

(2003) 08 KL CK 0030

In the High Court Of Kerala

Case No : O.P. No's. 3883/02, 177, 1841, 1949, 4292, 4848, 5164 and 10542 of 2003

Mohandas

APPELLANT

Vs

Enquiry Commissioner and Special Judge

RESPONDENT

Date of Decision : 01-08-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 156, 156(3), 190
Guruvayoor Devaswom Act, 1978 — Section 28(4)
Penal Code, 1860 (IPC) — Section 13(1), 3, 4, 406, 409
Prevention of Corruption Act, 1988 — Section 2

Citation : (2004) CriLJ 509 : (2004) 1 ILR (Ker) 194 : (2004) 1 KLT 873

Hon'ble Judges : S. Sankarasubban, J;K.K. Denesan, J

Bench : Division Bench

Advocate : T.P. Kelu Nambiar, K.T. Sankaran, Preethy Karunakaran, Bijimol Jose, P.G. Rajagopal and M. Gopalakrishnan Nambiar, for the Appellant; S. Sudhakaran V. Jayakumar, Thottathil B. Radhakrishnan, Sreelatha Puthalath, S. Radhakrishnan, V. Gopal, Usha Ravindran, V. Renu and S. Chandrasekhar, for the Respondent

Judgement

S. Sankarasubban, J.—These Original Petitions are filed by the members of the erstwhile Managing Committee of the Guruvayur Devaswom and the Commissioner and the previous Administrator of the Devaswom against the order passed by the Enquiry Commissioner and Special Judge, Trichur in C.M.P. No 559 of 2002. By this order, the court has directed vigilance enquiry and further action on Ext. P1 complaint. Ext. P1 complaint is filed by one Suresh alleging certain allegations against the previous members of the Managing Committee and against the Administrator and Commissioner. As soon as the complaint was received, the Special Judge called for the remarks from the Commissioner and thereafter the impugned order was passed.

2. The complaint is filed under the Prevention of Corruption Act. It further states that the audit was not taking place due to the mismanagement of the members

of the Managing Committee. The Enquiry Commissioner got details from the Commissioner of Guruvayur Devaswom and passed the impugned order, which is marked as Ext.P2 in O.P.No. 4292 of 2003.

3. Learned Counsel for the petitioner mainly argued that under the Guruvayur Devaswom Act (hereinafter referred to as "the Act"), there cannot be any complaint for corruption against the petitioners. According to them, the Act itself prescribes the procedure for recovering loss that has been resulted on the fault of the members. According to them, a person has got right to live peacefully and if an enquiry is foisted against a person it will affect his reputation in the society. The petitioners are also critical of the manner in which Ext. P2 order has been passed. Ext.P-2 order will clearly go against the petitioners. Impleading petitions have been filed by some persons. They supported the order passed by the learned Judge and submitted that it is only a preliminary order and that the petitioners are prejudiced by the impugned order.

4. We heard learned Counsel for the petitioners and learned Government Pleader and also learned Counsel for the impleading petitioners.

5. Learned Counsel for the petitioners brought to our notice certain sections of the Act. Chapter IV deals with budget, accounts and audit. Section 23(1) of the Act says that the Committee shall keep regular accounts of all receipts and disbursements. Section 23(2) states that the accounts of the Devaswom shall be subject to concurrent audit, that is to say, the audit shall take place as and when expenditure is incurred. Sub-section (3) of Section 23 of the Act says that the audit shall be made by auditors appointed in the prescribed manner, who shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code. After the completion of the audit, the audit report is given to the Commissioner. Section 26 of the Act deals with rectification of defects disclosed in audit and order of surcharge against Committee, etc. As per Section 26 of the Act, the Commissioner shall send a copy of every audit report to the Committee and it shall be the duty of the Committee to remedy any defects or irregularities pointed out by the auditor and report the same to the Commissioner. Under Sub-section (2) of Section 26 of the Act, if, on a consideration of the report of the auditor along with the report, if any, of the Committee, the Commissioner is satisfied that the Committee or any officer or other employee of the Devaswom was guilty of misappropriation or wilful waste of the funds of the Devaswom or of gross neglect resulting in loss to the Devaswom, the Commissioner may, after giving notice to the Committee or such officer or other employee to show cause why an order of surcharge should not be passed against it or him and after considering its or his explanation, if any, by order certify the amount so lost and direct the Committee or such officer or other employee to pay within a specified time such amount personally and not from the funds of the Devaswom. Any person aggrieved by the order of surcharge, shall approach the court to rectify or to set aside the order.

