
(2011) 08 KL CK 0124

In the High Court Of Kerala

Case No : Criminal M.C. No. 2303 of 201-1

Thadiyantevida Nazeer

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 12-08-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 307, 308, 378
Negotiable Instruments Act, 1881 (NI) — Section 21

Citation : (2011) 3 KLT 734

Hon'ble Judges : V. Ramkumar, J;P.Q. Barkath Ali, J

Bench : Division Bench

Advocate : K. Ramakumar and T.K. Kunhabdulla, for the Appellant; M. Ajay),
for the Respondent

Final Decision : Dismissed

Judgement

V. Ramkumar, J.—In this CrI. Miscellaneous Case filed under S.482 Cr.P.C. the petitioners who are accused Nos. 1,3,4 and 9 in Sessions Case No. 2 of 2010 (NIA) on the file of the Special Court for the Trial of N.I.A. Cases Kerala at Ernakulam (hereinafter referred to as "the Special Court" for short), challenge Annexure - C order dated 8.7.2011 passed by the Special Court. As per the said order, the Special Court dismissed their application filed as CrI. M.P. 135 of 2011 (Annexure - IV) seeking to cancel Annexure - III order dated 2.9.2010 of the Special Court tendering pardon to the approver, Shammi Firoz who was originally A7 and who was subsequently examined in the case as P.W. I.

2. A chronological narration of the facts leading to the impugned order is as follows:-

3.3.2006

Infuriated by the attitude of the officials including the Executive and the Judiciary in not granting bail to the Muslim accused persons involved in the Marad (sic) case the nine accused persons hatched a criminal conspiracy to make, plant and

explode bombs in the K.S.R. T. C. Bus stand and the Moffusil Bus Stand in Kozhihode city and they thereby committed offences punishable under Sections 120 B, 124 -A, 153 A and 324 read with S.34 I.P.C. and Sections 16(1) (b), 18 and 23 of the Unlawful Activities (Prevention) Act, 1967 and S.3 of the Explosive Substances Act, 1908.

Two cases were registered as Crime Nos. 80 of 2006 and 81 of 2006 of Kasaba and Nadakkavu Police Stations, Kozhihode.

13.6.2006

The investigation of the two cases was transferred from the local police to the CBCID SIG-III, Kozhihode.

1.12.2009

The Government of India entrusted the investigation of the case with the National Investigation Agency ("N.I.A". for short)

4.12.2009

The aforesaid two crimes were re-registered as Crime Nos. 5 of 2009 and 6 of 2009 of N.I.A., New Delhi

19.3.2010

A7 Shammi Firoz was arrested by the N.I.A.

20.3.2010

Shammi Firoz was produced before the Special Court for the trial in N.I.A. Crime No. 5 of 2009.

On that day he made Annexure A written request (registered as CrI. M.P. 437/10) expressing his willingness to turn an approver and make a full and true disclosure of the entire circumstances of the case within his knowledge.

25.3.2010

The Superintendent of Police, N.I.A. filed Annexure -I petition (registered as CrI. M.P. 436/10) to record the statement of Shammi Firoz under S. 164 Cr.P.C since he had expressed his willingness to disclose the entire circumstances of the case involving himself and others. (This petition was filed since the police alone could sponsor an accused to be an approver).

30.3.2010

The Special Court allowed CrI. MP. 436/10.

31.3.2010

On the direction of the Special Court, the Judicial Magistrate of First Class, 1, Ernakulam recorded the statement of Shammi Firoz under S. 164 Cr.P.C. and

Shammi Firoz accepted the tender of pardon by expressing his willingness to make a full and true disclosure of the entire circumstance of the case within his knowledge.

14.6.2010

The Superintendent of Police, N.I.A. who is the Chief Investigating Officer filed Annexure-II Petition (Registered as 735/10) to treat A 7 (Shammi Firoz) as an approver and tender him pardon.

2.8.2010

The N.I.A. filed charge-sheet against 8 accused persons after deleting A5 A6 was killed in an encounter at Jammu & Kashmir. A2 and A8 are absconding. A3 was granted bail. Others are in judicial custody.

2.9.2010

Shammi Firoz also filed Annexure-B petition (registered as CrI. M.P. 1056/10) to tender him pardon since he had already expressed his willingness to disclose the entire facts and circumstances in his statement recorded S. 164 Cr.P.C. by the Magistrate.

