In Re: State

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Court : Kerala

Decided On : Sep-29-1972

Reported in : 1973CriLJ1288

Judge : P. Narayana Pillai and; E.K. Moidu, JJ.

Appellant : In Re: State

Judgement :

E.K. Moidu, J.

1. The question that arises for determination in these criminal references is whether the trial Magistrate has the right to dispense with the Presence of a person and remove him from partv array if it is conclusively established that he is not an accused person charged with any offence in the case under enauirv or trial.

2. These references came before us on account of an order of a learned single iudge of this court under Section 3 of the Kerala High Court Act. 1958. The District Magistrate (Judl.) Tellicherrv referred these cases under Section 438 Criminal P. C. to this Court to pass an order in accordance with law setting aside the order of the Sub Magistrate, Cannanore passed on 30-11-1971 in C.C. 984/1971 and C C. 985/1971.

3. On the strength of a First Information statement of one Assanand Kundan two separate crimes were registered at the police station. Pavangadi on 25-5-1970.

There were 7 accused persons in the first crime and 5 in the other in each of which the offences alleged to have been committed were under Sections 143. 147 and 323 read with Section 149 of the Penal Code. After investigation, a report under Section 170 Criminal P. C. and final report under Section 173 Criminal P. C-had been filed beforp the Sub Magistrate by the Sub Inspector. Pavangadi in each of these cases when the Magistrate took these cases to file in C.C. 984/71 and C. C 985/71 and took cognizance of the offences on sending summons to the accused persons in each of these cases. When thev appeared before the Magistrate on 30-10-1971 thev had been supplied with all the documents which the prosecution wanted to relv upon in the prosecution of the case against them- From 30-10-1971 to 30-11 1971 these cases underwent few adiourn-ments during which time the Magistrate, the accused persons, the rounsel who appeared for them and even the Sub Inspector who laid the charge against the accused persons realised that the 5th accused described as Narayanan, son of Raman Per-uvannan was not the real accused and that his name was wronglv entered in the police charge.

The real 5th accused according to them was one Narayanan, son of Nanivil Raman. The Sub Inspector had also filed a report before the Magistrate on 24-11-1971 that summons was wrongly issued to Narava-nan. son of Raman Peruvannan instead of Narayanan son of Nanivil Raman and therefore he submitted that fresh summons had to be issued to the latter person. He had also expressed his regret for entering a wrong name in the charge-sheet which he laid before the Court. On receipt of this report and on correct understanding of the identity of the accused person, the learned Sub-Magistrate passed the following order on 30-11-1971 in each of these cases:

All the accused present. The name of A5 is one Narayanan, son of Nanivil Raman. So A5 before the Court is not the wanted accused as per the report of Sub Inspector' There is no charge against A5 and he has wronely come before Court. So he is discharged from this case. Issue summons to the real A5 in the address. Correct the name of the accused in the charge-sheet.

On the strength of this order the Dresence of Narayanan, son of Raman Peruvannan was dispensed with and summons was issued afresh to Narayanan,

Son of Nanivil Raman. In response to that summons Narayanan son of Nanivil Raman also appeared before the Magistrate as the real 5th accused in both the cases.

4. The District Magistrate, Telli-cherry on the basis of news-paper reports that a wrong person had been summoned to the court and that the Police took such a long time to realise the mistake as to the identitv of the accused in question called for the records in these cases from the Sub-Magistrate and examined them under Section 435(1) Criminal P. C. The District Magistrate was of the opinion that Narayanan son of Raman Peruvannan should not have been sent awav merely under an order 'Discharged' after charge was laid, against him and that the Maeis-trate acting under Section 251-A (2) Criminal P. C. should have passed an order of discharge under that specific section and that even if the discharge was valid the Magistrate should not have substituted the name of Narayanan son of Nanivil Raman in the place of Naravanan, son of Raman Peruvannan in the charee-sheet laid by the police as an amendment of the charge is not contemplated under law and that the provisions of Criminal Procedure Code also do not permit such a procedure. Hence, the learned District Magistrate expressed the opinion that this Court should interfere with the order passed by the learned Sub Magistrate and pass an order in accordance with law.

