

Akbar Vs. State of Kerala

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Court : Kerala

Decided On : Nov-24-2009

Reported in : 2010(1)KLT714

Judge : P.S. Gopinathan, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 216, 313, 397(2) and 482; ;Indian Penal Code (IPC) - Section 120B

Appeal No. : Crl. R.P. No. 3162 of 2009

Appellant : Akbar

Respondent : State of Kerala

Advocate for Def. : Jayakrishna, Public Prosecutor,; Sivan Madathil,; B. Ram

Advocate for Pet/Ap. : S. Rajeev, Adv.

Judgement :

ORDER

P.S. Gopinathan, J.

1. The revision petitioner is the de facto complainant in C.C. No. 201/2006 on the file of the Chief Judicial Magistrate Court, Kollam. Respondents 2 to 11 are being prosecuted by the first respondent for offence under Section 120B IPC and other

provisions. The evidence on the side of the prosecution was closed. The respondents 2 to 11 were questioned under Section 313 of the Code of Criminal Procedure and thereafter the prosecution and the accused were being heard. Amidst the hearing, the Deputy Director of Prosecution, Kollam, who is conducting the prosecution filed a petition as C.M.P. No. 9443/2009 seeking an order to alter charge. In the affidavit accompanying the petition it was stated that during the course of hearing it was argued that the charge was not specific and it had prejudiced the accused and the charge framed is not in accordance with the final report submitted by the police and that the beginning and end of the commission of offence under Section 120B IPC is not specified and that it was wrongly mentioned that conspiracy was alleged subsequent to the unlawful assembly and that the involvement of the 11th accused was not specifically mentioned in the charge and such omission may even entitle the respondents 2 to 11 for acquittal and couldn't be cured in appeal.

2. After hearing the accused and the prosecution, the learned Magistrate by the order impugned dated 8.10.2009 dismissed the petition. Para.2 of the order impugned reads as follows:

2. It is true that as per Section 216 of the Cr.P.C. the court may alter charge at any time before Judgment is pronounced. But when a charge is altered by the court after the commencement of trial, the prosecution and the accused shall be allowed to recall and examine witness with reference to such alteration. But charge in this case was framed long back and examination of the witnesses for both the prosecution and defence over and the matter is heard also. According to me, if the charge is altered at this stage, the disposal of the case will be prolonged further. Time limit is also prescribed by the Hon'ble High Court for the disposal of the case. So, the petition is liable to be dismissed.

3. Assailing the legality, correctness and the propriety of the above order, this Revision Petition was filed by the de facto complainant.

4. The learned Counsel for respondents 2 to 11 raised a preliminary objection stating that the order impugned is of an interlocutory nature and shall not be interfered in exercise of the revisional powers. It was argued that it is the duty of

the court to frame charge and the charge was properly framed and there is nothing to alter the charge and that the prayer is only for altering the charge and that even if the petition is allowed it would not culminate the proceedings. So, the order is purely one of interlocutory nature which is not liable to be challenged in revision. The counsels appearing for the party respondents canvassed my attention to the decision reported in *Bhaskar Industries Ltd. v. B.D. and A. Ltd.* 2001 (3) KLT 307 (SC). At para.8, it is held:

[W] hether an order is interlocutory or not, cannot be decided by merely looking at the order or merely because the order was passed at the interlocutory stage. The safe test laid down by this Court through a series of decisions is this: If the contention of the petitioner who moves the Superior Court in revision, as against the order under challenge is upheld, would the criminal proceedings as a whole culminate? If it would, then the order is not interlocutory in spite of the fact that it was passed during any interlocutory stage.

On the other hand, the learned Counsel for the revision petitioner submitted that the order altering charge is revisable. In support of his argument, the decision reported in *Sreedharan v. State of Kerala* : 2005 (2) KLT 108 was relied on. At para.7, this Court has held:Framing of charge may or may not amount to interlocutory order as it depends upon facts of the case, the statute under which proceedings have been initiated, as also the nature of objections raised against it etc. If the objection or objections raised against the order framing charges are such that upholding such objection/objections would result in termination of the proceedings, then framing of charge cannot be regarded as merely interlocutory order for the purpose of revisional jurisdiction under Section 397(2) of the Code.