2.9.2010

Special Court allowed CrI. M.P. 735/2010 as per Annexure III order in which the Court inter alia observed as follows :-

Direct evidence may not be plentiful. In the very nature of the case approver's evidence, if available, will be a boon to the prosecution to establish the offences. Once approver's evidence is made available, there need only be search for corroboration which can even be from circumstances.

There is no dispute that this order was passed by the Special Court under S.307 CrP.C.

In view of the order in CrI. M.P. 735/07 the Special Court allowed CrI. M.P. 1056/10.

21.2.2011

Shammi Firoz, the approver was examined as P. W. 1 before the Special Court during the trial of SC 2 of 2010 NIA

22.2.2011

170 days after the passing of the order granting pardon to the approver (Shammi Firoz), the petitioners herein (A1, A3, A4 and A9) filed Annexure-IV petition (registered as CrI. M.P. 135/11) under Sections 306, 307 and 308 Cr.P.C. to cancel the grant of pardon to Shammi Firoz and to try him also as an accused in the case. The three grounds put forward in support of the petition were :

- i) The Special Court had no power to grant pardon under S.307 Cr.P.C.
- ii) The order dated 2.9.2010 granting pardon was not a speaking order
- iii) Shammi Firoz examined as P.W. 1 committed breach of the condition of pardon by not making a full and true disclosure of all the circumstances within his knowledge as could be discernible from his evidence.

17.5.2011

On behalf of the N.I. A. Annexure--V objection was filed by the Special Public Prosecutor opposing Crl. M.P. 135 of 2011. It was inter alia contended that the Special Court constituted under the N.I.A. Act- 2008 was a Court of Session in view of S. 16 of the N.I. A. Act as per which the Special Court had the power to take cognizance of the offences without the accused being committed to it, that the Special Court being a Court of Session had the power to tender pardon to an accused under S.307 Cr.P.C, that the order granting pardon was a speaking order supported by reasons, that the evidence given by P.W. 36 the Magistrate who recorded the statement of Shammi Firoz would show that the approver had disclosed all the facts truly concerning him and the co-accused that the approver had given evidence truly and no prejudice will be caused to the accused persons, that in case the approver had not complied with the conditions of pardon S.308 Cr.P.C. could be invoked only by the Public Prosecutor and that the accused/ petitioners had no right to challenge the order granting pardon nor had they any right to be heard in the matter.

8.7.2011

The Special Court passed the impugned order dismissing Crl. M.P. 135 of 2011 and upholding the objections of the N.I.A.

3. It is the above order dated 8.7.2011 passed by the Special Court which is assailed in this Crl. M.C.

4. We heard Sr. Advocate Sri. K. Rama Kumar, the learned counsel appearing for the petitioners and Sri. M. Ajay, the learned Special Public Prosecutor for the N.I.A.

5. When this Crl. M.C. was filed, the Registry had objected to the maintainability of this Crl. M.C. on the ground that the impugned order is a final order and it was, at best, a revisable order. The learned counsel for the petitioners, however, maintained that the impugned order would not terminate the main proceedings before the Special Court and it was, therefore, only an interlocutory order and since no revision would lie against such order, the Crl. M.C. under S.482 was maintainable. In view of the above stand taken by the petitioners the learned Single Judge directed the Registry to number the Crl. M.C. Subsequently, the learned Judge ordered the matter to be placed before a Division Bench in view of S.21 of the N.I.A. Act. That is, how this Crl. M.C. came for consideration before us.

6. Section 21 of the N.I.A. Act reads as follows:-"

Appeals.-

(1) Notwithstanding anything contained in the Code, an appeal shall lie from any judgment, sentence or order, not being an interlocutory order, of a Special Court to the High Court both on facts and on law.

(2) Every appeal under sub-section (1) shall be heard by a bench of two Judges of the High Court and shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal.

(3) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Special Court.

(4) Notwithstanding anything contained in sub-section (3) of section 378 of the Code, an appeal shall lie to the High Court against in order of the Special Court granting or refusing bail.

(5) Every appeal under this Section shall be preferred within a period of thirty days from the date of the judgment, sentence or order appealed from:

Provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days:

Provided further that no appeal shall be entertained after the expiry of period of ninety days.