6. Our attention is also invited to Section 28 of the Act. Sub-section(4) of Section

28 of the Act says that every person authorised by the Committee or acting under its instruction in pursuance of his section or the Administrator shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code. Hence, the argument is that there cannot be any resort to under the Prevention of Corruption Act.

7. The complainant in Ext. P1 is one Suresh. Allegations are raised therein against 11 persons who include the Commissioner, the Administrator and the former members of the Managing Committee of Guruvayur Devaswom. According to the complainant, the accused persons are guilty of offences punishable under Sections 406 and 409 of I.P.C. and Section 13(1) (c) and (d) of the Prevention of Corruption Act. Though Ext. P1 is styled as a complaint to invoke the jurisdiction of the Court of the Special Judge, Thrissur (for short the "Special Court") u/s 190 of the Criminal Procedure Code, the prayer made therein is to forward the complaint to the Vigilance and Anti-corruption Department for enquiry. Section 190 of Cr.P.C. reads:

"190. Cognizance of offences by Magistrates.- (1) Subject to the provisions of this chapter, any Magistrate of the First Class, and any Magistrate of the Second Class specially empowered in this behalf under Sub-section (2), may take cognizance of any offence-

- (a) upon receiving a complaint of facts which constitute such offence;
 - (b) upon a police report of such facts;
 - (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.
- (2) The Chief Judicial Magistrate may empower any Magistrate of the Second Class to take cognizance under Sub-section (1) of such offences as are within his competence to inquire into or try".

The Special Court, for obvious reasons, has not taken cognizance of the offences alleged in Ext.P1. Reference may be made in this connection to Section 19 of the Prevention of Corruption Act. Instead, the Court has forwarded Ext.PI together with records produced by the complainant to the Director, Vigilance and Anti-corruption Bureau (for short "V.A.C.B"), Thiruvananthapuram, "for necessary vigilance enquiry and further action, if any, as contemplated by law". Before doing so, the remarks of the 1st counter petitioner in Ext.PI were called for by the Special Court. Ext.P3 impugned in these cases is the order thus passed by the Special Court on 26th November 2002.

8. On the basis of the contentions raised at the Bar, on behalf of the petitioners, the main issues for consideration are:

- (1) Jurisdiction of the Special Court to pass an order in the nature of Ext.P2.
- (2) Legality and justifiability of the observations or findings made by the Special Court in Ext.P2.

9. According to the complainant the allegations made by him in Ext.P1 constitute offences punishable under the Prevention of Corruption Act (for short "P.C. Act") and the Indian Penal Code (for short "I.P.C."). It is nobody's case that the said averments, even if accepted in their entirety as true and correct, will not attract Section 13 of P.C. Act. The Special Court is empowered u/s 3 of the P.C. Act to try offences punishable under that Act including conspiracy to commit or attempt to commit or abetment to commit the aforesaid offences. Section 4 of the P.C. Act, while vesting exclusive jurisdiction in the Special Court to try the above-mentioned offences, says that when trying any case, a Special Judge may also try any offence, other than an offence specified in Section 3, with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial. Therefore, the Special Court has got the power to try, not only offences punishable u/s 13(1) (c) and (d) of P.C. Act but also those alleged under Sections 406 and 409 of the IPC in Ext.P1. That being so, the next question touching the jurisdiction of the Court to try the counter petitioners in Ext. P1 , is whether they are public servants, for, Section 13 of the P.C. Act deals with criminal misconduct by public servants. Learned Counsel for the petitioners invited our attention to Section 28(4) of the Guruvayur Devaswom Act, 1978 (for short the "G.D. Act") to contend for the position that as far as the officers of Guruvayur Devaswom is concerned, persons mentioned in the aforesaid provision alone come within the meaning of the term "public servant" in Section 21 of the IPC. Section 28(4) reads as follows:

"Every person authorised by the Committee or acting under its instructions in pursuance of this section or the Administrator shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code (Central Act 45 of 1860)".

