(2013) 08 KL CK 0014

In the High Court Of Kerala

Case No : B.A. No. 5497 of 2013

Tenny Joppen APPELLANT

Vs

State of Kerala RESPONDENT

Date of Decision : 23-08-2013

Acts Referred:

Citation : (2013) 3 KHC 706 : (2013) 3 KLT 819

Hon'ble Judges : S.S. Satheesachandran, J

Bench : Single Bench

Advocate : P. Vijaya Bhanu, Vipin Narayan, Dileep P. Pillai and Thomas J. Anakkallunkal, for the Appellant; K.P. Dandapani, Advocate General, for the Respondent

Judgement

S.S. Satheesachandran, J.—Petitioner is the third accused (A3) in Crime No. 656/2013 of Konny Police Station, Konni, which is now under investigation by a Special team constituted to investigate crimes of similar nature, popularly known as Solar Scam cases. The above crime has been registered for offence punishable under S. 420 read with S. 34 I.P.C. on a complaint filed before the magistrate by one Sreedharan Nair against two persons alleging that they defrauded and cheated him of a sum of Rs. 40 lakhs. Making false promises they induced him to believe that full assistance from Government would be extended to install a Solar energy plant, providing land site in Kinfra Park, Palghat and cheated him of the above sum. Details of the allegations in his complaint for disposal of this petition is not necessary since in my Order dated 22.7.2013 in B.A. 4856/2013 dismissing previous bail application of petitioner it has been stated. Allegations to implicate petitioner later as third accused (A3) can be noted summing it up thus: Petitioner was working as Personal Assistant in the office of the Chief Minister of the State. One among the accused named in the complaint, a lady, who impersonated under a different name, took the complainant to the office of the Chief Minister and introduced him to petitioner, who also then induced him to believe the false promises made by the accused persons named. On the assurances given by petitioner, with whom he had talked over phone earlier at the behest of one among the accused, a sum of Rs. 40 lakhs, after signing of an agreement, was handed over to the accused to meet the initial expenses for installing the solar plant. According to the complainant when he went to the office of Chief Minister with one among the accused named in his complaint he had met the Chief Minister and Officers also and he was made to believe that all assistance for the solar plant will be provided by the Government.

2. Petitioner was arrested on 28.6.2013, and on production before the magistrate he was remanded to judicial custody on the same day. His continued detention for the purpose of investigation is not necessary and he is ready and willing to abide by any condition imposed by this court, is the submission of his counsel to seek his release on bail.

3. Learned Advocate General who appeared on behalf of the State submitted that though investigation of the crime is not over, it is complete against the petitioner and as such there is no objection in releasing him on bail on imposing stringent conditions, suggesting them also.

4. Two aspects arose for consideration during the hearing of the bail application, one over the remanding of petitioner by the magistrate in judicial custody for a period of 30 days at a stretch, and the other over the investigation conducted in the present crime, and also other crimes covered by ''Solar Scam cases'' for which a Special Investigation Team has been constituted with Additional Director General of Police as head of the team. Learned Advocate General has expressed some reservations in looking into the matters touching upon the investigation of the crimes in the present proceedings. I shall advert to later why that question cannot be left untouched in the facts and circumstances involved in the proceedings.

5. Petitioner while he continued under detention in judicial custody in the crime was produced before the magistrate on 22.7.2013. Learned magistrate has forwarded a copy of the order of remand as directed, and copy of remand report was produced by respondent. Investigating officer had requested for remand of the accused only for a period of 14 days stating that investigation has not been completed and his detention for such period more is required. Without adverting to the circumstances stated in his report and also deciding judicially further remand for one month was ordered by the magistrate solely on the submission made by Assistant Public Prosecutor over the inconvenience caused in deploying police personnel in the court premises. More than the question of legality or permissibility of remanding a person exceeding period of 15 days at a time, what is important is that remand of an accused to judicial or police custody cannot be done in a mechanical manner. Any Order of remand by the magistrate is passed by him in discharge of his judicial function. He is not passing such an order as an executive authority. He has to apply his mind to the facts and circumstances presented and also the question whether remand of the accused for completion of investigation is essential taking note that every investigation over a crime has to be completed at the earliest (See Manubhai Ratilal Patel Tr. Ushaben Vs. State