If the order dated 2.9.2010 which was sought to be cancelled is not to be treated as an interlocutory order then it was appealable under S.21(1) but no appeal has been filed. As per S.21(5) an appeal has to be preferred within 30 days of the date of the order. Eventhough the first proviso to S.21(5) enables the High Court to entertain an appeal after the period of 30 days if the appellant had sufficient cause for not preferring the appeal within the thirty days the second proviso thereto says that no appeal shall be entertained after the expiry of 90 days. This means that after 1.12.2010 when 90 days expired from the date of the order, even this Court could not entertain an appeal notwithstanding the existence of sufficient cause, if any This Crl. M.C. was filed only on 15.7.2011 which is long after the said 90 days. Even if this Crl. M.C. were to be converted to an appeal, still it will be an incompetent appeal filed after 315 days of the order dated 2.9.2010 and such appeal cannot be entertained after the extended period of limitation. A perusal of S. 19 of the N.I.A. Act will show the concern for expeditious trial which has to be given precedence over the trial of any other case. It is the above time bound dispensation which is reflected in the second proviso to S 21 (5) of the N.I.A Act.

7. If, in the alternative, the order dated 2.9.2011 is to be treated as aninterlocutory order then S.21(3) is an express bar to an appeal or revision even against interlocutory orders. When the Legislature has specifically

prohibited an appeal or revision even against interlocutory orders, the above statutory obstacle cannot be indirectly surmounted by filing a petition under S.482 Cr.P.C. In other words, the inherent power of the High Court cannot be exercised for doing some thing which is expressly prohibited by the statute.

8. On the merits also we are not inclined to accept the contentions of the petitioners. As for the contention that the Special Court had no power to grant pardon under S.307 Cr.P.C, Harshad S. Mehta and Others Vs. The State of Maharashtra, is a complete answer in the case of Special Courts. In paragraph 52 of the said decision the Apex Court addressed the question as to whether a Special Court has the power to grant pardon at any stage of the proceedings and the source of power of the Special Court to grant pardon. It was held that the power under S.307 Cr.P.C. cannot be denied to the Special Court merely because there was no commitment of the case to the Special Courts Moreover, in this very same case on a different occasion this Court in Shammi Firoz Vs. National Investigation Agency, had ruled that it was in compliance of the S.307 Cr.P.C. that the Special Court tendered pardon too Shammy Firoz. (See paragraph 14 of the said decision).

9. The argument that the order granting pardon is vitiated for non-compliance of sub-s.4 (a) S.306 Cr.P.C. is also to be repelled in the light of the conclusion in para. 12 of the decision of the Apex Court in A. Deivendran v. State of Tamil Nadu AIR 1998 SC 282.

10. Although the power to grant pardon is vested in the Court, ordinarily it is for the prosecution to ask that a particular accused out of several, may be tendered pardon. Even where the accused directly applies to the Special Judge, he must first refer the request to the prosecuting agency which is to decide whether to sponsor or not the said request. (See Jasbir Singh Vs. Vipin Kumar Jaggi and Others, . This was the reason why even though Shammy Firoz filed an application to turn an approver on 20.3.2010 the Special Judge directed the Magistrate to record the 164 statement of Shammy Firoz only on receipt of CrI. M.P. 436 of 2010 by the N.I.A.

11. Equally misconceived is the petitioners contention that the order granting pardon is not a speaking order supported by reasons. The order dated 2-09-2010 is undoubtedly a speaking order.

12. It is pertinent to note that the prosecution has no case that Shammy Firoz examined as P.W. 1 had breached the contract between him and the State by resiling from the conditions of pardon. Even in the case of a breach S. 308 Cr.P.C, the Legislature has advisedly reposed the remedy only in the Public Prosecutor. The Public Prosecutor has no grievance that Shammy Firoz examined as P.W. 1 has resiled from the condition of pardon or that he has failed to make a full and true disclosure of the entire circumstances of the case within his knowledge. Hence, Annexure IV petition filed by the petitioners under S.306, 307 and 308 Cr.P.C. was misconceived since those Sections do not entitle the accused to seek

a cancellation of the order granting pardon to the approver or to re-transpose the approver back to the array of accused.

The result of the foregoing discussion is that this was an ill-advised expedition by the petitioners/accused who were actuated by the sinister motive of aborting the trial assiduously conducted by the Special Judge. We, therefore, dismiss this Crl.M.C.

Dated this the 12th day of August, 2011.