

(2009) 01 KL CK 0048
In the High Court Of Kerala
Case No : Criminal M.C. No. 4520 of 2008

Jose Poothrikkayil (Fr.)

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 15-01-2009

Acts Referred:

Constitution of India, 1950 — Article 22
Criminal Procedure Code, 1973 (CrPC) — Section 362

Citation : (2009) 1 ILR (Ker) 425 : (2009) 1 KLJ 381 : (2009) 1 KLT 389

Hon'ble Judges : R. Basant, J

Bench : Single Bench

Advocate : C.P. Udayabhanu, for the Appellant; M.V.S. Namboothiry, SC, (C.B.I),
for the Respondent

Judgement

FURTHER DIRECTION/CLARIFICATION

R. Basant, J.—The contraversry is about an unfortunate inadvertent statement which had crept into para. 38 of the order passed by this Court on 28.11.08, which has been reported in Fr. Jose Poothrikkayail v. Union of India 2008 (4) KLT 822. It was a dictation at the Bench. The relevant portion is extracted below:

37. There is a contention that the mandate of the decision in D.K. Basu Vs. State of West Bengal, has been violated. Even though there is a contention that no arrest memo has been prepared and copies have not been given to the relatives, I find no factual basis for this allegation. The case diary reveals that those formalities have been complied with. But Sri. C.P. Udayabhanu raises a contention that proposition No. 10 of the decision in D.K. Bsu, which is extracted below has not been complied with. It reads:

10. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

The counsel also relied on the mandate of Article 22 of the Constitution. An arrestee is entitled for legal consultation. This cannot be denied to him at all. But

such legal consultation cannot extend to the accused turning back to the counsel when each question is put by the Investigating Officer to ascertain what he should say and what he should not say. But there is no doubt that an arrestee while in custody is entitled for reasonable legal assistance and consultation. I do note that during this long period of 14 days while they are in custody opportunity for legal consultation has not been provided. Appropriate direction to that effect can be issued.

38. I am satisfied, in these circumstances that these petitions must meet with their inevitable fate of dismissal, but subject to a direction that all the accused persons shall be granted permission to have legal consultation with one lawyer of their choice while in custody between 3.30 and 4 p.m. on 29.11.08 at the office of the CBI Kochi, in the presence of the Investigating officer. I direct so.

(emphasis supplied)

2. After discussions at the Bar in that case, it was observed that the accused are entitled to have legal consultation with one lawyer of their choice. The time had to be fixed. The venue had to be fixed. The modalities had to be fixed. While the dictation was going on, the time, venue etc. were fixed by discussion with counsel. The person responsible for ensuring that the directions were followed had to be specified. It was mentioned at the bar that it may be in presence of the Investigating Officer and that was accepted and that is how that portion (underlined above) crept into the order. Little did I think that this could be interpreted to mean that an accused and his counsel must hold legal consultations in the physical presence within audible distance of the Investigating Officer. Nothing could have been more preposterous and puerile than that. No one in the legal fraternity with a modicum of law in his cranium could ever have thought he accused and his counsel can be obliged by a Court to held legal consultation in the presence of the Investigating Officer, impending their right to have consultation in a free atmosphere. That would have been negation of the very right.

3. That direction was issued. No one raised any objections against that direction. It did not occur to me, I must unreservedly confess, that such a direction can be interpreted to mean that the accused and his counsel must hold discussions and consultations in the presence of the investigating Officer. No one having sought clarification, I did not think it necessary that suo motu clarification must be made.

4. When the decision was reported in the law journals, it did arouse anguish in me that there is the possibility of such an interpretation being advanced. But no clarification was sought and I felt that at least in this case that observation had not created any pernicious consequences. Later when the order granting bail to the accused was brought to my notice, it was observed that in para. 19 there are observations to the following effect

para 19: ...

... According to them, accused were denied even permission to have legal consultation with their counsel in a free atmosphere and hence, they are totally in the dark.

It then occurred to me that probably my worst apprehensions had come true. It was hence that direction was issued on 08.01.09 that it must be explained to the court how the interview took place between the advocates concerned and the accused in pursuance of the said order dated 28.11.08.

5. I have stirred up the hornet's nest. There is assertion and counter assertion as to how the consultations went on. The Standing Counsel for the CBI armed with a statement filed by the Investigating Officer asserts that consultation were done in a free and fair atmosphere without any interference from any CBI official though the CBI official was admittedly present at visual distance but not at an audible distance. The counsel for the accused on the contrary have asserted that the representative of the CBI was not merely at a visual distance, but was within audible distance also. He was an impediment for proper legal consultations, it is asserted.

6. The "Dharna" of the Bench and the Bar above all is to do justice. If such a direction of this Court had created any such unintended consequence, I would certainly have expected the counsel to point out that, so that the injustice need not be perpetrated. The counsel now states that though the consultation went on between them and the accused in the hearing distance of the CBI representative, they did not choose to raise any objections. I would certainly love to believe that any advocate as a sublime officer of the Court in such situation would have insisted that the CBI official must exclude himself from hearing distance. That would have been justice to the accused, justice to the system, justice to me at show hands the unfortunate inadequacy occurred and also justice to the noble profession of law.

7. I am not at the moment concerned or obliged to resolve the controversy on that aspect as no one has raised a grievance about that. In fact, the learned senior counsel Sri. B. Raman Pillai as also the other counsel appearing for the accused assert unambiguously that they have no grievance whatsoever and had never raised a grievance that they were not given adequate opportunity to interact with their clients. They only wanted to see their clients at that time and that was satisfied and therefore there is no grievance, it is submitted.

8. But I have grievance. The direction of the Court should not send any negative message to any one. I make it absolutely clear that it was not intended that the legal consultation between the accused and their counsel shall be within the hearing of the CBI representative. If such a direction were issued by any court, that would be denial of the constitutional and statutory right of legal consultation which an arrestee has.

9. To rule out the possibility of any unintended and perverse message going around, I clarify that it was not intended at all that legal consultation between

the accused and their counsel was to be done or can be directed to be held in the presence of the Police Officer. That was not the intention. That could not have been intention. No one with a sense of law could have issued such a direction nor could the directions have been so understood by any such person.

10. I am satisfied that no further directions or findings are necessary in the matter. To remove any confusion that may remain in the mind of the officers of the subordinate judiciary. I state unequivocally that is impermissible in law for any Court to direct that the constitutional and statutory right of legal consultation of an accused with his counsel must be exercised in the physical presence - i.e. within audible distance of a police officer.

11. The error being only the result of an inadvertent gap between though and word, I feel that Section 362 Cr. P.C. does not stand in the way of this suo motu clarification/ explanation. Registry shall ensure that a copy of this clarification is furnished to all the criminal courts in the State.