

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl.M.C. 3772/2005 & Crl.M.A. 7974/2005**

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Date of reserve: 14.07.2009
Date of decision: 22.07.2009

P.C. KATHURIA ...PETITIONER
Through: Mr. Nageshwar Pandey, Mr. A.K.
Pandey, Advs.

Versus

C.B.I. ...RESPONDENT
Through: Mr. Harish Gulati, Mr. Anindya.
Malhotra, Advs.

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether the Reporters of local papers
may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be
reported in the Digest? Yes

: **MOOL CHAND GARG, J.**

1. This petition has been filed by the petitioner, who was summoned as an co-accused by a Special Judge by invoking power under Section 319 Cr.P.C. in a case pending against accused Ashok Chawla, LDC, DDA, C-Block, Vikas Sadan and Kamal Agnihotri, a private person, on the allegations that Ashok Chawla accepted a bribe of Rs.2,500/- from Kamal Agnihotri and that Kamal Agnihotri had been accused of having offered that bribe. The allegations made against Ashok Chawla and Kamal Agnihotri in the complaint are as under:-

“...Inquiry at the spot have revealed that money being transacted between Kamal Agnihotri and Ashok Kumar was being paid as bribe by former for accepting delivery of documents submitted by him earlier.”

The accused Ashok Chawla is being tried for an offence under Section 13(1)(a) and (d) read with Section 13(2) of the Prevention of Corruption Act, while Kamal Agnihotri is being tried for the offence under Section 12 of the Prevention of Corruption Act.

2. It has been submitted on behalf of the petitioner that by order dated 09.10.2002 the petitioner was summoned as co-accused in the present case by the learned Special Judge on the ground that he is guilty of having acquired assets disproportionate to his business. The relevant portion of the order dated 13.05.05 passed by the Ld. Special Judge, whereby charges under Section 13(1)(a) r/w Section 13(2) of the Prevention of Corruption Act and under Section 13(1)(e) r/w Section 13(2) of the prevention of Corruption Act are framed against the present petitioner, is reproduced hereunder:

4. Inspector Rajesh Kumar also carried out searches of office table drawer of cashier P.C. Kathuria, which led to recovery of Rs. 35,000/- besides Rs. 4738/- lying on the relevant page for 24.07.95 of the fee register on the table of the said cashier, while the said fee register reflected total collection for that day up to that page Rs. 4381/-

5. The CBI filed a charge sheet against Ashok Kumar and Kamal Agnihotri, the two accused who were caught while giving and accepting illegal gratification. After the examination of Inspector Rajesh Kumar, (PW2), it was revealed that during the surprise check, a sum of Rs. 35,000/- was recovered from the drawer of P.C. Kathuria and further a sum of about Rs. 4700/- were recovered from the cash register, while the collection for that day was much less. On this evidence, accused P.C. Kathuria was summoned by this Court by order dated 09.10.02.

6. The amount recovered from cashier was in excess of the collection of the Registrar's Office on that day. Some chits were also found from the accused, which indicate that the accused was habitual of accepting gratification other than legal remuneration from persons who came to his office for getting documents registered.

7. A prima-facie offence under Section 13(1)(a) read with 13(2) of PC Act is made out against the accused P.C. Kathuria. Further the accused was found in possession of amount in excess of daily official collection. The accused has no explanation for the possession of this excess amount and is, therefore, prima facie liable under Section 13(1)(e) read with 13(2) of the PC Act.

It is, therefore, ordered that charge under Section 13(1)(a) read with Section 13(2) of the PC Act and under Section 13(1)(e) read with 13(2) of the PC Act be framed against the accused PC Kathuria.

Announced in open court.
Dt. 13.5.2005

(DINESH DAYAL)
SPECIAL JUDGE: DELHI

3. Learned counsel for the petitioner submitted that this order is illegal and is beyond the powers of the Ld. Special Judge which were available to him under Section 319 Cr.P.C. and constitute gross abuse of the process of the Court. Section 319 of the Cr.P.C., for the sake of reference, is reproduced hereunder:

319. Power to proceed against other persons appearing to be guilty of offence.

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which Such person could be tried together with the accused, the court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the court he may be arrested or Summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the court although not trader arrest or upon a summon, may be detained by such court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the court proceeds against any person under subsection (1) then-

(a) The proceedings in respect of such person shall be commenced afresh, and witnesses re-heard.

(b) Subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the court took cognizance of the offence upon which the inquiry or trial was commenced.

