P. Ajayan Vs. State of Kerala, Represented by the Public Prosecutor and Another

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Court : Kerala

Decided On : Aug-20-2011

Judge : V. Ramkumar &Amp; P.Q. Barkath Ali

Appeal No. : Crl.M.C.No.70 of 2011 & 679 of 2011

Appellant : P. Ajayan

Respondent : State of Kerala, Represented by the Public Prosecutor and Another

Judgement :

V. Ramkumar, J.

These two cases filed under Sec.482 Cr.P.C. come up for consideration before us consequent on a reference made by a learned Judge of this Court (Justice Thomas P. Joseph). The learned judge was prima facie of the view that the decision reported in Chacko v. Mohandas - (2010 (3) KLT 122) and the two unreported decisions in Radhakrishnan v. State of Kerala (Crl.M.C.No.4824 of 2010) and Premkumar v. State of Kerala (Crl.M.C.No.4361 of 2010) require re-consideration by a larger Bench in view of the fact that the amendment made under Sec.151 of the Electricity Act, 2003 (hereinafter referred to as “the Act”) by introducing two provisos thereto and inserting Sections 151 A and 151 B with effect from 15-6-2007 being amendment of the procedural law and, therefore,

retrospective in its application, cognizance taken by Magistrate on police reports filed prior to 15-6-2007 would be valid.

2. Cahcko's case was decided by one of us while sitting single and the two unreported decisions were rendered by Justice M. Sasidharan Nambiar.

3. In Crl.M.C.No.70 of 2011 on 5-1-2005 the Walayar police had booked a case against the petitioner therein for offences punishable under Sections 135, 138 and 139 of the Act by registering Crime No.6 of 2006 and subsequently on 26-11-2005 the police filed a final report before the Judicial Magistrate of the First Class-1, Palakkad and on the same day the learned Magistrate took cognizance of the offences and took the case on file as C.P.No.93 of 2005. The case was thereafter committed to the Special Court namely, Addl. Assistant Sessions Court, Palakkad where it was registered as S.C.261 of 2007 and pending before that Court.

4. In Crl.M.C.79 of 2011 the Kalady Police had registered Crime No.331 of 2006 against the petitioner therein for an offence punishable under Sec.135 of the Act on 21-6-2005. Subsequently, a final report was filed on 19-09-2006. On 25-09-2006 the Judicial Magistrate of the First Class, Perumbavoor took cognizance of the offence and took the case on file as C.C.No.12 of 2006. The case was, thereafter, committed to the Addl. Sessions Court, North Paravur (the Special Court) on 21-4-2007 where it was registered as C.C.No.3 of 2009. The case is pending before the Special Court.

5. Both the Crl.M.Cs. were filed for quashing the proceedings before the respective courts on the allegation that cognizance of the offences taken by the respective Magistrates prior to 15-6-2007 with effect from which the Act was amended as per Act 26 of 2007 bad for the reason that the police got the power to investigate and file a final report under Sec.173 (2) Cr.P.C. only with effect from 15-6-2007 and that as on the dates when the Magistrates took cognizance of the offences, the above amendment had not come into force.

6. The questions formulated by the learned Judge for decision by a larger Bench are:-

i) Whether since Sec.151 of the Act is procedural in character, the proviso added thereto and Sec.151-A and 151-B introduced by the amendment Act of 2007 with effect from 15-6-2007 are retrospective in its application saving cognizance taken on reports submitted by the police under Sec.173(2) of the Code before 15-6-2007?

ii) Whether the decisions in Chackov. Mohandas - (2010 (3) KLT 122) and V. Radhakrishnan v. State of Kerala (Crl.M.C.No.4824/2010 and Premkumar v. State of Kerala (Crl.M.C.No.4361 of 2010) have been rendered correctly in view of the above position?

iii) Is not cognizance taken in these cases on police reports filed under Sec.173 (2) of the Code prior to 15-6-2010 valid in view of the proviso to Sec.151 and Sec.151-A of the Act introduced by the Amendment Act, 2007?