5. It requires no authority to state that the police has the right to file a supplementary charge-sheet after a final report under Section 173 Criminal P. C. was filed. If a police officer after lavins charge sets further information, he can still investigate and lav further charge-sheets. If fresh facts come to light after a final report, Magistrate's permission is not necessarv for further investigation. So in this case the police officer was right in bringing to the notice of the Sub Magistrate that the charge was laid against a wrong person.

6. The fact that a report had been filed by the police under Section 173(1) Criminal P. C. is not a bar for further investigation or for filing a supplementary report as against the same accused persons. The police has the right to reopen the investigation even after filing of the charge-sheet under Section 173 Criminal P. C. if fresh facts come to light. I think the law is well settled that the police has the right

to reopen the investigation even after submission of the charges under Section 173 Criminal P. C if fresh facts come to litht. (See Divakar Singh v. Ramamurthi Naidu1 AIR 1919 Mad 751 : (19 Cri LJ 901) Mohinder Singh v. Emperor. AIR 1932 Lah 103 at P. 109 : 33 Cri LJ 97: Hanumantha Gowd v. Official Receiver, Bellarv. AIR 1946 Mad 503, Mohd. Niwaz v. Crown. (1947) 48 Cri LJ 774 (Lah): Prosecuting Inspector, Koonihar v. Minaketan Mahato : AIR1952 Ori350 Raghunath Sharma v. The State : AIR1963 Pat268 . In this regard it is relevant to point out the observation in Rama Shanker v. State of Uttar Pradesh : AIR1956 All525 . It is as follows:

An investigating officer is reauired by Section 173 of the Code to submit a charge-sheet, but this does not render his act of submitting a charge sheet a iudicial act. A court has not iudicial control over the investigations and over the manner or the circumstances, in which an investigating officer makes his report under Section 173. An investigating officer's act is wholly administrative. There is, therefore, nothing to prevent his submitting another report in supersession of an earlier one. He can do it on his own initiative, or under direction of the Superintendent of Police or the District Magistrate.....Hence no illegality is committed by an investigating officer in submitting a charge-sheet after previously submitting a final report.

The observation in : AIR1952 Ori350 may also be seen:

The police have the right to reopen investigation even after a submission of charge-sheet under Section 173 Criminal P. C. if fresh facts come to light. Such fresh investigation can be made even after commitment proceeding had commenced and even after commitment proceeding had terminated.

7. There was no difficulty in this case for holding that Naravanan, son of Raman Peruvannan was not an accused in these cases. His name did not appear either in the F. I. R. or in the statements of witnesses recorded by the police during the investigation under Section 161 Criminal P. C Even in the report under Section 173 Criminal P- C his name did not come into the picture. Throughout the proceedings beginning from the first information statement recorded on 25-5-1970 to the Police report under Section 173 Criminal P. C. only the name of Narayanan,

son of Nanivil Raman appeared as the 5th accused in the case. But the police committed a mistake in entering the name of the 5th accused in the charge-sheet. It was in the charge-sheet for the first time that the name of Narvanan. son of Raman Peruvannan was entered by mistake. It was therefore clear that neither the pro-secution nor the other accused persons had any case that Narayanan, son of Raman Peruvannan, was one of the accused persons, who was directly or indirectly connected with the incident and that on the contrary he was altogether a stranger against whom no charge could be laid. The police, however, realised the mistaken identity of the 5th accused only after Narayanan son of Raman Peruvannan appeared in Court in response to summons issued .to him.

8. Under these circumstances the question is whether the Sub Madstrate has the right to dispense with the pre-sence of Narayanan, son of Raman Peruvannan. and remove him from partv array as he was not an accused person in the cases pending before him.

