

Ajitha Vs. State of Kerala

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Court : Kerala

Decided On : Nov-28-2005

Reported in : 2006(1)KLT339

Judge : K. Thankappan, J.

Acts : Immoral Traffic (Prevention) Act, 1956 - Sections 5; [Indian Penal Code \(IPC\), 1860](#) - Sections 109, 341, 366, 376, 376A, 376B, 376C and 376D; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 24, 24(8), 194, 216, 327, 327(1), 327(2), 327(3), 407 and 482; [Constitution of India](#) - Article 21

Appeal No. : W.A. 30176 of 2005 etc.

Appellant : Ajitha

Respondent : State of Kerala

Advocate for Def. : P.C. Iype, State Attorney,; T.R. Ramachandran Nair,; V.V

Advocate for Pet/Ap. : K.S. Madhusoodan,; T.V. Jayakumar Namboodiri,; Sivan Mad

Judgement :

K. Thankappan, J.

1. These Writ Petitions and Crl. Miscellaneous Cases relate to Crime No. 282 of 1997 of Nadakavu Police Station, Kozhikode registered on the basis of the First Information Statement given by Ms. K. Ajitha, the petitioner in W.P. (C) No. 30176 of 2005.

2. The case was registered against 16 accused whose names and addresses are mentioned in Ext.PI charge (produced in W.P.(C) No. 30176 of 2005) framed on the basis of the final investigation report filed by the police. The case is now pending as S.C. No. 124 of 2002 on the file of the Additional Assistant Sessions Court II, Kozhikode. The above case was nicknamed by the media as 'Ice Cream Parlour Case'.

3. The short facts of the case are that one Ms. Sreedevi, the first accused in Ext.PI was alleged to be running a commercial sex centre under the guise of running an ice cream parlour and on the basis of the First Information Statement given by the petitioner in W.P. (C) No. 30176 of 2005, the above crime was registered by the police. It is alleged that all the 16 accused mentioned in Ext. P1 committed offences punishable under Sections 366, 109 and 341 I.P.C. and Section 5 (ia), (c) and (d) of the Immoral Traffic (Prevention) Act, 1956.

4. The second respondent in both the Writ Petitions is one K.V. Joseph, Special Public Prosecutor appointed by the Government under Section 24(8) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') to represent the State in Section C. No. 124 of 2002 on the file of the Additional Assistant Sessions Court II, Kozhikode. In Ext.PI charge, the name of Sri. P.K. Kunhalikutty, former Minister of the State Government was mentioned at pages 7, 8, 9, 12, 15, 16 and 28 as if he was also involved in the commission of the alleged offences. It is further alleged that the very mention of the name of Sri. P.K. Kunhalikutty provoked the second respondent to file a petition under Section 216 of the Code, a copy of which is produced as Ext. P2 in W.P.(C) No. 30176 of 2005, praying that the court below may alter/amend the charge framed in the said case on 6-10-2005 excluding the accusations made against Sri. P.K.Kunhalikutty as he was not included in the party array. It is further alleged in the above Writ Petition that the second respondent not only filed Ext. P2 petition, but also held a press conference

at Kozhikode on 17-10-2005 which was partly telecast by Asia Net, Surya, India Vision and Kairali. Ext.P3 is the CD. of the press conference. It is alleged by the petitioner that in the press conference, the second respondent made provocative, irregular and illegal imputations against the Presiding Officer, the IIInd Additional Assistant Sessions Judge, Kozhikode.

5. The very same allegations are raised by the petitioner in W.P. (C) No. 31108 of 2005 who is none other than Sri. V.S. Achuthanandan, the Opposition Leader of the State Assembly. Both the petitioners in the Writ Petitions, therefore, seek a direction to the first respondent to take steps to remove the second respondent from the post of Special Public Prosecutor in S.C. No. 124 of 2002 pending before the Additional Assistant Sessions Court II, Kozhikode. Apart from the above common prayer, the petitioner in W.P. (C) No. 31108 of 2005 seek a further direction to the first respondent to consider and pass orders on Exts.P2 and P5 representations filed by him before the Chief Minister of the State Sri. Oommen Chandy as expeditiously as possible taking into account the serious nature of the allegations levelled against the second respondent.