7. We heard Sr. Advocate Sri. Raju Joseph, the learned counsel appearing for the petitioner in Crl.M.C.No.70 of 2011, Adv. Sri. S.P. Chaly, the learned counsel appearing for the petitioner in Crl.M.C.679 of 2011, Advocate Sri. Pulikkool Aboobacker, the learned counsel appearing for the Kerala State Electricity Board (hereinafter referred to as “the K.S.E.B.” for short) and Advocates M/s. M.S. Breeze and C.S. Hrithwik, the learned Public Prosecutors, who defended the State.

8. Adv. Sri. Pulikkool Aboobacker, the learned Standing Counsel for the K.S.E.B. made the following submissions before us in opposition of the Crl.MCs:-

The first proviso to Sec.151 as introduced by the Amendment indicates that the Court is given the power to take cognizance of an offence under the Act upon a police report also filed under Sec.173(2) Cr.P.C. On a perusal of the objects and reasons given to the Amending Act it would be clear that eventhough as per the provisions contained in Section 151 of the Act, the offences relating to theft of electricity etc. are cognizable offences, the said provision as it existed prior to 15-6-2007 stood as a barrier to the investigation of those offences by the police and the proposal to amend the Section was only to clarify the positions. It was to enable the police also to file final reports under Sec.173 (2) Cr.P.C. that the above

amendment was made and since it is clarificatory in nature, it should be deemed to be an amendment of the procedural law which is always retrospective unless otherwise indicated in the Amending Act. There is nothing in the Amending Act to suggest that the amendment has only prospective application. The Calcutta High Court has taken a similar view in AjoyKumar Ghosh v. State of West Bengal - (2008 KHC 5433). As per the amendment brought about by Act 26 of 2007, there is only a change in the procedure before the Magistrate, and, therefore, the said amendment will operate retrospectively. A change in the law of procedure does not bring about any change in any of the substantive rights of the parties and no person has a vested right in any particular course of procedure. (See Mt. Kamlabhai and other v. Sheo Shankar Dayal and another - (AIR 1958 SC 915). Where the amendment is clarificatory or curative in character, as in the present case, it always operates retrospectively. (See paragraphs 14, 19 and 21) of Zile Singh v. State of Haryana and others - (AIR 2004 SC 5100). In paragraph 9 of Union of India v. Sukumar Pyne - AIR 1966 SC 1206 the Apex Court has clearly observed that alteration in procedure is always retrospective unless there are good reasons to suggest otherwise and that there is no vested right for any person with regard to the existing procedure when the legislature introduces a new procedure. To the same effect is the decision rendered by the Apex Court in ChannanSingh and another v. Smt. Jai Kaur - AIR 1970 SC 349). Since the amendment introduced by Act 26 of 2007 is retrospective in operation, the Magistrates were fully justified in taking cognizance on a police report and the respective petitioners do not have any right to voice any grievance regarding the cognizance taken.

THE STAND OF THE PUBLIC PROSECUTORS

9. The learned Public Prosecutors also supported the stand taken by the K.S.E.B. by submitting as follows:

The aforementioned offences punishable under the Act were already cognizable if we go by Part II of the First Schedule of Cr.P.C. and, therefore, the police did have the power to investigate those offences without the permission of the Magistrate under Sec. 155(2) Cr.P.C. If so, the police had also the authority to file a final report the cognizance which alone stood barred under Section 150 (1) of the Act.

What has been introduced by the amendment is only a power enabling the Magistrate to take cognizance on a police report as well. In that view of the matter the amendment is only clarificatory and would therefore operate retrospectively.

