is of wider amplitude than that of the Sessions Judge or Magistrate in a similar situation while trying a sessions case or a warrant case. In the above decision this Court said that under Sections 233(3) and 243(2) Cr.P.C., the power of the Sessions Judge and the Magistrate to refuse issuance of process is circumscribed by three factors

mentioned specifically, namely, vexation, delay or defeating the ends of justice. In both the above decisions, the question whether the term 'any witness' used in Sub-section 2 of Section 254 Cr.P.C. would take in the complainant was not considered. In the decision in Kamarudheen's case (supra) that question was considered by the learned single Judge of this Court and said that the words 'any witness' in sub-clause would not include the complainant. The position is the same in regard to the meaning of the words 'any witness' appearing in Section 254(2) Cr.P.C. The accused has no right to get the complainant examined as a witness on his side. So, no direction need be given to the Magistrate to issue summons to the complainant for being examined as a witness to the petitioner. Application is hence dismissed.

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