6. Heard Sri.K.S. Madhusoodanan and Sri. Sivan Madathil learned counsel appearing for the petitioner in W.P. (C) No, 30176 of 2005 and W.P. (C) No. 31108 of 2005 respectively. The State Attorney Sri. P.C. Iype appearing for the State as well as the second respondent was also heard by this Court.

7. Learned counsel appearing for the defacto complainant in Crime No. 282 of 1997 who is the petitioner in W.P. (C) No. 30176 of 2005 strenuously argued that the second respondent is unfit to hold the post of Special Public Prosecutor in S.C. No. 124 of 2002. Counsel further contended that as per the provisions of Section 24(8) of the Code, though the Government is empowered to appoint a legally qualified advocate to conduct a case or class of cases as Special Public Prosecutor, such Public Prosecutors have a legal duty to assist the court as the minister of a court of law. Counsel further argued that such Prosecutors appointed under Section 24(8) of the Code shall not in any way protect the accused in a criminal case against whom criminal offences are alleged by the prosecution. On the other hand, counsel submitted, the Prosecutor or the Special Public

Prosecutor shall conduct the case entrusted with him without fear or favour. According to the learned counsel, filing of Ext.P2 petition and holding a press conference would clearly indicate that the second respondent was trying to favour Sri. P.K. Kunhalikutty, Former Minister of State. Counsel also contended that the appointment of the second respondent as Special Public Prosecutor was not in accordance with Section 24 of the Code and hence he should be removed from the post of Special Public Prosecutor in S.C. No. 124 of 2002 on the file of the AdditionalAssistant Sessions Court II, Kozhikode.

8. The very same contention are taken up by Sri. Sivan Madathil, learned counsel appearing for the petitioner in W.P. (C) No. 31108. Apart from the relief sought for in W.P. (C) No. 30176 of 2005, an additional relief is sought for in W.P. (C) No. 31108 of 2005, that is, to consider and pass orders on Exts.P2 and P5 representations.

9. The State Attorney, Sri. P.C. Iype, on the other hand, contended that the second respondent was appointed as Special Public Prosecutor in S.C. No. 124 of 2002 as per the provisions contained in Section 24(8) of the Code as he was found, by the Government, to be a well qualified and experienced Advocate capable of conducting cases for and on behalf of the prosecution. Counsel further contended that as per the provisions of the Code, a qualified Advocate can be appointed by the State Government to appear in a case or class of cases as directed by the Government. Counsel has taken the stand that Sri K.V. Joseph, the second respondent in the Writ Petitions was found fit to act as Special Public Prosecutor in S.C. No. 124 of 2002. Ext.P2 petition filed by the second respondent, according to Sri. P.C. Iype, was well within the provisions of Section 216 of the Code and that the second respondent was justified in filing such a petition as it was irregular and illegal on the part of the Presiding Officer to make accusations against a third party in a criminal charge. Sri P.C. Iype further submitted that the alleged press conference held by the second respondent was with bona fide intention and it was not intended to make any imputation against the Presiding Officer.

10. The question before this Court is whether Sri K.V. Joseph, the second respondent in the above Writ Petitions should be ordered to be removed from the post of Special Public Prosecutor in S.C. No. 124 of 2002 on the file of the Additional Assistant Sessions Court II, Kozhikode.