of Gujarat and Others, Where investigation could not be completed within a period of 24 hours from the apprehension of the accused remand to custody whether it be police or judicial arise for consideration. Without looking into the report filed by the investigating officer but solely on the submission of Assistant Public Prosecutor expressing the difficulties experienced in providing police personnel, which never can be considered as a ground for ordering continuous detention of petitioner in custody, learned magistrate has mechanically passed the order directing remand of petitioner for a period of 30 days at a stretch. Learned magistrate in his remarks has referred to a decision rendered by this court, in which answering a reference (Judgment No. (2) 2001 Judicial Vision) it has been held that it is not impermissible to pass an order of remand exceeding 15 days under S. 167(2) of the Code. That decision cannot be understood as laying down a proposition that there could be orders of remand exceeding the period of 15 days under S. 167(2) at a time for any reason whatsoever, or as a matter of course. In cases where exceptional circumstances are shown like petitioner in custody has to undergo prolonged treatment with hospitalisation for more than 15 days at a stretch for an ailment suffered or where his continuous presence for trial in some other case in a court situate beyond the State is warranted, and such other causes, it may be open to the court to pass an order of remand exceeding the period of 15 days under S. 167(2) of the Code. Sub-section (2) of S. 167 of the Code fixes the period of 15 days only with respect to the order of first remand of accused person produced before him and the proviso under the sub-section states only the maximum period of 90 and 60 days in relation to the punishment for the offences imputed against him, does not postulate that when subsequent remands are made by the magistrate as a matter of course it could exceed 15 days at a time. Remand of an accused in detention could be ordered under S. 167(2) only for a maximum period of 90 and 60 days, as the case may be, having relation to the punishment provided for the offence imputed, if only the investigation of the crime is continuing and not completed within such period. S. 309 of the Code which is applicable for postponing or adjourning a proceedings during inquiry or trial mandates that remand of the accused person to custody under that section shall not exceed 15 days at a time. The Apex Court in Chaganti Satyanarayana and Others Vs. State of Andhra Pradesh, referring to the period of remand fixed under S. 309 of the Code has held that in ordering remand under S. 167(2) of the Code also the period so fixed has to be followed. So much so at a time the maximum period of remand of an accused person after the expiry of 15 days from the date of the first remand under S. 167(2) of the Code cannot exceed more than 15 days at a time in the absence of exceptional justifiable cause to order remand exceeding such period.

6. Who is the investigating officer conducting the investigation of the crime and also other crimes covered by the Solar Scam cases is another question which has arisen for consideration. That question does not require to be looked into by this court at this stage while considering the bail application was the submission of

learned Advocate General. Applications for bail in other crimes under the Solar Scam cases are also considered by this court, and in one of them, B.A. 5635/2013 learned State Public Prosecutor appeared on behalf of the State. A statement was also filed in the above petition by respondent State through the State Public Prosecutor in which it has been stated that though individual cases are assigned to one or other Dy. S.P. in the special investigation team ''all major decision like criminal liability of individuals, approval of charge etc., are taken with the knowledge and approval of the head of the S.I.T.'' In the hearing on the above bail application also at a later stage Advocate General appeared and the view canvassed by him in the present case that ADGP has only supervision over investigation has been pressed upon.

7. A team has been constituted by the Director General of Police to investigate the Solar scam cases. That team is headed by an Additional Director General of Police. Copy of the order dated 14.6.2013 passed by the Director General of Police has been produced. Constituting a special team, seven crimes registered at different stations are directed to be investigated by the that team under the Additional Director General of Police. Subsequently orders have been passed in relation to other crimes also, and at present, on the copies of orders produced, 34 crimes are being investigated by the Special team. The order of D.G.P. would show that constitution of a Special Investigation Team was felt essential over the crimes registered in which large number of persons had been cheated by a Company with false promises of providing Solar Energy Solutions. In such cases, mainly, two accused persons, who had used different names as well, committed the offence of cheating. Whether the Director General of Police is empowered to constitute a special team for the purpose of investigation is beside the point. Now it has been shown that during the pendency of the present applications Government have passed an Order dated 17.8.2013 ratifying the action of the Police Chief and also that of the Subordinate Officers as well in the constitution of special investigation team. S. 36 of the Code of Criminal Procedure no doubt empowers a superior officer to exercise the powers of an officer in charge of police station under his jurisdiction. Supervision and control exercised are different from empowerment to constitute a Special Team for Investigation of one or more crimes. Under the Kerala Police Act, 2011 the power to constitute special team for the time being is only with the Government, and S. 21(2)(b) of the Act specifically states that the Government may create units or make special arrangements for investigation of the complicated, heinous, sensational or specially important crimes. Even if that be so, it may still be open to State Police Chief to constitute a Special Team for Investigation and then get his orders ratified by Government. Now, Special Investigation Team constituted by the Director General of Police for the investigation of the Solar Scam cases has been ratified by the Government. The only question then to be looked into is who is the Officer in charge of a Police Station over the investigation conducted in such cases. Special Investigation Team is headed by Additional Director General of Police. Subsequent to the constitution of the team, some orders passed by him

