

State of Kerala Vs. Sudhir

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Court : Kerala

Decided On : Dec-13-2002

Reported in : 2003(1)KLT840

Judge : J.B. Koshy and; K. Thankappan, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 156(3), 173, 173(8), 190(1), 197 and 197(1); Prevention of Corruption Act - Sections 19

Appeal No. : C.R.P. No. 1 of 2001

Appellant : State of Kerala

Respondent : Sudhir

Advocate for Def. : P.N. Gopalakrishnan Nair,; T.R. Ramachandran Nair and; K

Advocate for Pet/Ap. : P.V. Madhavan Nambiar, Director General of Prosecutions

Judgement :

ORDER

J.B. Koshy, J.

1. This reference is made by the Enquiry Commissioner and Special Judge (Vigilance), Thrissur under Section 395(2) of Cr.P.C. Following are the questions

referred :

(a) Whether the grant of sanctions by the Government for a different action in a different forum already made curtails the power of the criminal court to act independently under Section 156(3) or Section 173(8) Cr.P.C. to direct a further investigations (Under Section 156(3) or Section 173(8) Cr.P.C.)?

(b) Whether under those circumstances a direction by the Criminal Court for further investigations Under Section 156(3) or Under Section 173(8) Cr.P.C. would amount to a seek to review the stand taken by the Government?

(c) Whether under those circumstances the Criminal Court is duty bound to accept the view of the Investigating Officer blindly without making any independent decision of its own, since the Government has already chosen to refuse to accept the view of the Investigating Officer/Director, Vigilance and Anti-Corruption Bureau, Thiruvananthapuram. If that is so would it be not amount to a position where the court just plays into the hand of the arbitrary action of the Police/Government to pput and choose the servants to subject to the criminal prosecutions instead of taking action against the delinquent officers on equal footing?

2. Questions referred can be understood and answered only after considering the factual backgrounds. On 17.1.1998 an FIR was registered as V.C. 1/98 against the first respondent on the basis of the vigilance enquiry for offences punishable under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 and under Sections 420, 468, 471 and 477A of IPC. The allegation against the 1st respondent who was employed as a Medical Officer, P.H. Centre, Senapathy, Idukki District from June, 1993 to June, 1997 is that he fraudulently marked his attendance register in the P.H. Centre while he was working in the St. Joseph Hospital, Dharmagiri, Kothamangalam, Ernakulam District for about three years during the period from 1994 to 1997. Investigating Officer had questioned as many as 57 witnesses and seized 69 documents and submitted his final report on 17.3.2001 stating that there were no sufficient evidence to charge sheet and take criminal case but it recommended to take departmental action. Accordingly Government charge sheeted him as per Service Rules and enquiry was directed to

be conducted under the Kerala Civil Service (Classification, Control and Appeal) Rules. The investigating officer, in the final report filed before the Special Judge, recommended to drop the case. When final report was submitted this reference was made as according to Special Judge case files (CD files) indicates a prima facie case against the 1st respondent. But sanction by Government/Competent authority is required as a condition precedent to launch prosecution in view of Section 19 of the Prevention of Corruption Act.

3. With regards to first two questions, regarding power under Section 156(3) and 173(8) of Cr.P.C. are concerned matter is well settled. As held by the Supreme Court in *H.S. Bains v. The State (Union Territory of Chandigarh)* (AIR 1980 SC 1883), the power under Section 156(3) can be exercised even after the submission of a report under Section 173 which would mean that it is open to the Magistrate not to accept the conclusion of the Police Officer and direct further investigation by the said agency. When the police submits a final report after investigation with the conclusion that there is no sufficient materials available for the prosecution of the accused, Magistrate or Special Judge has no jurisdiction to direct the police to submit a charge sheet even if he can himself take cognizance of such offence under Section 190(1) as held by the Supreme Court in *Abhinandan Jha and Ors. v. Dinesh Mishra* (AIR 1968 SC 117), *R.N. Chatterji v. Havildar Kuer Singh* (1970 (1) SCC 496), This is all the more so when Magistrate cannot take cognizance without prior sanction in view of Section 197 of Cr.P.C. or Section 19 of the P.C. Act. Power of the Magistrate is only to direct a reinvestigation or further investigation by the same agency and not to direct the police to submit charge sheet. Judgment of the Apex Court in *Hemant Dhasmana v. Central Bureau of Investigation* (AIR 2001 SC 2721) also shows that Special Judge can direct further investigation by the same agency in the corruption cases for ends of justice even though it cannot direct investigation by a particular officer. This is the power vested in the Magistrate under Section 173(8) of Cr.P.C.