11. This Court considered the argument advanced on either side and has gone through the documents produced in the Writ Petitions. The contention taken up by Sri. K.S.Madhusoodanan, learned counsel appearing for the petitioner in W.P. (C)No. 30176 of 2005 that the second respondent was appointed as Special Public Prosecutor in S.C. No. 124 of 2002 without considering the panel sent by the District Judge requires no consideration as the said appointment was as per the provision contained in Section 24(8) of the Code which does not prescribe any such condition unlike in the case of appointment of State Public Prosecutors or Public Prosecutors and Additional Public Prosecutors of Districts. This Court has already considered the factual matrix which led to the registration of Crime No. 282 of 1997 of Nadakavu Police Station and the allegations contained in the First Information Statement given by the defacto complainant who is the petitioner in W.P. (C) No. 30176 of 2005. This Court has also considered the wide publicity given by the media and taking into account the importance of the case, this Court is of the view that the second respondent has transgressed the limits of a Special Public Prosecutor whose duty was to prosecute the culprits without fear or favour. It was the duty of the second respondent to bring the true facts and materials before the court of law for administration of justice. The Public Prosecutor, Special Public Prosecutor or the Government Pleader, as the case may be, are duty bound to enlighten the court with true facts and legal principles which would enable the court of law to dispense justice in correct perspective. The second respondent ought not to have made any imputations against the Presiding Officer. That is not his duty as a Special Public Prosecutor.

12. In the above circumstances, the action of the second respondent now alleged in the Writ Petitions are sufficient enough for an order to remove him from the post of Special Public Prosecutor in S.C. No. 124 of 2002 on the file of the Additional Assistant Sessions Court II, Kozhikode. Hence, this Court hereby order that Sri K.V. Joseph, the second respondent in the above Writ Petitions shall be removed

from the post of Special Public Prosecutor in S.C. No. 124 of 2002 pending before the Additional Assistant Sessions Court II, Kozhikode. The first respondent shall pass a formal order in this regard forthwith. The State Government shall appoint a qualified lawyer as Special Public Prosecutor in S.C. No. 124 of 2002 within 15 days from today after complying with all the formalities.

13. The shadow of doubts which arose out of the action of the second respondent has compelled this Court to take such a decision. Apart from the above and more important is the fact that even the least scratch would bring about a blur in the glorified image of the goddess of justice. It is made clear that the observations contained in this judgment will be not be a blot on the professional life of the second respondent, Sri K.V. Joseph.

14. Now coming to the reliefs sought for in W.P. (C) No. 31108 of 2005, this Court is of the view that the petitioner will be satisfied with the order passed in W.P. (C) No. 30176 of 2005. The only other direction that would be required in W.P. (C) No. 31108 of 2005 is to consider Exts.P2 and P5 representations filed by the petitioner/Since the State Government is already directed to take steps by passing an order removing the second respondent from the post of Special Public Prosecuted in S.C. No. 124 of 2002, this Court is of the view that no further direction is necessary. However, it is only proper for the first respondent to give a reply to the petitioner with regard to the matter as expeditiously as possible.

15. Crl. M.C. No. 3662 of 2005 is filed by the 7th accused in S.C. No. 124 of 2002 on the file of the Additional Assistant Sessions Court II, Kozhikode. The reliefs sought for in this Crl. Miscellaneous Case is for a direction to the court below to conduct the trial of the above Sessions Case in camera and also to direct the print and electronic' media not to publish any matter in relation to any such proceedings till the final judgment is pronounced.

16. Sri.C.C.Thomas, learned counsel appearing for the petitioner in the above Crl. Miscellaneous Case relied on the decision of the Supreme Court reported in State of Punjab v. Gurmit Singh : 1996 CriLJ1728 and contended that as per Section 327(3) of the Code, the court can allow the proceedings in a criminal case to be conducted in camera. In the above judgment, the Apex Court considered the

provisions of Section 327 of the Code and held as follows:

It casts a duty on the Court to conduct the trial of rape cases etc. invariably 'in camera.' The Courts are obliged to act in furtherance of the intention expressed by the Legislature and not to ignore its mandate and must invariably take recourse to the provisions of Section 327 (2) and (3) Cr.P.C. and hold the trial of rape cases in camera. It would enable the victim of crime to be a little comfortable and answer the questions with greater ease in not too familiar a surroundings. Trial in camera would not only be in keeping with the self respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of the evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in an open Court under the gaze of public. The improved quality of her evidence would assist the Courts in arriving at the truth and sifting truth from falsehood. The High Court would therefore be well advised to draw the attention of the trial Courts to the amended provisions of Section 327 Cr.P.C. and to impress upon the Presiding Officers to invariably hold the trial of rape cases in camera, rather than in the open Court as envisaged by Section 327(2) Cr.P.C. When trials are held in camera, it would not be lawful for any person to print or publish any matter in relation to the proceedings in the case, except with the previous permission of the Court as envisaged by Section 327(3) Cr.P.C. This would save any further embarrassment being caused to the victim of sex crime.

