

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE R. NARAYANA PISHARADI

MONDAY, THE 15TH DAY OF FEBRUARY 2021 / 26TH MAGHA, 1942

Crl.Rev.Pet.No.1547 OF 2016

AGAINST THE ORDER IN CMP 9/2016 DATED 11-08-2016 OF COURT OF
ENQUIRY COMMNR. & SPECIAL JUDGE, THALASSERY

PETITIONER/COMPLAINANT:

SHAILAJA P
AGED 38 YEARS, W/O MURALI S, PAYANGAPPADAN,
CHAMAKUZHI, KINANOR, PERIYANGANAM,
KASARAGOD-671 314.

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENTS AND STATE:

- 1 THE VIGILANCE AND ANTI CORRUPTION BUREAU
DIRECTOR, THIRUVANANTHAPURAM-695001.
- 2 THE SUPERINTENDENT OF POLICE
VIGILANCE & ANTI CORRUPTION BUREAU, NORTHERN RANGE,
KOZHIKODE-673 656.
- 3 THE DEPUTY SUPERINTENDENT OF POLICE
VIGILANCE & ANTI CORRUPTION BUREAU, KASARAGOD UNIT,
KASARAGOD-670121.
- 4 THE INSPECTOR OF POLICE
VIGILANCE & ANTI CORRUPTION BUREAU, KASARAGOD UNIT,
KASARAGOD-670 121.

SRI A RAJESH SPL PP VACB

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 03.02.2021, THE COURT ON 15.02.2021 PASSED THE FOLLOWING:

“CR”

R.NARAYANA PISHARADI, J

Crl.R.P.No.1547 of 2016

Dated this the 15th day of February, 2021

ORDER

The revision petitioner is said to be a human rights activist. She was the complainant before the Court of the Enquiry Commissioner and Special Judge, Thalassery.

2. The petitioner filed Annexure-I complaint before the Director of Vigilance and Anti-Corruption Bureau (VACB). The complaint was with regard to the corrupt practices conducted by the officers of the Malanadu Rubber and Other Agricultural and Processing Co-operative Society (for short 'the Society') in relation to the procurement of copra/coconut.

3. Annexure-I complaint was forwarded by the Director of VACB to the Inspector of Police, VACB, Kasaragod unit. After conducting a surprise check and verification of records, the Inspector of Police submitted Annexure-II report to the Director

of VACB. This report contained the details of the irregularities noticed during the surprise check and also some recommendations.

4. The Director, VACB forwarded Annexure-II report to the Government. As per the direction of the Government, a vigilance enquiry was conducted by the Dy.S.P, VACB, Kasaragod unit. He submitted Annexure-IV enquiry report stating that the enquiry did not yield any direct evidence to prove the allegations.

5. The petitioner then filed a writ petition as W.P.(C) No.13750/2015 before this Court for quashing Annexure-IV vigilance enquiry report and for issuing a direction to the VACB to conduct a fresh enquiry in the matter. As per Annexure-VI judgment, this Court closed the writ petition granting liberty to the petitioner to invoke appropriate remedies in accordance with law.

6. Thereafter, the petitioner filed Annexure-VII complaint in the Court of the Enquiry Commissioner and Special Judge, Thalassery against the Secretary, President and the Directors of the Society, the Office Manager of KERAFED, the Joint Registrar

of the Co-operative Societies and a private person, alleging commission of the offences punishable under Sections 13(1)(c) and 13(1)(d) read with 13(2) of the Prevention of Corruption Act, 1988 (for short 'the Act') and under Sections 465, 468, 409, 420 and 120B of the Indian Penal Code.

7. Learned Special Judge forwarded Annexure-VII complaint to the Dy.S.P, VACB for conducting preliminary enquiry. A preliminary enquiry report was filed in the court stating that a detailed enquiry was conducted at the time of the vigilance enquiry and there are no grounds for taking any action against the accused persons based on the allegations made by the complainant.

8. Learned Special Judge considered the allegations in Annexure-VII complaint and also the findings in the vigilance enquiry report and found that the allegations made in the complaint are proved to be not tenable by the vigilance enquiry conducted and apart from the allegations made in the complaint, there are no materials before the court to hold that misappropriation of funds was committed by the accused

persons. Accordingly, as per Annexure-VIII order, the learned Special Judge dismissed the complaint.

9. The petitioner has filed this revision petition challenging the legality and propriety of Annexure-VIII order.

10. Heard the learned counsel for the petitioner and the learned Public Prosecutor.

11. Learned counsel for the petitioner has not made any submissions before this Court based on the allegations contained in Annexure-VII complaint. Therefore, it is not necessary here to narrate the allegations in the complaint in detail. Suffice it to state that the allegations in Annexure-VII complaint are with regard to the misconduct, malpractices and misappropriation of money committed by the officers in connection with procurement of copra/coconut by the Society.