JUDICIAL EVALUATION

10. We are afraid that we find ourselves unable to agree with the above submissions.

Section 151 of the Act the main part of which is the same both before and after the amendment, reads as follows:

151. Cognizance of offences: No Court shall take cognizance of an offence punishable under this Act except upon a complaint in writing made by Appropriate Government or Appropriate Commission or any of their officer authorized by them or a Chief Electrical Inspector or an Electrical Inspector or licensee or the generating company, as the case may be for this purpose.

The relevant portion of the Objects and Reasons for the Amendment reads thus:-

“As per the provisions contained in Section 151 of the Act, the offences relating to theft of electricity, electric lines and interference with meters are cognizable offences. Concerns have been expressed that the present formulation of Section 151 stands as a barrier to investigation of these cognizable offences by the police. It is proposed to amend Section 151 so as to clarify the position.”

The amendments brought about by Act 26 of 2007 so far as they relate to the present controversy are the introduction of two provisos to Sec. 151 and insertion of 151 A and 151 B. The said amendments read as follows:-

Amendment of Sec. 151:- In Section 151 of the principal Act, the following provisos shall be inserted, namely:-

“Provided that the court may also take cognizance of an offence punishable under this Act upon a report of a police officer filed under Section 173 of the Code of Criminal Procedure, 1973 (2 of 1974);

Provided further that a special court constituted under Section 153 shall be competent to take cognizance of an offence without the accused being committed to it for trial."

Section 151 A and 151 - B also read as follows:-

151-A. Power of police to investigate - For the purpose of investigation of an offence punishable under this Act, the police officer shall have all the powers as provided in Chapter XII of the Code of Criminal Procedure - 1973 (2 of 1974).

151-B - Certain offences to be cognizable and non-bailable - Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence punishable under Sections 135 to 140 or Section 150 shall be cognizable and non-bailable."

11. A perusal of the aforesaid provisions will clearly indicate that until 15-6-2007 with effect from which the amendment came into force, a court could take cognizance of the offences punishable under the Act only on a complaint in writing and that too made by the appropriate Government or appropriate commission or any of their officer authorized by them or a Chief Electrical Inspector or an Electrical Inspector or a licensee or the generating company as the case may be. In other words, the police did not figure as one of the authorities enumerated under the said provision with power either to file a complaint or to file a police report. Eventhough by a process of interpretation by resort to Part II of the First Schedule to Cr.P.C. it could be said that the offences were cognizable entitling the police to commence investigation under Chapter XII Cr.P.C. without the formal order of the Magistrate under Sec 155 (2) Cr.P.C. it is pertinent to note that the offences under the Act were specifically declared to be cognizable and non-bailable only with the introduction of Sec. 151 B with effect from 15-6-2007. Even assuming that prior to the amendment the police could commence investigation, they could not submit a final report under Sec. 173 (2) Cr.P.C. since cognizance of the offences was specifically confined to complaints and that too by any of the officers enumerated under Sec. 151 of the Act. The police was not one of the authorities so enumerated. The Court was given the power to take cognizance of an offence upon a report filed by a police officer under Sec. 173(2) Cr.P.C. only for

the first time with effect from 15-6-2007 with the introduction of first proviso to Sec. 151 of the Act. No body had entertained any doubt prior to the above amendment that there was a statutory interdict against the Magistrate taking cognizance on a police report. Even the Referring Judge has made it explicitly clear that before the above amendment there was a statutory bar against the court taking cognizance of an offence under the Act except upon a complaint in writing preferred by the empowered officers as provided under Sec. 151 of the Act. To put it differently, there was absolutely no confusion in any quarters that cognizance could be taken only on a complaint and that it was only the persons enumerated under Sec. 151 who could file such complaint. More specifically, nobody had any doubt that the police did not have any authority to file any police report and the Magistrate also could not have taken cognizance upon a police report.