Section 327 of the Code reads as follows:

Court to be open.-- (1) The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court, to which the public generally may have access,'so far as the same can conveniently contain them.

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

(2) Notwithstanding anything contained in Sub-section (1), the inquiry into and trial of rape or an offence under Section 376, Section 376-A, Section 376-B, Section 376-C or Section 376-D of the Indian Penal Code (45 of 1860) shall be conducted in camera:

Provided that the presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the Court.

(3) Where any proceedings are held under Sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the Court.

17. This Court has already considered the factual situation and the allegations against the petitioner and the other accused in the final charge filed by the police. This case being one which was given wide publicity by the print and electronic media and the origin of the case being the First Information Statement given by the President of an organisation 'Anweshi' which stands for protection of the right of women as a whole and for Women Empowerment in every walk of life and the offence alleged against the accused being heinous in nature, it is only proper for this Court to allow the first prayer. Moreover, the first prayer has not been seriously objected to by the respondent. Hence, it is ordered that the trial in S.C. No. 124 of 2002 on the file of the Additional Assistant Sessions Court II, Kozhikode shall be conducted in camera. With regard to the second prayer, it is for the petitioner to seek the relief before the court below.

18. Crl. M.C. No. 3732 of 2005 is filed by the 12th accused in S.C. No. 124 of 2002 on the file of the Additional Assistant Sessions Court II, Kozhikode. The reliefs sought for in this Crl. Miscellaneous Case are as follows:

(a) invoke the power under Sections 194, 407 and 482 of the Code of Criminal Procedure and transfer the SC No. 124/2002 pending before the Hon'ble Asst. Sessions Court II, Kozhikode to any other competent Court outside Kozhikode District, in order to secure the ends of justice.

(b) direct the court to which the case is transferred to expedite the trial in accordance with law.

Even though this Crl. Miscellaneous Case is filed for transfer of S.C. No. 124 of 2002 from the present court to any other competent court outside Kozhikode District, learned counsel for the petitioner Sri. Antony Dominic submitted that the petitioner will be satisfied if S.C. No. 124 of 2002 pending before the Additional Assistant Sessions Court II, Kozhikode is transferred to any other court having equal jurisdiction within the District. Counsel submitted that all the 16 accused against whom charge is filed are known to the public either politically or otherwise and hence, the remarks made by the Presiding Officer while passing Annexure C order will have an adverse effect on the final decision. Counsel further submitted that the petitioner apprehends that he may not get justice in view of the preconceived notion entertained by the court below. Learned counsel also contended that the unnecessary interference of persons like the 17th respondent herein with the investigating agency by itself creates further apprehension in the mind of the petitioner. The apprehension of the petitioner appears to be justified.

19. Notice was issued to the respondents and notice was served on all except respondents 6, 7 and 8. Advocate Sri. K.S. Madhusoodanan appears for the 17th respondent who is the petitioner in W.P. (C) No. 30176 of 2005. Most of the accused are represented by counsel. Hence, this Court is of the view that non service of notice to respondents 6,7 and 8 will not cause any prejudice to them.

20. The brief facts of the case has already been dealt with in W.P. (C) No. 30176 of 2005 and hence, it is not necessary to reiterate the same. When this Crl. Miscellaneous Case was admitted by this Court, remarks was called for from the IInd Additional Assistant Sessions Judge, Kozhikode regarding the allegations contained in the Crl.M.C. In the remarks submitted on 17.11.2005, the learned IInd Additional Assistant Sessions Judge had narrated the history of the case. He denied the allegations levelled against him and even justified the passing of Annexure C order. To justify the stand taken by him, the learned IInd Additional Assistant Sessions Judge had even relied on certain judicial pronouncements including that of the Apex Court.

