

(2012) 08 KL CK 0025
In the High Court Of Kerala
Case No : Criminal Rev No. 1583 of 2012

Janiz K. Thomas

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 17-08-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 173, 239, 240, 482
Penal Code, 1860 (IPC) — Section 34, 406, 420, 477

Citation : (2012) 3 KLJ 852

Hon'ble Judges : C.T. Ravikumar, J

Bench : Single Bench

Advocate : Abraham P. George, K. Vinodkumar and M. Santhy, for the Appellant; Biju Meenattoor, PP, for the Respondent

Final Decision : Dismissed

Judgement

C.T. Ravikumar, J.—The first accused in C.C. No. 458 of 2007 on the file of the Court of Judicial First Class Magistrate-I, Ernakulam Smt. Janiz K. Thomas is the revision petitioner in CrI. R.P. No. 1583 of 2012. She and her husband Sri. K.M. Thomas who are respectively accused Nos. 2 and 1 in C.C. No. 3176 of 2005 on the file of the same Court, have filed CrI. R.P. No. 1584 of 2012. The said Smt. Janiz K. Thomas and the said Sri. K.M. Thomas along with their co-accused in C.C. No. 2867 of 2005 on the file of the same Court, have filed CrI. R.P. No. 1585 of 2012. CrI. R.P. No. 1586 of 2012 has been filed by the said Sri. K.M. Thomas and his co-accused Nos. 2, 3 and 5 in C.C. No. 3486 of 2006 on the file of the same Court. The petitioners in CrI. R.P. Nos. 1583 & 1586 of 2012 are indicted for offences under sections 406, 420 and 477 read with section 34 of the Indian Penal Code and the petitioners in the other two revision petitions are charge sheeted alleging commission of offences under sections 406 and 420 read with section 34 IPC. All these revision petitions have been filed against the orders dismissing the applications filed by the revision petitioners u/s 239 of the Code of Criminal Procedure for discharge, moved in the respective calender cases. The commonness in the factual matrix, the subject matter as also the parties

persuaded me to take up the matters simultaneously for hearing. In fact, the learned counsel appearing for the revision petitioners in all these revision petitions also sought for a joint hearing of the matters. Now, they are being disposed of by this order. Sri. K.M. Thomas and his wife Smt. Janiz K. Thomas are conducting an institution by name Care & Concern Agencies and Services Pvt. Ltd., claims to be an educational agency, at Palarivattom. The gist of the allegations against them is that they had collected money for arranging admission to students in certain educational institutions run by some of the respondents/accused persons, for nursing at Bangalore and admissions were not arranged in recognized institutions besides the failure to arrange bank loans, as promised. Non-recognition for that course by the Government of Karnataka, in such institutions was also alleged. Respondent No. 2 in Crl. R.P. Nos. 1583 & 1584 of 2012, third petitioner in Crl. R.P. No. 1585 of 2012 and petitioners 2 to 4 and respondents 2 and 3 in Crl. R.P. No. 1586 of 2012 are the accused persons who are running such nursing institutions. After investigation a final report was laid alleging commission of offences, as aforesaid, against the revision petitioners.

2. The revision petitioners filed petition u/s 239 Cr.P.C. seeking their discharge on the ground that the charge against them is groundless. Essentially, the common contention was that the colleges in which the concerned de-facto complainants were admitted do have recognition from the Government of Karnataka and also the Karnataka Nursing Council. The further contention was that the de-facto complainants quit their studies on account of non-availability of educational loan and that they had not promised to arrange the educational loan for them.