12. It is true that in the statement of Objects and Reasons to Act 26 of 2007, Sec. 151 is proposed to be amended to clarify the position that as per the existing formulation of the said Section it stands as a barrier to investigation of cognizable offences by the police. Merely because the Objects and Reasons uses the expression “clarify”, the amendment does not become clarificatory of the existing law. We can understand if the police were expressly given the power to conduct investigation but the provision enabling cognizance of the offences was confined only to complaints. It would then be a case of obvious omission to mention the authority of the police to file the final report under Sec. 173 (2) Cr.P.C. justifying a clarificatory amendment which undoubtedly would operate retrospectively. But that is not the situation here. At a time when the police did not figure as one of the authorities entitled to file either a complaint or a police report, it was for the first time that the amendment specifically empowered the police to investigate the offences in accordance with their powers under Chapter XII Cr.P.C. and it was for the first time that the Court was empowered to take cognizance of the offence upon a police report. The absence of a validating provision in the Amending Act is also a pointer in support of the view that the Legislature was not rectifying the mistake, if any, in the then existing provision by supplying the omission. Section 1(2) of the Amending Act (Act 26 of 2007) specifically provide that the Amending Act shall come into force only on such date as the Central Government, by notification in the official gazette, appoint. So, it could come into force only on a

future date. It was by a subsequent notification that the Central Government notified 15-6-2007 as the date with effect from which the Amending Act would come into force. So, it was intended to operate only prospectively.

13. The amendment is not clarificatory of the existing law. As per the existing law the Police were not one of the category of persons who could file a complaint. A police report under Section 173(2) Cr.P.C was also not included in the category of documents in relation to which Courts were empowered to take cognizance. Merely because the offences, even prior to 15.06.2007, could be said to be cognizable and non-bailable by resort to a strained interpretation extending to Part II(b) of the First Schedule to Cr.P.C and for that reason the Police could, if they wanted, arrest an offender without a warrant (which alone is the meaning of "cognizable offence") and possibly commence investigation under Chapter XII Cr.P.C without the order of a Magistrate under Section 155(2) Cr.P.C, and even file a Police Report, it does not follow that the court could take cognizance of the offences on such Police Report at that point of time (i.e prior to 15.6.2007). The Police could not have filed a complaint either since they did not fall under the authorities enumerated under Section 151 of the Act empowered to file a complaint. A converse situation can now be visualized. Supposing the Magistrate were to refuse to take cognizance on a police report filed prior to 15.06.2007 and reject the police report as not maintainable, as it possible to find fault with the Magistrate after 15.06.2007 on the ground that the Amendment Act 26 of 2007 operates retrospectively and therefore the Magistrate should have re-traced his steps by causing the Police Report to be re-submitted and should have thereafter taken cognizance of the offence? Certainly not. We do not think that such a course would be open to the Magistrate who would then be reviewing his own previous order. Strictly speaking, the amendment was not introducing any change of procedure. Even after the amendment, the procedure is the same. Prior to the amendment, the only stream in relation to which the Magistrate could take cognizance of the offences was the one provided under Section 190(1)(a) Cr.P.C and all the other streams provided under clauses (b) and (e) of Section 190(1) Cr.P.C stood excluded by virtue of Section 4(2) and 5 of Cr.P.C. By the amendment, one more stream, namely the one provided under clause (b) of Section 190(1) Cr.P.C was also opened.

14. A Constitution Bench of the Supreme Court in Shyam Sunder v. Ram Kumar (AIR 2001 SC 2472) had occasion to consider the scope and amplitude of declaratory statutes.

This is what the Apex Court observed in that decision:

“40. Lastly it was contended on behalf of the appellants that the amending Act whereby new S.15 of the Act has been substituted is declaratory and, therefore has retroactive operation. Ordinarily when enactment declares the previous law, it requires to be given retroactive effect. The function of a declaratory statute is to supply an omission or explain previous statute and when such an Act is passed it comes into effect when the previous enactment was passed. The legislative power to enact law includes the power to declare what was the previous law and when such a declaratory Act is passed invariably it has been held to be retrospective. Mere absence of use of word declaration in an Act explaining what was the law before may not appear to be a declaratory Act but if the Court finds an Act as declaratory or explanatory it has to be construed as retrospective. Conversely where a statute uses the ‘word declaratory’ the words so used may not be sufficient to hold that the statute is a declaratory Act as words may be used in order to bring into effect new law.