5. Since the prayer of the Deputy Director of Prosecution in the petition was only to alter the charge, even if the charge is altered that would not culminate the proceedings. In the above circumstance, applying the ratio of the above decisions, I find that the order impugned is of an interlocutory nature and the objection raised by the respondent is sustainable and the order impugned is not liable to be interfered in exercise of the revisional powers.

6. But, for this reason, I find that this Court cannot shut its eyes in the event the order impugned is vitiated by illegality, impropriety or error. It is not disputed that it is the duty of the trial court to frame charge in the proper form and the charge shall be specific. When the Public Prosecutor brings to the notice of the Court that charge framed is not specific or that it is erroneous or not in accordance with the report submitted by the investigating officer, it is for the Court to see whether there is any substance in the allegation or not. If the charge framed is not specific or not in accordance with the report submitted by the police, it is the duty of the Magistrate to alter the charge and to have a just and fair trial. The last three sentences of the impugned order quoted above would show that the learned Magistrate instead of examining whether the charge framed is sufficient or proper or specific, it dismissed the petition with a reasoning that altering of the charge at that stage would prolong the disposal of the case. It appears that the learned Magistrate had declined to examine the issue because of the time limit prescribed by this Court for the disposal of the case. Such an approach would vitiate the trial and tantamount to miscarriage of justice.

7. In an order in I.A. No. 7588/2009 in W.P.(C) No. 396/2009 this Court reminded the lower court that, the time limits are fixed by superior courts in their anxiety to ensure expeditious disposal. All subordinate courts must realise that between the interests of justice and time limit prescribed, it is the interests of justice that shall have to prevail. If the Trial Court finds that justice in the given case cannot be achieved within the prescribed time limit, it is for such court to apply for extension of time. Time limits are not fixed so that the cases can be disposed of somehow.

8. It is ignoring that, the learned Magistrate refused to have the petition disposed on merits with a reason that this Court has prescribed time limit for disposal of the case. It is not at all a good reasoning and it can no way be allowed. The reasoning that altering of charge would prolong the trial is also erroneous and not sustainable. A request made by the prosecutor to alter the charge with an allegation that the charge is not in accordance with the report of the investigating officer could be dismissed, only if the allegation is not true. A trial without a proper charge would only lead to miscarriage of justice. In such circumstances, this Court shall not hesitate to interfere in exercise of the inherent powers vested on this

Court under Section 482 of the Code of Criminal Procedure, though no revision is maintainable.

9. This Court in Rocky V.A. v. V.I. Vakkachan 2009 (4) KHC 422, at para.5 it held as follows:

No objection regarding maintainability of the revisions was raised at that time. No doubt that would not make the revisions maintainable. Assuming that power of revision cannot be exercised in view of the bar under Section 397(2) of the Cr.P.C., Section 482 of that Code empowers this Court to pass appropriate orders if interference is warranted on the facts of the case. Therefore I am not inclined to dismiss the petitions for the reason stated by the learned Counsel and instead proceed to consider the contentions raised by learned Counsel in exercise of the powers conferred under Section 482 of the Cr.P.C.

10. In the event it is revealed that an order assailed is opposed to law or not sustainable and it is not liable to be interfered in revision, it would be appropriate for this Court to rectify the same in exercise of the inherent powers of Section 482 Crl. P.C. In this case, instead of the learned Magistrate examining whether the charge is specific and in accordance with the report filed by the Investigating Officer, the request of the learned Public Prosecutor was declined for the reason which is not at all justified. So, that order is liable to be set aside in exercise of the powers conferred on this Court under Section 482 Cr.P.C.

11. In the result, though the Revision Petition is not entertainable, as the impugned order is one of interlocutory nature, in exercise of the inherent powers vested on this Court under Section 482 of the Code of Criminal Procedure, the order impugned is set aside. The petition is remitted back to the Trial Court for fresh disposal in accordance with law. In the event the charge framed is found proper or perfect and specific, the learned Magistrate may proceed. In the event the charge is found not specific and appropriate, it is upto him to make necessary alterations and to have a disposal on merit. In case the learned Magistrate couldn't dispose the case within the time limit prescribed by this Court, the learned Magistrate may address this Court for extension of time.

The Criminal Revision Petition is disposed as above.

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