21. Learned counsel for the petitioner Sri. Antony Dominic relying on the decisions reported in K. Anbazhagan v. Superintendent of Police 2004 (1) KLT (SC) (SN) 79 : (2004) 3 SGC 767) and Sri. Jayendra Saraswathy Swamigal, Tamil Nadu v. State of Tamil Nadu and Ors. 2005 (9) JT 69 submitted that the attitude of the Presiding Officer was prejudicial to the accused persons including the petitioner and hence it is only proper for this Court to invoke the jurisdiction under Sections 194, 407 and 482 of the Code and transfer the case from the present court to any other court of competent jurisdiction within the District.

22. The request of the petitioner for transfer of S.C. No. 124 of 2002 was vehemently opposed by the learned counsel appearing for the petitioner in W.P. (C) No. 30176 of 2005 as well as by the State Attorney, Sri. P.C. Iype.

23. This Court has gone through Annexure C order. Even though this Court is not considering the merit of Annexure C order in this matter, from the facts and circumstances now revealed and also taking into account the allegations levelled against the Presiding Officer as well as the Special Public Prosecutor and in the light of the principles laid down in the decisions referred to above, this Court is inclined to allow this CrI. Miscellaneous Case. In the decision reported in K. Anbazhagan v. Superintendent of Police : 2004 CriLJ583 , the Apex Court held as follows:

Free and fair trial is sine qua non of Article 21 of the Constitution. It is trite law that justice should not only be done but it should be seen to have been done. If the criminal trial is not free and fair and not free from bias, judicial fairness and the criminal justice system would be at stake shaking the confidence of the public in the system and woe would be the rule of law. It is important to note that in such a case the question is not whether the petitioner is actually biased but the question is whether the circumstances are such that there is a reasonable apprehension in the mind of the petitioner.

Apart from the above judgment, yet two other decisions of the Supreme Court reported in Abdul Nazar Madani v. State of Tamil Nadu and Anr. : 2000 CriLJ3480 and Gurcharan Dass Chadha v. State of Rajasthan AIR 1996 SC 1418 are also relied on by this Court to take a decision in favour of the petitioner. In the former

judgment, the Apex Court held as follows:

Convenience of the parties including the witnesses to be produced at the trial is also a relevant consideration for deciding the transfer petition. The convenience of the parties does not necessarily mean the convenience of the petitioners alone who approached the court on misconceived notions of apprehension. Convenience for the purposes of transfer means the convenience of the prosecution, other accused, the witnesses and the larger interest of the society.

In the latter judgment, the Apex Court considered the necessity to transfer a case in a given situation and held as follows:

A case is transferred if there is a reasonable apprehension on the part of a party to a case that justice will not be done. A petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged. It is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case does not suffice. The Court has further to see whether the apprehension is reasonable or not. To judge the reasonableness of the apprehension the state of the mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must not only be entertained, but must appear to the Court to be a reasonable apprehension.

24. Further, even though the crime was registered as early as in 1997, trial has not been concluded so far. It is pertinent to note that the matter has come to the notice of this Court as well as the Apex Court. Hence, S.C. No. 124 of 2002 pending before the Additional Assistant Sessions Court II, Kozhikode shall stand transferred to the Principal Assistant Sessions Court, Kozhikode to be tried and disposed of as expeditiously as possible. The Additional Assistant Sessions Court II, Kozhikode shall transmit the entire files relating to S.C. No. 124 of 2002 to the Principal Assistant Sessions Court, Kozhikode forthwith.

In the result, W.P. (C) No. 30176 of 2005, W.P. (C) No. 31108 of 2005, Crl.M.C. No. 3662 of 2005 and Crl.M.C. No. 3732 of 2005 shall stand allowed to the extent indicated above.

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