It was contended that the G.D. Act is a self contained code and the provisions thereof shall determine the legal status and the nature of the powers, duties and responsibilities of the officers of the Guruvayur Devaswom. According to the petitioners, since the G.D. Act specifically identifies the class of persons who come within the ambit of the term "public servant" for the purpose of I.P.C., it should be held that all others not mentioned in Section 28(4) of the G.D. Act are not public servants. It was also contended that none of the officers of the Guruvayur Devaswom, but for Section 28(4) of the G.D. Act, are public servants either for the purpose of IPC or that of P.C. Act. Arguments were addressed before us to contend for the position that the officers of the Guruvayur Devaswom do not satisfy the definition of "public servant" u/s 21 of I.P.C. Taking us through the descriptions enumerated in that section, one by one, particularly the tenth description wherein the expression "any secular common purpose" is also employed, learned Counsel for the petitioners submitted that the Guruvayur Devaswom is a Hindu denomination and none of the descriptions fit in with the officers of that Devaswom.

10. We do not propose to examine the merits of the above contentions, because

in the very nature of these proceedings we think, we should confine ourselves to the bare minimum issues required to answer the question of jurisdiction. We have already said, based on Section 4 of the P.C. Act, that a Special Court trying an accused for offences under the P.C. Act is competent to try the said offender along with officers involved in the same transaction for other offences for which he may be tried under the CrI.P.C. Whatever that be, the Special Court gets jurisdiction, if it could be shown that the persons accused in the complaint are public servants as defined in Section 2(c) of the P.C. Act. Our attention was invited by the learned counsel for the complainant (2nd respondent in O.P.No. 177/03) to Clause (viii) of Section 2(c) of the P.C. Act, which reads:

"(viii) any person who holds an office by virtue of which he is authorised or required to perform any public duty;"

Counsel submitted that the Commissioner of Guruvayur Devaswom as well as the Administrator of Guruvayur Devaswom are persons who hold the respective offices and in that capacity are authorised and required to perform public duties. What is meant by "public duty" is stated in Section 2(b) of the P.C. Act in the following manner:

"public duty means a duty in the discharge of which the State, the public or the community at large has an interest;"

Could it be said that the State, the public or the community at large has no interest in the duties performed by the officers of the Guruvayur Devaswom? The answer to this question can be found from the preamble to the G.D. Act, which inter alia states:

"And whereas the administration and management of the said Temple and its properties and endowments had deteriorated and a situation had arisen rendering it expedient to reorganise, in the interests of the general public, the scheme of management of the affairs of the Devaswom, the Guruvayur Devaswom Act, 1971, was enacted to provide better management of the Devaswom in supersession of the said scheme;"

"And whereas it is expedient to provide in the public interest and in the interest of the worshippers of the Temple for a proper administration of the said Devaswom in accordance with the law as laid down in the said Judgment:"

Hence, it can be safely held that the Commissioner, the Administrator and the Members of the Managing Committee are public servants as defined in Section 2(c)(viii) of the P.C. Act.

11. It was argued on behalf of the petitioners, that the State Legislature has consciously excluded from the purview of the expression "public servants" the Managing Committee consisting of the Zamorin Raja and the Karanavan of the Mallisseri Illom, by virtue of the unequal position they enjoy. According to the counsel, it was for the above reason also, the Legislature in its wisdom describes those specifically mentioned in Section 28(4) of the G.D. Act, alone as public

servants.

12. We do not find any way to accept the above submission for more reasons than one. The definition of the words "public servant" in the P.C. Act is very wider when compared to the corresponding term in the IPC. Considering the laudable object behind that enactment, the Parliament has consciously spread the wings of that enactment to cover a wide range of persons. We do not understand Section 28(4) of the G.D. Act as one which restricts the scope and the meaning of the words "public servant" only to those class of persons mentioned therein. On the other hand, in our view, the said provision enlarges the scope of the term "public servant" and brings within its fold those classes of persons referred to in Section 28(4) also, by deeming them also as public servants. Hence in our view, Section 2(c)(viii) of P.C. Act ropes in officers of the Guruvayur Devaswom as well as the members of the Managing Committee.

13. Now, we shall deal with the legality of the procedure adopted by the Special Court in passing the impugned order. The procedure to be followed by the Court upon a complaint which is not dealt with u/s 190 Cr.P.C. or those under Chapters XIV, XV or XVI of the Cr.P.C. can be traced to Section 156(3) of the Code. Section 156 is as follows:

"156. Police officer's power to investigate cognizable cases.- (1) Any officer in charge of a police station may, without the order of a Magistrate investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceedings of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered u/s 190 may order such an investigation as abovementioned."