are produced to show that he had named some subordinate officers as investigating officers of the crimes which have been taken over by the Special Investigation Team. Authority to pass such orders by the Additional Director General of Police is traced to S. 36 and S. 157 of the Code of Criminal Procedure.

8. When a Special Investigation Team is constituted to investigate one or more crimes the primary question who is the officer in charge of a police station, as defined under the Code to be treated as in control of the investigation of the crimes. Officer in charge of a police station has been defined under S. 2(o) of the Code thus:-

"Officer in charge of a police station" includes, when the officer in charge of the police station is absent from the station-house or unable from illness or other cause to perform his duties, the police officer present at the station-house who is next in rank to such officer and is above the rank of constable or, when the State Government so directs, any other police officer so present;

If we go by the order of the State police Chief constituting the Special Investigation Team to investigate the solar scam cases there can be no doubt that Additional Director General of Police who is heading such team alone could be treated as the officer in charge of a police station in respect of such crimes. If that be so whether S. 157 or S. 36 of the Code enable and empower such officer to appoint officer in charge of a police station over different crimes constituting and treating them as investigating officers of such crimes. A statement has been filed before this court by a Police Officer who has been constituted as the investigating officer by the Additional Director General of Police in the present crime stating thus:-

While individual cases are assigned to one Dy. S.P. for investigation, all major decisions like criminal liability of individuals, approval of charges etc., are taken with the knowledge and approval of the head of the S.I.T.

In the context, it has to be pointed out the final decision and completion of investigation as to whether the accused to be placed for trial indicting him of any offence rests with the investigating officer, and none else. It cannot be delegated or controlled by any other person whatever be his superiority in rank or whatever be the supervisory powers vested with him over the investigation of crime. A Special Investigation Team has been constituted, as headed by an Additional Director General of Police, to investigate the crimes, in which two accused in common have cheated several people. From the submissions made, it appears, a common nexus in the crimes registered involving those two accused persons is undoubtedly the basis for constituting such a special team. I have referred to the case of the complainant in the present case in which some serious imputations are made not only against the accused persons named in complaint but some others also. Some officers in the office of the Chief Minister also fall under the shadow of Solar Scam cases. Allegations are imputed against public officers, politicians etc., in some cases is not a matter of dispute. When that be so, where a special investigation team is constituted for investigation of such crimes and that team is headed by the Additional Director General of Police over and above the question whether he could constitute and appoint his subordinate officers as ''officer in charge of Police Station'' and investigating officer of the crimes while retaining the final decision to be taken whether the accused in such crimes is to be put up for trial with him is a serious question to be probed into. What has been stated by the Apex Court over the power of investigating officer etc., in M.C. Mehta Vs. Union of India (UOI) and Others, in the context deserves to be taken note. Observations made in the decision read thus:-

Investigation usually starts on information relating to the commission of an offence given to an officer in charge of a police station and recorded under S. 154 of the Code. If from information so received or otherwise, the officer in charge of the police station has reason to suspect the commission of an offence, he or his subordinate has to proceed to the spot to investigate the facts and circumstances of the case, and if necessary, take measures for the discovery and arrest of the offender. Under S. 155 the officer in charge of a police station has the power of making a search in any place for the seizure of anything believed to be necessary for the purpose of investigation. A subordinate officer may be deputed by him for that purpose. The investigating officer has also the power to arrest the person under S. 54 of the Code. It is important to notice that where the investigation is conducted not by the officer in charge of the police station but by a subordinate officer such subordinate officer has to report the result of the investigation to the officer in charge of the police station. If, upon the completion of the investigation it appears to be officer in charge of the police station that there is no sufficient evidence, he may decide to release the suspected accused. If, it appears to him that there is sufficient evidence or reasonable ground to place the accused on trial, he has to take necessary steps under S. 170 of the Code. In either case, on completion of the investigation he has to submit a report to the magistrate under S. 173 of the Code in the prescribed form. Thus, under the Code, investigation consists of proceeding to the spot, ascertainment of the facts and circumstances of the case, discovery and arrest of the suspected offender, collection of evidence and formation of the opinion as to whether on the material collected there is a case to place the accused before a magistrate for trial, and if so, taking the necessary steps for the same by the filing of a charge-sheet under S. 173. The scheme of the Code shows that while it is permissible for an officer in charge of a police station to depute some subordinate officer to conduct some of these steps in the investigation, the responsibility for each one of the above steps is that of the officer in charge of the police station (see S. 168 of the Code). This Court had categorically stated in the above judgment that, the final step in the investigation, namely, the formation of the opinion as to whether or not there is a case to place the accused on trials to be of the officer in charge of the police station and this function cannot be delegated. This Court unequivocally observed that there is no provision for delegation of the above function regarding formation of the opinion but only a provisions entitling the superior officers to supervise or participate under S. 551 (corresponding to S. 36 of the present Code). This court further held that, a police report which results from an investigation as provided for in S. 190 of the Code is the material on which cognizance is taken. But from that it cannot be said that a valid and legal police report is the foundation of the jurisdiction of the court to take cognizance.