9. The learned Sub Magistrate pointed out in his report that he used the word 'Discharge' when the presence of Narayanan, son of Raman Peruvannan was dispenced with and removed his name from the party array not in the sense the word is used in Section 251-A (2) Criminal P. C- but as it is used in ordinary par-lancp for sending away a person who was not accused of any offence. According to him no auestion of a discharge as contemplated under Section 251-A (2) Criminal P. C. arose in the case. He also stated that he was competent to rectify the mistake in the charge-sheet on the application of the prosecutor in the circumstances of the present case, especially when there is no allegation of prejudice or ground for injustice from any of the parties who appeared in the case before him.

10. It has to be stated at the outset that Section 251-A (2) Criminal P. C. has no application to the case. That section comes into operation only if an accused is to be discharged upon the consideration of fa) the documents referred in Section 173(2) the examination of the accused, if necessary and (c) the arguments of both sides. The discharge of an accused at any previous stage as under the other procedure in Section 253(2) and for absence of complainant on hearing dav as

under section 259 is not contemplated under Section 201-A (2). Unless and until the person before the court is as accused and the charge against him found to be groundless no auestion of discharge of an accused arises under Section 251A (2). It cannot be said that Narayanan, son of Raman Peruvannan was an accused person against whom a charge was found to be groundless in this case. Once his identity is established that he was not accused of any offence he should have been set at liberty forthwith. The learned Sub Magistratp has only acted in accordance with law in sending away Narayanan, son of Raman Peruvannan, without any delay. It is iust and proper that he is not deprived of his personal liberty except according to Procedure established by law. When therp is a conflict between the law of procedure and substantial rights of the parties it is the duty of the court or the iudsre to ignore the procedure (See In re: Kumar Rupendra Deb RaHhot v. Ashrumati Debi : AIR1951 Cal286 .

11. That the subordinate courts have the inherent power to act ex debito iustitiae to do the real and substantial justice for which alone it exists or to prevent the abuse of its own process cannot be disputed- There had been cases in which lower courts' orders were held justified in acting in the exercise of an inherent power in criminal cases. Section 561-A Criminal P. C. confers upon the High Court the right to exercise inherent powers in appropriate cases. But it does not confer no new or extended Power but only saves the inherent power which it alreadv possesses. The absence of any reference to any other criminal Court in Section 561-A does not necessarily impiv that such Courts can in no circumstances exercise inherent power. Courts may act on the principle that every procedure should be understood as permissible till it is shown to bp prohibited by law- It is unnecessary to pronounce as to the extent of the inherent power of the trial Court,

12. Though Section 561-A Criminal P, C. is silent with regard to the inherent power that can be exercised by the subordinate Courts, the omission does not mean that subordinate courts cannot, when necessary exercise inherent powers-On this auestion Madhva Bharat HishJ Court made a clear pronouncement in a decision reported in Hariram v. The State AIR 1956 Madh Bha 17 : (1956 Cri LJ 66) which reads:

It is an established proposition of law that court of justice must possess inherent powers, apart from the express provision of law, which are necessary to their existence and the proper discharge of duties imposed upon them by law- The Criminal Procedure Code or for the matter of that no procedural law is ever exhaustive and in cases where circumstances reauired it the courts havp acted on the assumption that thev possess inherent cowers (as of right) to do iustice for which thev really exist. At the same time it must be remembered that a court has no inherent power to do that which is prohibited by the Code.

In this view of the matter every court whether Civil or Criminal in the absence of any express provision to the contrarv, shall be deemed to possess as inherent in its very constitution, all such powers as are necessarv in the course of the administration of iustice. The rulp of inherent powers has its source in a latin maxim 'Quado lex aliauid alicui concedit, con-codere videtur id sine quo iosa esse non potest', which means that when law j?ives anything to any one, it fives also all those things without which the thine itself could not exist.

Reference in this regard may also be rrde to a decision reported in Rukmapa Naik v. Mohammad Hussain. 1965 Mad LJ (Cri) 159 wherein Hegde, J stated as follows:

Absence of any provision on a particular matter does not mean that there is no such power, and the court may act on the principle that every pfocedurp should be understood as permissible till it is shown to be prohibited by law. It is un-necessarv in this case to pronounce as to the extent of the inherent power of the trial Court.