The police officer who is directed by the criminal court u/s 156(3) to conduct investigation shall follow the procedure prescribed u/s 154 of the Code so as to record the complaint as the First Information Report and then proceed to investigate the case. We find no other provision in the Code empowering the Special Court to forward Ext. P1 complaint together with the documents produced by the complainant to the Director of Vigilance and Anti-corruption Bureau to conduct enquiry or investigation as the case may be. Here, the order of the Special Court is to conduct an enquiry into the allegations and not investigation. Such a direction was issued by the Special Court, presumably in obedience to the rulings of the Supreme Court. In *P. Sirajuddin, etc. Vs. State of Madras, etc.*, the Supreme Court held as follows:

"Before a public servant, whatever be his status, is publicly charged with acts of dishonesty which amount to serious misdemeanour or misconduct of the type

alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. The lodging of such a report against person, specially one who like the appellant occupied the top position in a department, even if baseless, would do incalculable harm not only to the officer in particular but to the department he belonged to, in general. If the Government had set up a Vigilance and Anti Corruption Department as was done in the State of Madras and the said department was entrusted with enquiries of this kind, no exception can be taken to an enquiry by officers of this department but any such enquiry must proceed in a fair and reasonable manner. The enquiring officer must not act under any preconceived idea of guilt of the person whose conduct was being enquired into or pursue the enquiry in such a manner as to lead to an inference that he was bent upon securing the conviction of the said person by adopting measures which are of doubtful validity or sanction. The means adopted no less than the end to be achieved must be impeccable. In ordinary departmental proceedings against a Government servant charged with delinquency, the normal practice before the issue of a charge-sheet is for someone in authority to take down statements of persons involved in the matter and to examine documents which have a bearing on the issue involved. It is only thereafter that a charge-sheet is submitted and a full scale enquiry is launched. When the enquiry is to be held for the purpose of finding out whether criminal proceedings are to be resorted to the scope thereof must be limited to the examination of persons who have knowledge of the affairs of the delinquent officer and documents bearing on the same to find out whether there is prima facie evidence of guilt of the officer. Thereafter the ordinary law of the land must take its course and further inquiry be proceeded with in terms of the Code of Criminal Procedure by lodging a First Information Report".

Normally an order of the criminal court u/s 156(3) of the Code directing the police to conduct investigation need not discuss the merits or demerits of the case, though it is necessary for the court to satisfy itself before issuing such an order that the allegations in the complaint constitute an offence punishable under the I.P.C. or such other penal statutes. In this case, the Special Court while directing the Director of V.A.C.B. to conduct enquiry into the allegations in the complaint has written a detailed order giving reasons in support of its finding. The manner in which the learned Special Judge has written the impugned order (Ext.P3) gives the impression that the allegations contained in Ext. P1 are founded on true facts and would attract the penal provisions of the P.C. Act provided the requisite mens rea for the alleged acts or omissions is established. For example, in paragraph 17 of Ext. P3, the learned Special Judge has stated as follows:

"The circumstances now revealed that there was omission on the part of the authorities to take appropriate action on the basis of the previous audit report. Misappropriation amounting to lakhs or crores even though revealed in the previous audit reports, there was culprit and criminal silence on the part of the authorities in taking proper action indicating that they had conveniently shut

their eyes to the criminal misappropriation and criminal breach of trust that was carried against the interest of the Devaswom in respect of the public fund to be handled in the way the culprits chose. It would show that the persons responsible to supervise and control were equally aiding the commission of the crime. The present set up would show that by showing non co-operation with the audit parties deliberately and by suppressing the material records from the audit party (it could be equally a case where the relevant documents were deliberately destroyed to screen the offences already committed if any) there was culpable and criminal omission done by the authorities in promoting the corruption in the, affairs of the Devaswom especially in dealing the Devaswom Fund and conveniently the authorities chose to remain inaction without any justifiable reasons."

preceding further, what is seen on a reading of paragraph 18 of the impugned order is that the Special Court has discussed the likelihood of the counter petitioners committing offences under Sections 202, 204, 217 and 218 read with 511 IPC over and above the offences alleged u/s 409 read with Section 120B IPC and offence u/s 15 of the PC. Act. Even the complainant does not have such a case. In paragraph 19, the Special Judge would state that "before registration of the first information report, it is only just and proper that a preliminary enquiry is conducted to indicate whether the overt acts of the respondents were with dishonest intention or not".