(underlining supplied).

9. In some of the crimes investigated by the S.I.T., it is stated, already reports have been filed after completing investigation by the subordinate officers in the team as if they are the officers in charge of the Station over such crimes. I express no opinion over the reports so filed in the crimes.

10. Advocate General has made some reservation in looking into the question as to who is the officer in charge of the Station in the crimes covered by the Solar Scam cases producing some orders, circulars etc., and also relying on some decisions. What is at stake is fair investigation of the crimes. When conflicting views are expressed as to who is the officer in charge of Station who is conducting the investigation of the crimes covered by the Solar Scam, definitely, this court is expected to look into that matter and point out that question requires to be considered seriously to avoid miscarriage of justice. Learned Advocate General has relied on State of Andhra Pradesh Vs. Awad Bin Younus Yafai, to urge that while disposing bail application of accused directions cannot be passed. The question is looked into not for issuing any direction but only in view of the different views expressed in bail petitions at different stages of hearing. Where a special investigation team is constituted for investigation of the crimes as to who could be the ''officer in charge of such crimes'' competent to take the final decision in placing the accused for trial it has to be looked into when conflicting views are expressed before this court. That cannot amount to an interference with the investigation of the crimes. However, I make it clear that this court while disposing the bail application is not deciding the issue involved, but leave it open for consideration at the appropriate stage by the concerned including the magistrate before whom final report is filed after completion of investigation of the crime.

11. Case Diary has been produced for my perusal. Looking into the materials gathered by the investigating agency I find statement of the complainant under S. 164 of the Code has been recorded by the Magistrate. His statement before the magistrate indicate of his questioning by several police officers including the Additional Director General of Police who is heading the Special Investigation Team. Even in the statement filed in the present case by the police officer deputed to investigate the crime by the Additional Director General of Police heading the investigation team it is stated thus:

All major decisions like criminal liability of individuals, approval of charge etc., are taken with the knowledge and approval of the head of the S.I.T.

The above officer is not taking the final decision whether the accused is to be placed for trial after investigation. Such circumstances would indicate that it is only in the interest of the State serious deliberation is made with reference to the relevant provisions of the Code as to who could be treated as the ''Officer in charge of police station'' in the crimes when a Special Investigation Team is headed by a Superior police officer.

State has no objection in releasing the petitioner on bail at this stage though investigation of the crime has not been completed. Learned Advocate General has insisted for imposing some conditions restricting the movements of petitioner within the place of his residence, appearance before the investigating officer, production of his passport etc. No circumstance has been brought to my notice why such stringent conditions should be imposed against the petitioner infringing his liberty when he is released on bail. After his arrest ever since he continued in judicial custody. Now, that the investigation over the involvement of petitioner in the crime is stated to be almost over, I find he can be ordered to be released on bail subject to the following conditions.

1) Petitioner shall execute a bond for Rs. 50,000/- with two solvent sureties for the like sum, by each of them to the satisfaction of the Judicial First Class Magistrate-II, Pathanamthitta.

2) Petitioner shall report before the investigating officer as and when directed till completion of the investigation.

3) Petitioner shall not induce any person who is acquainted with the facts of the case so as to dissuade him from disclosing the true facts to the Police or the Court, as the case may be.

4) Petitioner shall not leave the State for a period of six months or till completion of investigation, whichever is earlier. Petition is allowed.