12. Learned counsel for the petitioner has challenged the legality and propriety of Annexure-VIII order on the following grounds: (1) Learned Special Judge should have treated Annexure-VII complaint as a protest complaint. The complaint should not have been forwarded to the VACB for conducting any

preliminary enquiry. (2) Learned Special Judge should have examined the complainant on oath and proceeded further under Chapter XV of the Code of Criminal Procedure, 1973 (for short 'the Code'). (3) Dismissal of the complaint by the learned Special Judge is illegal and improper. The complaint could have been dismissed only under Section 203 of the Code and it could have been dismissed only after examination of the complainant on oath and after taking further steps, if necessary.

13. When the petitioner filed the complaint in the court, the learned Special Judge passed an order directing the VACB to conduct a preliminary enquiry. The petitioner did not then challenge that order. Having failed to challenge the order passed by the court for conducting preliminary enquiry, it is futile for the petitioner now to contend that no such order should have been passed by the court.

14. Even if it is accepted that, in view of the vigilance enquiry conducted earlier it was not necessary for the court to direct a preliminary enquiry to be made, it did not cause any prejudice to the petitioner. It appears that the Dy.S.P, VACB did

not conduct any separate preliminary enquiry but made a report to the court adopting the findings in Annexure-IV vigilance enquiry report.

15. Even otherwise, in the light of the decision of the Apex Court in **Lalita Kumari v. Government of Uttar Pradesh (AIR 2014 SC 187)**, it cannot be found that any illegality or impropriety was committed by the learned Special Judge in passing an order to conduct a preliminary enquiry. In spite of making reference to Annexure-IV vigilance enquiry report in the complaint, it is not known whether the petitioner had produced copy of that report before the court along with the complaint.

16. All persons arrayed as accused in the complaint, except one, were public servants. On receiving the complaint, the learned Special Judge could not have forwarded it under Section 156(3) of the Code for investigation, in the absence of any sanction under Section 19(1) of the Act obtained by the complainant.

17. Section 19(1) of the Act (as it stood before the amendment by Act 16 of 2018) provided that no Court shall take

cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction of the competent authority.

18. In **Anil Kumar v. Aiyappa : (2013) 10 SCC 705**, the Apex Court has held as follows:

"When a Special Judge refers a complaint for investigation under Section 156(3) Cr.P.C, obviously, he has not taken cognizance of the offence and, therefore, it is a pre-cognizance stage and cannot be equated with post cognizance stage. We may now examine whether, in the above mentioned legal situation, the requirement of sanction is a pre-condition for ordering investigation under Section 156(3) Cr.P.C, even at a pre-cognizance stage. Once it is noticed that there was no previous sanction, as already indicated in various judgments referred to hereinabove, the Magistrate cannot order investigation against a public servant while invoking powers under Section 156(3) Cr.P.C".

19. Having regard to the ratio of the judgment in **Anil Kumar** (supra), in **Narayana Swamy v. State of Karnataka (AIR 2016 SC 4125)**, the Apex Court held that an order

directing further investigation under Section 156(3) of the Code cannot be passed in the absence of valid sanction under Section 19(1) of the Act.

20. In **Manju Surana v. Sunil Arora : (2018) 5 SCC 557**, the question that was considered was whether prior sanction for prosecution against a public servant was required before setting in motion even the investigative process under Section 156(3) of the Code. The Apex Court referred the question to be decided by a Larger Bench.

21. A Division Bench of this Court, in **Muhammed v. State of Kerala : 2019 (1) KHC 239: 2019 (1) KLT 156**, has held that until a final decision is taken in the reference in **Manju Surana** (supra), the dictum laid down in **Anil Kumar** (supra) would hold the field.

22. Therefore, as per the law as it stood at the time when the learned Special Judge passed Annexure-VIII order and as it stands now, a complaint filed against a public servant alleging commission of an offence specified in Section 19(1) of the Act cannot be forwarded by the court under Section 156(3) of the

Code for investigation in the absence of sanction under Section 19(1) of the Act obtained by the complainant.

23. Learned counsel for the petitioner has contended that the Special Judge should have examined the petitioner/complainant on oath and proceeded further under the provisions of Chapter XV of the Code. When the Magistrate or the Special Judge applies his mind to the facts or allegations in the complaint with a view to proceed under the provisions of Chapter XV of the Code, he takes cognizance of the offence. In other words, the contention of the petitioner is that the learned Special Judge should have taken cognizance of the offences alleged against the accused in the complaint.

24. Learned Special Judge could not have taken cognizance of the offences under the Act in the absence of sanction under Section 19(1) of the Act. The provision contained in Section 19(1) of the Act is couched in mandatory terms and forbids the court from taking cognizance of any offence mentioned therein against a public servant except with the previous sanction of the competent authority. Grant of sanction by the competent

authority under Section 19(1) of the Act is a sine qua non for taking cognizance of the offence. The language employed in subsection (1) of Section 19 admits of no equivocation and operates as a complete and absolute bar to any Court taking cognizance of any offence mentioned therein against a public servant except with the previous sanction of the competent authority (See **Nanjappa v. State of Karnataka : AIR 2015 SC 3060**).