3. In the context of the contentions it is relevant to note that earlier, the revision petitioners herein had approached this court by filing petitions u/s 482 Cr.P.C. for quashing the proceedings pending against each of them. Criminal Miscellaneous Cases 180 and 210 of 2011, filed by the accused in C.C. Nos. 2867 of 2005 and 3486 of 2006 respectively, were disposed of as per order dated 9.2.2011, produced as Annexure-A6 in Crl. R.P. No. 1585 of 2012. Criminal Miscellaneous Cases seeking similar prayers filed by the accused in C.C. Nos. 3176 of 2005 and 458 of 2007 such as, Crl.M.C. Nos. 1156, 1162, 1163 and 1164 of 2011 were disposed of by order dated 8.4.2011, produced as Annexure-A3 in Crl. R.P. No. 1583 of 2012. Annexures-A6 and A3 referred above, would reveal that, virtually, this Court declined to invoke the inherent power u/s 482 Cr.P.C. and only permitted the revision petitioners herein to take up the plea of discharge at the appropriate stage. It was, thereafter, that the revision petitioners have filed petitions, taking up the plea of discharge u/s 239 Cr.P.C. in the respective calender cases, that resulted in the impugned orders.

4. The impugned orders in these revision petitions, all dated 5.5.2012, passed by the learned Judicial First Class Magistrate-I, Ernakulam would make it clear that all the revision petitioners herein, took up contentions on similar lines viz., the contentions referred to hereinbefore. They have produced certain documents said to have been issued by the authorities concerned and contended that the

colleges in which the respective de-facto complainant got admitted in nursing course had authorization from competent authorities.

5. The learned Magistrate held that such documents cannot be relied on at the stage of section 239 Cr.P.C. for the reason that the authenticity of such documents had not been proved. Further it was held:-

Those documents can be admitted in evidence, at the stage of trial, only if it comes within the purview of primary or secondary evidence as defined in the Evidence Act.

It was further held that it would not be possible to rely on those documents, at that stage, to hold that the institution of the concerned accused had authorisation and that the charge against the accused is groundless.

6. The revision petitioners herein, virtually, reiterated the contentions that were raised before the learned Magistrate. They have also produced the documents which were produced by them before the learned Magistrate. The learned counsel for the revision petitioners attempted to sustain the contentions relying on the decisions of this Court in Baby M.K. Vs. M/s. Shan Finance (P) Ltd. and Another, , State of Kerala Vs. Viji , Case No. 94 and that of the Hon''ble Apex Court in Hem Chand Vs. State of Jharkhand, . The decisions in Baby's case (supra) and Hem Chand's case (supra) are to the effect that at the stage of section 239 or 240 Cr.P.C. a Court is not expected to resort to the exercise of weighing of evidence whilst expected only to see whether a prima facie case is made out. The decision in Viji's case (supra) is to the effect that before an order of discharge is passed by the Magistrate, he is required to consider all documents referred to in section 173 Cr.P.C. and to see whether there is any reasonable basis or foundation for framing charge and in other words, they make out a prima facie case. There can be no doubt or dispute with respect to those positions of law. In this case, it cannot be contended that the learned Magistrate has weighed the evidence. The learned Magistrate has, actually, looked into the questions whether the charge against them could be said to be groundless. A bare perusal of section 239 Cr.P.C. would make it abundantly clear that for discharging an accused u/s 239 Cr.P.C. the learned Magistrate is bound to record his reasons for doing so. In other words, the learned Magistrate has to give the reasons for holding the charge as groundless. At the same time, a bare perusal of the aforesaid provisions and the decisions relied on by the revision petitioners would make it beyond doubt that weighing of evidence is not expected and virtually, impermissible, at that stage. True that an order passed u/s 239 Cr.P.C. is revisable. Therefore, though it is imperative on the Magistrate to give explicitly the reasons only in the case of discharging an accused u/s 239 Cr.P.C. it will only be appropriate to pass an order reflecting application of mind that is, Crl. R.P. No. 1583/2012 & connected cases 7 consideration of the records referred to in section 173 Cr.P.C. I may hasten to add, such consideration shall not be converted as weighing of evidence. It is to be noted that Sri. K.M. Thomas and Smt. Janiz K. Thomas specifically stated in the revision petitions that the