43. In KeshavlalJethlal Shah v. Mohanlal Bhagwandas (1968) 3 SCR 623: (AIR 1968 SC 1336), this Court while interpreting S.29(2) of the amending Act, held thus (para 8 of AIR):

“An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. Section 29(2) before it was enacted was precise in its implication as well as in its expression the meaning of the words used was not in doubt, and there was no omission in its phraseology which was required to be supplied by the amendment.”

(emphasis supplied)

Black’s Law Dictionary IXth edition page 1543 gives the meaning of the expression “curative statute” as follows:-

An act that corrects an error in a statute's original enactment, usually an error that interferes with interpreting or applying the statute.

Likewise, the meaning of the expression "declaratory statute" is given as follows:-

"The law enacted to clarify prior law by reconciling fluctuating judicial decisions or by explaining the meaning of a prior statute."

In Zile Singh v. State of Haryana (AIR 2004 SC 5100) the Apex Court observed as follows:-

"13. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the Legislature to affect existing rights, it is deemed to be prospective only nova constitutio futuris formam imponere debet praeteritis - a new law ought to regulate what is to follow not the past. (See Principles of Statutory interpretation by Justice G.P. Singh Ninth Edition 2004 at p/438). It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole (ibid p.440)

14. The presumption against retrospective operation is not applicable to declaratory statutes….. in determining, therefore the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended …. An amending Act may be purely declaratory to clear a meaning of a provision of the principle Act which was already implicit A clarificatory amendment of this nature will have retrospective effect.

15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Crales (Statute Law, Seventh Edition) it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the Courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the Courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated (p.388). The rule against retrospectivity does not extend to protect from the effect of a repeal a privilege which did not amount to accrued right (p.392)".

(emphasis supplied)

15. Thus, the Legislature by bringing out the amendment through Act 26 of 2007 was not supplying any obvious omission. There was absolutely no omission in the parent statute. Probably difficulties might have been expressed due to the non-inclusion of the Police among the authorities enumerated under Section 151 of the Act and the non inclusion of the Police Report while providing cognizance only on a complaint. Those difficulties might have necessitated the amendment. But certainly, it cannot be said that by the amendment the earlier position was being clarified or something which was missing in the statute was being supplied. What was introduced by the amendment was an additional mode of institution of the amendment was an additional mode of institution of the case before the Magistrate over and above the existing mode of taking cognizance only on complaints. Express authority also was conferred upon the Police to conduct investigation under Chapter XII of Cr.P.C culminating in the filing of a Police Report under Section 173(2) Cr.P.C and cognizance was permitted to be taken on such Police Reports as well. Prior to the amendment the Court had absolutely no power to take cognizance on a Police Report and the could not file a complaint before the

Court enabling the court to take cognizance. In JeevankumarRaut and another v. Central Bureau of Investigation - (2009 (7) SCC 526), the question arose as to whether cognizance taken on a police report filed by the CBI alleging the commission of offences punishable under Transplantation of Human Organs Act, 1994 was justified in law. It is pertinent to note that in that statute the Police was one of the authorities entitled to commence proceedings before the court and the Police did have the power to file a complaint (but not a police report) before the Court after conducting investigation and cognizance could be taken on such complaint. But what was filed before Court was a final report under Section 173(2) Cr.P.C. This is what the court observed.