While dealing with practice and procedure in all the courts the Privv Council had occasion to point out that courts having jurisdiction to act are bound to see that no injury is done by their acts. In Jai Borham v. Kedar Nath Marwari AIR 1922 PC 269 Lord Carson pointed out , 'one of the first and highest duties of all courts is to take care that the act of the court does no iniurv to any of the suitors and when the expression 'thp act of the court' is used, it does not mean merely the act of the pri-marv court or of any intermediate court of appeal but act of the court as a whole from the lowest court which entertains iurisdiction over the matter upto the Highest Court which fanally disposes of the case.'

13. Madhva Pradesh Hiah Court in Rami Bai v. Nathu AIR 1961 Madh Pra 25 : (1961-1 Cri LJ 94) on comparison of the powers conferred upon the Civil and Criminal Courts under Section 151 Civil Procedure Codp and Section 561-A of the Criminal Procedure Code dealt with the proposition as follows:

This takes us to the auestion as to whether subordinate criminal courts have any inherent powers at all as are referred to in Section 151 Civil Procedure Code, and in regard to the High Courts, in Sec- tion 561-A of the Criminal Procedure Code itself. Both these sections have about the same formula describing the inherent power except that Section 561-A adds 'or otherwise to secure the ends of iustice'. It is not as if either section created or invested the Courts concerned with .anv new power. On the contrary, the power is already therP and all that these sections do is to Provide that in regard to all Civil Courts, nothing in the Civil Procedure Code limits or otherwise affects the inherent power, and in regard to the High Court, actin? as the court of criminal iustice, that nothing in the Criminal Procedure Code does so limit or affect its inherent power.

14. Dealing with the inherent power of subordinate Courts in Criminal Cases the decision states further as follows:

As for the subordinate Criminal Courts that inherent power has not been taken awav but is limited by the express provision of the Code, while in a similar case in, regard to Civil Courts therp, is no such limitation. Thus one comes to the conclusion that every criminal Court has got inherent Power to make such orders as may be necessarv to give effect to any order under this code or to prevent abuse of process of any court or otherwise to secure ends of iustice; but a criminal court other than a Hieh Court cannot, invoke this power if there is already an express provision in the Code in this regard.

The right to exercise inherent powers by the subordinate criminal courts is explained by the same decision in the following passage at page 27:

In practice, the Criminal Procedure Code seeks to be exhaustive, so that the occasion for exercise of inherent power by a Subordinate Criminal Court (unlikp a Civil Court) arises very rarely. Further it would be an occasion very similar to one

arising under this or that express provision in the Code with the difference that it does not auitp fall within the four corners of that section- It is the dutv of every such court to act rightly and fairly according to the circumstances towards all parties involved AIR 1922 PC 269 even in the. absence of an express provision in the Code.

15. Instances can be emoted of cases where the order of Magistrate was held iustified in acting in the exercise of an inherent power in certain Criminal cases. As for example the decision in Lalit Mohan Bhattachariee v. Noni Lai Sarkar. AIR 1923 Cal 662 : 25 Cri LJ 464 may be seen. It was a case in which it was held that it was open to a Magistrate to change his mind after ordering the issue of summons under Section 204 of the Code. Another strange example was furnished by Achambit Mandal v. Mahatab Singh-(1914) ILR 42 Cal 365 : 16 Cr LJ 148. a case in which the Magistrate took up a summons case on a date in advance of that fixed for the hearing and the complainant being naturally absent passed an order under Section 247 of the Code. Subsequently the complainant appeared on the proper date, and the Maffistratp ignored his own order under Section 247 and proceeded to try the case: the Calcutta High Court held that the Masistratp was entitled to do so. This ruling can be appreciated in the light of the observation of Sir Barnes Peacock C J- in Hurro Chunder Rov Choudrv v. Shoorodhonee Debia. (1868) 9 Suth WR 402 : (Benf LR Sup Vol 985) wherein it was held 'we should do well, in construing Acts of the legislature to take for our guidance Domat's remark that since laws are general rules, thev cannot make express provision against all inconvenience, which are infinite in number and so that their dispositions shall express all the cases that may possibly happen'