institution run by them by name Care & Concern Agencies and Services Pvt. Ltd. is an educational agency doing services in arranging admissions for various professional courses including B.Sc. Nursing in the State of Kerala and also in other states. In that context it is to be noted that the learned Magistrate has taken into consideration the fact that the final report carries specific allegations attracting the alleged offences and that the prosecution witnesses in their section 161 statements gave versions to support the same. That apart, on perusing the documents produced by the revision petitioners, the learned Magistrate held that their authenticity had not been proved and they could be admitted in evidence only at the stage of trial, in accordance with the Evidence Act. Those findings and observations of the learned Magistrate cannot be said to be inconsistent with or contradictory to, the dicta laid down by those decisions. Now, I may consider the question whether the documents produced by the revision petitioners can be looked into, as sought for, for the purpose of considering the plea of discharge of the revision petitioners. It is well-nigh settled that either in exercise of inherent powers or the revisional powers at the preliminary stage, the documents sought to be brought on record by the defence cannot be looked into. The said documents are admittedly, produced before the Court of the Judicial First Class Magistrate-I, Ernakulam in the respective calender cases and looking at their nature the learned Magistrate held that the said documents could not be relied on at the stage of consideration of an application for discharge viz., at the stage of section 239 Cr.P.C. for the reason that their authenticity had not been proved and they could be admitted in evidence, at the stage of trial, only if they fall within the purview of primary or secondary evidence as defined in the Evidence Act. True that in the decision in Harshendra Kumar D. Vs. Rebatilata Koley Etc., the Hon'ble Apex Court held that consideration of defence at prima facie stage by High Court under revisional power or inherent power is not absolutely barred. In order to prevent injustice or abuse of process or to promote justice, High Court may look into the materials which have significant bearing on the matter at prima facie stage, it was further held. It is possible if materials relied on by the accused are beyond suspicion or doubt or which are in the nature of public documents and are incontrovertible. Thus, it leaves no doubt that it would be unsafe and imprudent to look into unmarked materials viz., the documents sought to be brought on record by the defence if they do not fall strictly within the category specifically referred to in the aforesaid decision of the Hon'ble Apex Court. In this context, it is relevant to note that in these cases, some of the documents produced are in Kannada though their English translations are also produced. In the case of some accused, they were absconding for sometime, according to the police. Going through the said documents, I find no reason to disagree with the findings of the learned Magistrate that the authenticity of the documents have to be proved and that they could be admitted in evidence only at the stage of trial, in accordance with law. I am persuaded to form such an opinion especially in view of Annexure-A3 in CrI. R.P. No. 1585 of 2012 and Annexure-A3 in CrI. R.P. No. 1586 of 2012. Prima facie, there is marked difference in the signature of the then President of Indian Nursing Council Sri. T.

Dileep Kumar, in those documents and it will fortify the said conclusion besides the fact that some other documents are translated versions. I am of the firm view that it would be unsafe and imprudent to look into such unmarked materials, at this preliminary stage, in exercise of revisional jurisdiction, to discharge the revision petitioners u/s 239 Cr.P.C. The upshot of the discussions is that these revision petitions challenging the orders in dismissing C.M.P. No. 1319 of 2011 in C.C. No. 458 of 2007, CrI. R.P. No. 1583/2012 & connected cases 10 C.M.P. No. 1216 of 2011(A) in C.C. No. 3176 of 2005, C.M.P. No. 741 of 2011 in C.C. No. 2867 of 2005 and C.M.P. No. 740 of 2011 in C.C. No. 3486 of 2006, of the Court of the Judicial First Class Magistrate-I, Ernakulam are liable to fail and the said orders do not call for interference by invoking the revisional jurisdiction.

Resultantly, all the revision petitions are dismissed. It is made clear that the observations regarding the contentions and documents made in this order are made purely for the purpose of deciding these revision petitions.