1.4. Counsel for the petitioners submitted that the manner in which the Special Court has passed the impugned order is patently prejudicial to the petitioners and though the words "prima facie" are used in some portions of the impugned order, it is futile to expect a free and fair enquiry or investigation at the hands of the Vigilance Police, in the face of the order passed by the Special Court. The Vigilance Police bound by the order of the Special Court, may in all probability, take it for granted, that the facts forming the foundation of the allegations against the petitioners stand established and what remains for it to enquire into is the existence of mens rea constituting the offences. We find force in the above submission made on behalf of the petitioners. In our view, the Special Court has totally misunderstood the scope of examining the records and conducting a brief enquiry into the allegations against public servants in terms of the rulings of the Supreme court. Learned Counsel for the petitioners invited attention to the decision of the Supreme Court in Secretary, Minor Irrigation and Rural Engineering Services, U.P. and Others Vs. Sahngoo Ram Arya and Another, . The above decision was brought to our notice to contend for the position that the vigilance enquiry ordered by the Special Court is an affront to the fundamental right to life guaranteed under Article 21 of the Constitution. It is true that the Supreme Court, in the facts and circumstances of the above case, held that a direction to conduct enquiry against the respondent therein, issued to the CBI, without examining the materials to find whether there was justification for ordering such enquiry, violated the right guaranteed under Article 21 of the Constitution. In paragraph 6 of the aforesaid decision, the Supreme Court held as

follows:

"It is seen from the above decision of this Court that the right to life under Article 21 includes the right of a person to live without being hounded by the Police or the CBI to find out whether he has committed any offence or is living as a law abiding citizen. Therefore, it is clear that a decision to direct an inquiry by the CBI against a person can only be done if the High Court after considering the material on record comes to a conclusion that such material does disclose a prima facie case calling for an investigation by the CBI or any other similar agency, and the same cannot be done as a matter of routine or merely because a party makes some such allegations. In the instant case, we see that the High Court without coming to a definite conclusion that there is a prima facie case established to direct an enquiry has proceeded on the basis of "its" and "buts" and thought it appropriate that the enquiry should be made by the CBI. With respect, we think that this is not what is required by the law as laid down by this Court in the case of Common Cause (*supra*)."

Learned Counsel for the petitioners submitted that a similar error has been committed by the Special Court while passing Ext. P3, inasmuch as findings in the impugned order are also based on "ifs" and "buts". On the other hand, Counsel for the respondent- complainant submitted that it will not be due compliance of the direction issued by the Supreme Court if the Special Court had simply forwarded the complaint to the Director of V.A.C.B., for enquiry, without examining the complaint and other relevant documents so as to find out whether there was prima facie substance in the allegations. We are of the opinion that in the light of the direction issued by the Supreme Court, the Special Court cannot simply act as a post office and issue without proper application of mind a direction to the Vigilance Police to conduct enquiry or investigation into the allegations. But at the same time we are not satisfied that the impugned order is free from legal infirmities. The Special Court ought to have taken special care to see that it does not enter into any finding which has got the potential to cause impediment in the free and fair enquiry or investigation, as the case may be, by the Vigilance Police. The Special Court has to examine the available materials so as to satisfy itself that a complaint which is baseless or frivolous or vexatious is not forwarded to the Vigilance Police for enquiry or investigation. This is to see that innocent public servants are not subjected to irreparable injury and hardship. The Special Court, if it is satisfied that the matter requires enquiry by the Vigilance Police, may briefly state the allegations and the materials in support thereof that have come to its notice and order enquiry into the matter by the Vigilance Police, without recording any finding with respect to the truth of the facts mentioned in the complaint. Unless the Special Court refrains from making observations or findings touching the merit of the allegations, any enquiry or investigation by the Vigilance Police will become a farce. As already stated by us, we have noticed that such infirmities have crept into the impugned order. Those observations and findings are liable to be expunged. We do not, however, think that the direction issued by the Special Court ordering enquiry by the Vigilance

Police into the allegations, calls for interference. We think that it will meet the ends of justice if it is made clear that it will be open to the Director of Vigilance and Anti-corruption Bureau to conduct enquiry into the entire factual matrix and all aspects relevant for the purpose of forming a free and fair opinion regarding the truth or otherwise of the allegations, as also the commission of acts or omission constituting any penal offence. The question of mens rea constituting the offences alleged also will come within the scope of that enquiry. We direct that the Director, V.A.C.B. shall act accordingly uninfluenced by the opinions, observations or findings contained in the impugned order.