The Courts have inherent Power to decide one auestion and reserve another and that it did not require any provision of the Codp to authorise a Judee to do what in the matter was iustice and for the advantage of the parties. Again in Krishnaswami Panikandar v. Ramaswami Chettiar AIR 1917 PC 179 : ILR 41 Mad 412 their Lordships held, 'where an ex parte order is passed excusing the delay in presenting an appeal, it must be regarded as a tacit term of such an order that though unaualified in expression it should be open to reconsideration at the instance of the partv preiudiciallv affected.' These observations, it is true, were

made with reference to the Code of Civil Procedure, but it seems that the principlp is by no means inapplicable to the Code of Criminal Procedure as well subiect of course to the qualification that inherent power cannot be invoked on a point where the Code has madP express provision. Following the above Privv Council ruling Patna High Court held that where an order is passed ex Parte it must be regarded as a tacit term of such an order that though unqualified in expression it should be open to reconsideration at the instance of the party preiudicially affected, whether the order is passed under Civil or Criminal procedure Code (See Asst. Govt. Advocate v. Upendra Nath Mukeriee AIR 1931 Pat 81 : 32 Cri LJ ,551 which was a case in which the late Babu Raiendra Prasad, who became President of India later, was sought to bp examined as a defence witness in another case while he was undergoing imprisonment as an 'A' class political prisoner in Hazaribagh Jail.)

16. In a later Patna case reported in Subhlal Gope v. State of Bihar : AIR1971 Pat151 it was pointed out that the procedure for disposal of a case is to advance administration of iustice. It further stated 'a Court of iustice, in its very constitution has inherent powers as are necessary to do the right and to undo a wrong in course of the administration of iustice. Although unlike Section 151' C. P. C. there is no specific provision in the Criminal Procedure Code conferring such inherent power on subordinate criminal courts, thev are justified in acting in exercise of inherent power, subiect to the Qualification that it cannot be invoked so as to override the express or implied provision of the Code.' That was a case where the committ-ine Magistrate passed an order of discharge under Section 209 in the absence of the complainant, but later on the complainant's application on the same dav reviewed his previous order and restored the case to file.

It was pointed out that the order of discharge in that case was not a iudgment as contemplated under Section 369 Criminal P. C and that the action of the Magistrate was perfectly valid even though there is no specific provision in the, code. The Magistrate's order was supported in the above decision and the relevant observation is at page 155. It starts. 'The order of discharge passed by the learned Magistrate in the absence of the complainant was not a iudement within the rneaning of the word as contemplated by Section 369 of the code and as such that Section did not stand as a bar to the learned Magistrate exercising his inherent

iuris-diction for the purpose of revising the criminal prosecution which in his opinion was wrongly terminated by the discharge order. There being no provision in the Code, either express or implied to the contrary, in my opinion, the learned Magistrate had inherent power to undo the wrong by recalling the- order of discharge passed by him.'

17. Once it is established that the person before a criminal Court is not an accused charged with any offence, though his namp appeared in the party arrav the court will have no iurisdiction to proceed against him under Section 251-A (2) Criminal P- C. even if the court takes cognizance of the offence under Section 190(b) Criminal P. C. against other accused persons. Provision for taking coeni-zance is madp under section 190 appearing in Chapter XV of the Criminal Procedure Code, Chapter XVI thereof deals with examination of the complainant (Section 200) the procedure to be adopted by a Magistrate, not competent to take cognizance of a case instituted before him (Section 301) postponement of issue of process (Section 202) and dismissal of a complaint (Section 203), Chapter XVII provides for the commencement of pro-ceedines before Magistrates. If the Magistrate taking cognizance under Section 190. Criminal P. C. is leeally incompetent to proceed in the manner provided in Chapter XVI or Chapter XVII of the Code then his taking cognizancp of the matter will be of no avail.