4. The learned counsel for the petitioner has also contended that

the power to summon the petitioner under Section 319 Cr.P.C. was circumscribed by the condition that the petitioner could have been tried as an accused with the other accused persons for the same offence for which the other accused persons were being charged as if the present accused was also with them at the initiation of the proceedings. It is further submitted that the evidence which will have to be led in the case of the petitioner is different from what has been led against other accused persons. As such, the impugned order cannot be sustained. He relied upon a judgment of Kerala High Court where the issue has been dealt with by Hon'ble Mr. Justice K.G. Balakrishnan, (present Chief Justice of India) in the case of Annamma Cherian Vs. State of Kerala 1990 Cr.L.J. 1976. In the said judgment while interpreting Section 319 Cr.P.C., the Hon'ble Judge was pleased to hold:

Section 319 says that if in the course of inquiry into, or trial of, an offence, it appears from the evidence that any person other than the accused who are already on party array committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed. Sub-sec. (2) of S. 319 further says that if such person is not attending the Court the Court may arrest him and summon him for the purpose of proceeding against him. Sub-sec. (3) of S. 319 empowers the Court to detain such person for the purpose of any inquiry or trial of the offence which he appears to have committed. Sub-sec. 4(1)(a) of S.319 says that proceedings in respect of the person who is newly added as the accused shall be commenced afresh and the witnesses be re-heard Sub-sec. 4(1)(b) of S.319 raises a legal fiction that the case may proceed against the newly added accused as if such person had been an accused when the Court took cognizance of the offence upon which the inquiry or trial was commenced. Even under the earlier Section i.e. S.351 of the old Cr.P.C., the Court had powers to take cognizance of offences as against the additional impleaded accused. However, it did not state whether or under what manner cognizance was taken by the Magistrate. Some courts had taken the view that the Magistrate is supposed to have taken cognizance under S.190(1)(c) of the Code.

5. Under sub-sec. 4(1)(b) of S.319 Cr.P.C. it is specifically made clear that it will be presumed

that the newly added person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced. This would show that the Court had already taken cognizance of the offence and by virtue of sub-sec. 4(1)(b) of S.319 a legal fiction is created that the cognizance would be presumed to have taken as against this newly added accused also. This, in my view, indicates that the Court is not empowered to take cognizance of any fresh offence. If an accused is impleaded by invoking S.319, the Court has no power to take cognizance of any fresh offence and the newly added accused could be tried only for the offence already taken cognizance against other accused. Sub-sec. (1) of S.319 Cr.P.C. would also show that the Court has got power to implead an additional accused only if it is found that he could be tried together with the accused who are already on party array.

6. In the instant case the allegation against the 1st accused was that he unauthorisedly sold ration articles and the allegation against the 2nd accused that he was in possession of ration articles without a valid ration document whereas the allegation against the appellant herein was that she made falsification of account and thereby committed offence punishable under S.50 of the Kerala Rationing Order and that she failed to cancel the appropriate space in the ration cards supplied to the card holders, when she actually sold the ration articles to the card holders. The charge against the appellant is independent and has no nexus to the offences alleged against accused 1 and 2. That being so, the Special Judge was not justified in invoking S. 319, Cr.P.C. to implead the appellant herein and to try her for offences other than the offences he had already taken cognizance. It is also important to note that under S.11 of the E.C. Act no Court shall take cognizance of the offence punishable under this Act except on a report in writing by the public servant as defined under S.21 of the I.P.C. So, the Special Judge had no power to take cognizance of the offence even under S.190(1)(c) of the Code unless there was a report in writing by the public servant. In any view of the matter the Special Judge was not justified in invoking S.319 of the Cr.P.C. to try the appellant for the offences punishable under Cls.29 and 50 of the Kerala Rationing Order. As the Special Judge had not taken cognizance of these offences, the whole trial against the appellant was vitiated by this illegality and the Special Judge acted without jurisdiction.

The conviction and sentence against the appellant is set aside and she is acquitted of all the charges framed against her.

5. Relying upon the aforesaid judgment, it is submitted that in the facts and circumstances of the present case the order passed by the Ld. Special Judge under Section 319 Cr.P.C. is unsustainable in law.

6. I have also heard the learned counsel for the respondent/CBI, who was also given a liberty to file written submissions. Nothing contrary to what has been said in the judgment of Kerala High Court in *Annamma Cherian's case* (supra) has been brought to my notice by learned counsel for the CBI. Even otherwise what has been held by the Kerala High Court is in tune with the language of Section 319 Cr.P.C. as quoted above.

7. As far as observation made by learned Special Judge that *prima facie* a case was also made out against the petitioner under Section 13(1)(a) read with Section 13(2) of the Prevention of Corruption Act on the ground that some chits were also found from him during the course of raid conducted by Inspector Rajesh Kumar, is concerned, it is apparent that neither the petitioner was arrayed as an accused at the time of filing of charge-sheet nor any sanction has been obtained for his prosecution despite his being a Government Servant. As such, even on that ground the impugned order cannot be sustained. In this regard, reference can also be made to a judgment delivered by this Court in Crl.M.C. 2684/2008 *Dr.C.P.Thakur Vs. CBI* decided on 8.4.2009. In this case also the complaint was filed after the accused ceased to be the government servant, which is the position in the present case also. It may be observed that the respondent despite opportunity granted to them have not filed written submissions as also have not come out with any contrary judgment to oppose the case of the petitioner.

8. Thus, I hold that the order dated 09.10.02 passed by the Ld. Special Judge against the petitioner summoning him in this case by exercising powers under Section 319 Cr.P.C. cannot be sustained.

Accordingly, the order dated 09.10.02 as also the orders passed subsequent thereto by the learned Special Judge in respect of the present petitioner are set aside. The petition is allowed.

Crl.M.A. 7974/2005

In view of the orders passed above, the application stands disposed of.

Copy of the order be sent to the Trial Judge along with the TCR, if any.

MOOL CHAND GARG, J.

JULY 22, 2009
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