

Thomas Vs. Varghese and anr.

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Court : Kerala

Decided On : May-29-2008

Reported in : 2008CriLJ4234; 2008(2)KLJ538

Judge : V. Ramkumar, J.

Acts : Evidence Act - Sections 40, 41 and 43; Indian Penal Code (IPC) - Sections 188 and 427; Code of Criminal Procedure (CrPC) - Sections 239, 240, 254 and 258

Appeal No. : Crl. R.P. No. 2855 of 2007

Appellant : Thomas

Respondent : Varghese and anr.

Advocate for Def. : Raveendra Babu, PP

Advocate for Pet/Ap. : Shaju Purushothaman and; K.S. Rajesh, Advs.

Judgement :

ORDER

V. Ramkumar, J.

1. The revision petitioner who is de facto complainant in C.C. 1099/2004 on the file of the JFCM, Chalakudy alleging the commission of offences punishable under

Sections 188 and 427 IPC, challenges the order passed by the learned Magistrate, discharging the accused. The first respondent herein is the accused in the said case.

2. The case of the prosecution in brief is as follows:

The accused knowing that he is restrained by an order of temporary injunction issued by the Munsiffs Court, Kodungallur in I.A. 1172/2003 in O.S. 615/2003, cut open a drain along with the western boundary of the property. The above act was done with the knowledge that the said act would cause injury and harm to the complainant. On account of the above act of the accused, the boundary wall fell into the property of the accused. The accused also destroyed the stones of the demolished boundary wall resulting in a loss of Rs. 12,000/- to the complainant. The accused has thereby committed offences punishable under Section 188 and 427 IPC.

3. After taking cognizance of the aforesaid offences, the learned magistrate issued notice to the accused. The accused appeared and was enlarged on bail. Thereafter the learned Magistrate posted the case for framing the charge. An interlocutory order passed by the Munsiff's Court, Kodungallur in O.S. 615/2003 to the effect that the defendant/accused is not liable for the collapse of the boundary wall, was produced by the accused at that stage.

4. Relying on the interlocutory order passed by the civil Court, the learned Magistrate, as per the impugned order dated 15-9-2006, discharged the accused under Section 254 Cr.P.C. Hence this revision.

5. The impugned order reads as follows:

This is a complaint case. After taking cognizance of the offence notice issued to the accused in return, he appeared before court and was enlarged on bail. While posted for framing of charge the accused counsel produced an order of the Munsiff's Court Kodungallur which was pronounced by the Munsiff on the very same fact in issue of the case. In that case, it was held that the accused herein who is the defendant/C.P. in O.S. 615/2003 on the file of that court, is not liable for

the collapse of the boundary wall. The finding of the Munsiff Court is relevant in the matter. Accordingly, the accused is discharged Under Section 254 of Cr.P.C.

6. I heard the learned Counsel for the petitioner as well as the learned Public Prosecutor.

7. The impugned order is unsustainable for the following reasons:

A) The learned Magistrate was making a wrong assumption that C.C. No. 11099/2004 was a complaint case. It was actually a case charge sheeted by the Sub Inspector of Police, Mala, after conducting investigation into Crime No. 179/2004 pursuant to the complaint lodged by the revision petitioner herein. Hence it was a case instituted on a police report and not a complaint case.

B. The second mistake committed by the learned Magistrate is by posting the case for framing the charge. Both the offences punishable under Section 188 and 427 IPC are offences, for which the appropriate trial can only be summons trial, in which case there is no question of framing charge. If so, there is no question of discharging the accused also. In a summons trial, the case can only be posted for reading over the particulars of the offence to the accused.

C) Even assuming that it was a warrant trial case in necessitating the framing of charge, after the decision of the Apex Court in *State of Orissa v. Debendra Nath Padha* : AIR 2005 SC359 overruling *Sathish Mehra v. Delhi Admn. and Anr.* : (1996)9SCC766 , the accused has no right to produce any documents at the stage of framing charge under Sections 239 and 240 Cr.P.C.

D) The third infirmity which the impugned order suffers from is the reliance placed by the learned Magistrate on the interlocutory order passed by the civil court. After the decision of the larger Bench of the Apex Court in *K.G. Premsankar v. Inspector General of Police and Anr.* 2002(7) SC 30, even if the criminal case and the civil case are founded on the same cause of action, the judgment of the civil would only be relevant if the conditions laid down in Sections 40 and 43 of the Evidence Act are satisfied. But it cannot be said that the judgment of the civil court would be conclusive as provided in Section 41. In order to become conclusive under Section

41 of the Evidence Act, the verdict of the civil court should be a final one and not an interlocutory order. It is well settled that civil and criminal proceedings are separate and independent proceedings and pendency of civil proceedings cannot bring to an end the criminal proceedings even if they arise out of the same set of facts. Vide *Pratibha v. Rameshwari Devi* 2008(1) SCC (Crl.) 399.

E) In a summons trial case there is no discharge. If the conditions envisaged under Section 258 Cr.P.C. are satisfied, the court may drop the proceedings. Such a power are satisfied, the court may drop the proceedings. Such a power also could be invoked in the present case in the absence of the circumstances envisaged by the said provision. At any rate, Section 254 Cr.P.C. does not empower the Magistrate to discharge the accused as was wrongly assumed by the learned Magistrate.

The result of the foregoing discussion is that the impugned order cannot be sustained and is, accordingly, set aside. C.C. 1099/2004 shall stand restored to file and shall be disposed of, in accordance with law.