4. Before Magistrate taking cognizance of the offences, wherever a prior sanction under Section 197(1) of Cr.P.C. or Section 19 of the Prevention of Corruption Act has to be obtained (as in this case), is necessary power of the Magistrate has to be exercised 156(3) only at the pre-cognizance stage, there is to say before taking

cognizance under Sections 190, 200 and 202. See *Tula Ram and Ors. v. Kishore Singh* (AIR 1977 SC 2401). But power of the police for further investigation and submit a report under Section 173(8) is not affected by the power under Section 156(3) as held in *State of Bihar and Anr. v. V.J.A.C. Saldhanna and Ors.* (AIR 1980 SC 326).

5. It is settled law that court cannot compel or give direction to the sanctioning authority for granting sanction for prosecution as held by Apex Court in *Mansukhlal Vithaldas Chauhan v. State of Gujarat* (1997 CrLJ 4059 SC). When a learned single Judge of Panjab and Haryana High Court in one case directed the State Government to accord sanction as provided under Section 197 of Cr.P.C. Apex Court interpreted it only as a direction to consider the question of according sanction as provided under Section 197 of Cr.P.C. In *State of Punjab v. Vinodkumar* (2001 (3) CrLJ 4938 para. 8) it was held as follows:

6. Regarding the direction passed by the learned single Judge that 'State Government shall accord necessary sanction as provided under Section 197 of the Code.' We chose to interpret and understand the said direction as this. 'State Government shall consider the question of according sanction as provided under Section 197, Cr.P.C. and pass appropriate orders thereon.' We have no manner of doubt that learned single Judge would not have granted a direction more than that though the phraseology used by him is liable to be interpreted in the way the State Government entertained appreciation about it. As the said direction would stand recast.

Therefore it is very clear that Special Judge cannot directly or indirectly direct the Government to grant sanction under Section 19 of the P.C. Act.

7. Court below in the third question also considered the question of possibility of arbitrary action of police and Government in picking and choosing case. It is the duty of the Government to keep law and order and court cannot exceed the powers vested under law and constitution in over enthusiasm. Facts and evidences also will vary from case to cases. Status of proof required in criminal case is different from proof required in a departmental enquiry. In this case the departmental enquiry is being conducted by the Vigilance Tribunal (see *State of*

Rajasthan v. B.K. Meena and Ors. (1996 (6) SCC 417).

8. A Division Bench of this Court in Haridas v. State of Kerala (2001 (2) KLT 194) already held that

'It is not necessary that the Court has to agree with the conclusion of the police. The Magistrate may reach a conclusion different from that of the investigating agency if he finds, on going through the materials, that the conclusion arrived at by the investigating agency cannot be accepted. It is the jurisdiction of the Magistrate to decide whether the materials placed by the investigating agency are sufficient to take cognizance of the offence or not. That power to take cognizance cannot be controlled by the investigating agency. It is for the investigating agency to decide whether on the basis of the materials collected during investigation a report has to be given to the court requesting to take cognizance of the offence or not and that power of the investigating agency cannot be controlled by the Court.'

Following Abhinandan Jha case (supra) it was held that when the police files a report slating that no case has been made, the Magistrate has no power to call up the Police to submit a final report charge sheeting the accused but it cannot direct any further investigation. Spoken by the Division Bench G. Sasidharan J. observed as follows:

'A provision has been incorporated in the Act mandating obtaining of sanction for the purpose of preventing unnecessary harassment of public servant. It is for the authority which has to grant sanction to apply its mind to the facts of the case and also to consider the materials and evidence collected during investigation and to take an independent decision regarding giving sanction for prosecution. In taking a decision regarding giving of sanction, the authority should not be influenced by external force and the discretion to grant or not to grant sanction must vest with the sanctioning authority. That being the position, the court cannot compel or give direction to the sanctioning authority for granting sanction for prosecution.'

9. We follow the above judgment and answer the reference accordingly. This order will not prevent the Government from reconsidering the question of granting sanction for prosecution or investigating agency from filing a final report under

Section 173(2) read with (8) if Government accords sanction under Section 19 of the P.C. Act.

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