18. This court In the matter of State of Kerala. AIR 1969 Ker 111 : (1969 Cri LJ 486) on a consideration of the relevant law and authorities on the tonic held in para II as follows:

It appears to us on the authority of the statements of law contained in the above decisions that taking cognizancp of an offence can only be for the purpose of initiating legal proceedings under any of the provisions of the Code. If the Magistrate has no power to take any proceedings in respect of an offence brought to his notice, he is not competent to take cognizance of that offence. Taking notice of the commission of an offence and keeping the matter to himself without bein# able to take any action thereon for want of power, would not amount to taking cognizance. In other words, the power to initiate proceedings against a person accused of an offence, is a condition precedent for taking cognizance of an

offence. A Magistrate, who has no power to try a person charged with an offence or to commit him for trial is not competent to take cognizance of that offence.

19. This conclusion was reached relying upon the decision reported in : 1951 CriLJ775 . (R. R. Chari v. State of U. P.) : AIR1950 Cal437 (Supdt and Remembrancer of Legal Affairs West Bengal v. Abani Kumar Baneriee): : 1959 CriLJ1368 (Naravandas Bhagawandas Madhab-das v. State of West Bengal and AIR 1961' Supreme Court 986 : 1961 2 Cri LJ 39 (Gopal Das Singhi v. State of Assam and dissenting from the view taken in the cases reported in : AIR1952 All873 fJaddu v. State): : AIR1967 Pat416 (Pancham Singh v. State): AIR 1956 Bom 437 - 1959 Cri LJ 1153 (State v. Shankar Bhaurao Khirode.)

20. On an anologv of the principle of law enunciated in thesp cases it can be said that the Magistrate will have no jurisdiction to proceed with the enauirv or trial of a case if it is established with utmost certainty that the person before him is not an accused person.

21. It requires no authority to mention that a proceeding against an accused preceding an order of discharge under Section 251-A (2) Criminal P. C. is not a trial in the strict sense but is only in the nature of an enauiry. (See S- Ranga-samy, (1965) Mad LJ (Cri) 78 : (1964-2 Cri LJ 430) Assuming that the sub Magistrate in this case Passed the order is a proceeding coming within the purview of Section 251-A (2) Criminal E. C. even then the order is not tainted with any illegality or irregularity as an order under the enquiry held by virtue of Section 251-A (2) Criminal P. C. is unaffected on account of Section 369 Criminal P. C. which states inter alia..... 'riQ court when it signed its iudgment, shall alter or review the same except to correct a clerical error'. The earlier order by which the Sub-Magistrate took cognizance of the offence by issuing summons to Narayanan, son of Raman Peruvannan shall be deemed to have been altered by the subseauent order dated 30-11-71 in accordance with law in due exercise of the inherent power vested in the Magistrate.

22. We find no ground to interfere with the order passed by the Sub Magistrate in the case. The learned Magistrate is correct in dispensing with the presence of Narayanan, son of Raman Peruvannan and removing him from the party array.

Under these circumstances we also find that the Magistrate is correct in amending the charge-sheet bringing on record the name of Narayanan, son of Nanivil Raman who is the real accused person in the case to avoid inconvenience and future complications at the trial. There is therefore no substance in these criminal References-

23. In the result the Criminal References are reiected and the order of the Sub Magistrate is confirmed. The Sub Magistrate will take up the cases for trial as expeditiously as possible after the records are received back by him.

Narayana Pillai, J.

24. In express terms Section 561-A of the Criminal Procedure Code applies only to High Courts and what the section does is only to declare that the inherent power already possessed by the High Courts is not taken away by the provisions of the Code. But that does not mean that the other Courts do not have inherent power. In the ab-sencp of express provision every court, whether Civil or Criminal, has in its very constitution inherent power to do the right and undo a wrong in the administration of justice. I agree in reiecting the References.