“25. Section 22 of TOHO prohibits taking of cognizance except on a complaint made by an appropriate authority or the person who had made a complaint earlier to it as laid down therein. The respondent, although, has all the powers of an investigating agency, it expressly has been statutorily prohibited from filing a police report. It could file a complaint petition only as an appropriate authority so as to comply with the requirements contained in Section 22 of TOHO. If by reason of the provisions of TOHO, filing of a police report by necessary implication is necessarily forbidden, the question of its submitting a report in terms of sub-section (2) of Section 173 of the Code did not and could not arise. In other words, if no police report could be filed sub-section (2) of Section 167 of the Code was not attracted.

28. To put it differently upon completion of the investigation an authorized officer could only file a complaint and not a police report as a specific bar has been created by Parliament. In that view of the matter the police report being not a complaint and vice versa, it was obligatory on the part of the respondent to choose the said method invoking the jurisdiction of the Magistrate concerned for taking cognizance of the offence only in the manner laid down therein and not by any other mode. The procedure laid down in TOHO, thus would permit the respondent to file a complaint and not a report which course of action could have been taken recourse to but for the special provisions contained in Section 22 of TOHO.”

In paragraph 31 of the said decision, the Apex Court fully approved the observations made by the Division Bench of this court in Moosakoya v. State of

Kerala to the effect that if the Police Officer is authorized by the Government to file a complaint on the basis of which the Court is empowered to take cognizance, no cognizance could be taken on a police report filed under Section 173(2) Cr.P.C. Even in situations where cognizance has been taken on complaints filed by officers not specifically authorized to do so, courts have held that such cognizance is bad (See Vallabhdas Agarwala v. Charkavarty - (AIR 1960 SC 576).

16. By the aforementioned amendment it cannot be said that there was only a change in the procedure to be followed by the Court. There was also an introduction of one more agency namely the Police who were also invested with the power to conduct investigation under Chapter XII of Cr.P.C and file a police report which was until then not within the bounds of the Police. Hence, for that reason also it cannot be said that the amendment only brought about a mere alteration of the procedure to be followed by the Court. The act of taking cognizance of an offence and thereafter issuing process to the accused is not an empty formality (See Para 28 of M/s. Pepsi Food Ltd and Another v. Special Judicial Magistrate - (AIR 1998 SC 128). Hence it was perfectly within the right of the accused to contend that the cognizance taken by the Magistrate on a police report prior to 15.6.2007 was bad. Once cognizance is taken, the several rights including those guaranteed under Articles 20 and 21 of the Constitution come into play and every person accused of an offence prior to the amendment had the legitimate expectation that the Magistrate will not be entertaining a police report. For this reason also it cannot be said that the amendment was purely procedural in character so as to induce this Court to hold that it operated retrospectively. It is pertinent to note that nobody had a case that the Act prior to the amendment suffered from any formal defect warranting rectification. The legislature has not touched the main part of Section 151 of the Act. By introducing the 1st proviso it only inserted an additional provision by which the Police were, for the first time, given the power to investigate into the offences under the Act and eventually file a final report under Section 173(2) Cr.P.C.

17. We accordingly answer the reference as follows:-

1. The amendment brought about to Section 151 of the Act of virtue of Act 26 of 2007 cannot strictly be held to be clarificatory in nature so as to infer that it was retrospective in its application. It therefore, would not save cognizance taken on police report prior to 15.6.2007.

2. In the light of the view taken by us, it cannot be said that the decisions in Chacko, Radhakrishnan and Premkumar were wrongly taken.

3. The cognizance taken by the respective Magistrates in these cases prior to 15.6.2007 when the Police did not figure as one of the authorities under Section 151 of the Act and no cognizance could be taken on a Police report prior to the said date, is bad.

The result of the foregoing discussion is that the respective Magistrates were not justified in taking cognizance of the offences on the Police reports prior to 15.6.2007. The proceedings before the courts below will therefore stand quashed. We, however, make it clear that this order will not preclude the Police from filing a final report under Section 173 (2) Cr.P.C. afresh on the basis of the investigation already conducted by them. If and when such final reports are filed the appropriate courts shall deal with the same in accordance with law.