25. When a complaint is filed before the Magistrate, ordinarily, he has got two options. The Magistrate may either forward the complaint to the police under Section 156(3) of the Code for investigation or he may take cognizance of the offence and proceed under the provisions of Chapter XV of the Code. In the instant case, as already found, in view of the decision in **Anil Kumar** (supra), in the absence of sanction under Section 19(1) of the Act, the learned Special Judge could not have forwarded the complaint under Section 156(3) of the Code for investigation. In view of the bar under Section 19(1) of the Act, he could not have taken cognizance of the offences under the Act and proceeded further. In such circumstances, even assuming that

the allegations in the complaint filed by the petitioner and the findings in the vigilance enquiry report, *prima facie*, disclosed commission of offences under the Act by the accused persons, the learned Special Judge could not have acted upon such complaint without any sanction under Section 19(1) of the Act obtained by the petitioner.

26. At this juncture, it is relevant here to take notice of the provisos to Section 19(1) of the Act inserted by amendment as per Act 16 of 2018. The first proviso to Section 19(1) of the Act states that, no request can be made by a person, other than a police officer or an officer of an investigating agency or other law enforcement authority, to the Government or the competent authority for previous sanction for taking cognizance by the court of any of the offences specified in that provision unless such person has filed a complaint in a competent court about the alleged offences for which the public servant is sought to be prosecuted and the court has not dismissed the complaint under Section 203 of the Code and directed the complainant to obtain sanction for prosecution against the public servant for further

proceeding. The second proviso to Section 19(1) of the Act states that, in case of any request from any such person, the Government or the competent authority shall not accord sanction to prosecute a public servant without providing an opportunity of being heard to the concerned public servant.

27. Therefore, after the amendment of Section 19(1) of the Act, which came into effect from 26.07.2018, in order to get sanction for prosecution, a private person has to satisfy two conditions. The first condition is that he should have filed a complaint in the competent court alleging the offences for which the public servant is sought to be prosecuted. The second condition is that the court has not dismissed such complaint under Section 203 of the Code but directed him to obtain sanction for prosecution against the public servant. In such a situation, the law now also provides an opportunity to the public servant concerned of being heard in the matter of granting sanction for prosecution.

28. However, there is merit in the contention of the learned counsel for the petitioner that the learned Special Judge

should not have dismissed the complaint under Section 203 of the Code without proceeding under the provisions of Chapter XV of the Code.

29. In **Mehmood v. Khazir : AIR 2015 SC 2195**, the Supreme Court has held as follows:

"If the complaint, on the face of it, does not disclose the commission of any offence, the Magistrate shall not take cognizance under Section 190(1)(a) of Cr.P.C. The complaint is simply to be rejected".

30. In **Biju Purushothaman v. State of Kerala [2008 (3) KHC 24: 2008 (3) KLT 85]**, this Court has held as follows:

"The power of dismissal of the complaint is not available to the Magistrate at the threshold. If after perusing the complaint, the Magistrate is of opinion that the averments therein do not at all spell out any offence, then he should definitely possess the power to throw away the complaint and terminate the matter then and there. This power is not dismissal but rejection. The Magistrate can, in such a case, reject the complaint. If the complaint on the face of it does not at all make out any offence, then the Magistrate may reject the complaint. This power

of rejection at the precognizance stage is inherent in any Magistrate and the said power should not be mistaken for the power of dismissal available to the Magistrate under Section 203 Cr.P.C since the latter power of dismissal is one which can be exercised only at the post cognizance stage”.

31. In **Raju Puzhankara v. Kodyeri Balakrishnan** [**2008 (2) KHC 318: 2008 (2) KLT 467**], this Court has held as follows:

“There is a power in every Magistrate to reject the complaint even at the pre-cognizance stage if the complaint on the face of it does not make out the offence alleged in the complaint. In such a case, the law does not oblige the Magistrate to proceed to Section 200 Cr.P.C or the subsequent sections in Chapter XV of Cr.P.C and thereby take cognizance of the alleged offence the ingredients of which are not even averred in the complaint. In such a case, the Magistrate undoubtedly has the power to reject the complaint at the threshold”.

32. In the instant case, the learned Special Judge did not take cognizance of the offences alleged in the complaint. The complainant was not examined on oath and no further steps were taken. Learned Special Judge only considered the allegations in

the complaint and the findings made in the vigilance enquiry report and found that the allegations in the complaint were proved to be not tenable. In other words, the learned Special Judge was of the view that the complaint did not disclose commission of any offence alleged in the complaint. In such a situation, the learned Special Judge should not have dismissed the complaint but he should have rejected it. Dismissal of the complaint at that stage is not contemplated by law. However, the error committed by the learned Special Judge in passing an order dismissing the complaint instead of rejecting it is not sufficient to set aside Annexure-VIII order. The revision petition is liable to be dismissed.

33. Consequently, the dismissal of Annexure-VII complaint by the learned Special Judge as per Annexure-VIII order, shall be treated as rejection of the complaint. With the above observation, the revision petition is dismissed.

R.NARAYANA PISHARADI, JUDGE

jsr

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PS to Judge