

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

TUESDAY, THE 3RD DAY OF MARCH 2015/12TH PHALGUNA, 1936

Cr1.MC.No. 3838 of 2011 ( )

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AGAINST THE ORDER IN CC 428/2009 of C.J.M.COURT, ALAPPUZHA  
DATED 11-10-2011

PETITIONER/4TH ACCUSED:

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RAJEEVAN.P, AGED 56,  
S/O. P.K.PANKAJAKSHAN, PULICKAL HOUSE,  
KALAPURA WARD, ALAPPUZHA-7.

BY ADVS.SRI.S.SREEKUMAR (SR.)  
SRI.M.A.MOHAMMED SIRAJ  
SRI.P.PRIJITH  
SRI.ANEESH JAMES  
SRI.P.MARTIN JOSE

RESPONDENT/STATE-COMPLAINANT:

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1. THE STATE OF KERALA, REPRESENTED BY  
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

ADDL.R2 TO R4 IMPEADED:

ADDL.R2 DEVADAS, S/O. VENKAPPAN, AGED 49,  
MACHUNKKAL HOUSE, PUNNAPRA P.O,  
ALAPPUZHA - 688 004.

ADDL.R3 DINESAN, S/O. KUNJU KUNJU, AGED 71,  
POZEEKKAL HOUSE, KOMMADY,  
THUMBOLI P.O., ALAPPUZHA -688 007.

ADDL.R4 PRATHAPAN, S/O.VASU, AGED 48,  
KUTTAPPALLIKKAL HOUSE, PUNNAPRA P.O,  
ALAPPUZHA - 688 004.

ADDL.R2 TO R4 IMPEADED AS PER ORDER DATED 29.11.2011 IN  
CRL.M.A.NO.7639/2011 IN CRL.M.C.NO.3838/2011.

ADDL.R2 BY ADV. SRI.K.A.SALIL NARAYANAN  
R1 BY PUBLIC PROSECUTOR SMT.V.H. JASMINE

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 03-03-  
2015 ALONG WITH CRL.M.C.NO.4087/2011, THE COURT ON THE SAME DAY PASSED

THE FOLLOWING:

Cr1.MC.No. 3838 of 2011 ( )

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APPENDIX

PETITIONER'S ANNEXURES:

ANNEXURE.I TRUE COPY OF BYE-LAWS OF SREEPADAM FUNDS.

ANNEXURE.II TRUE COPY OF FIR IN CRIME NO.275/06 BEFORE THE CHIEF  
JUDICIAL MAGISTRATE COURT, ALAPPUZHA DT. 01-04-2006.

ANNEXURE.III TRUE COPY OF FIR IN CRIME NO.275/06 BEFORE THE CHIEF  
JUDICIAL MAGISTRATE COURT, ALAPPUZHA DATED 27-05-2010.

ANNEXURE.IV TRUE COPY OF FINAL REPORT IN CRIME NO.357/2008  
DATED 25-02-2009 BEFORE THE CHIEF JUDICIAL MAGISTRATE COURT,  
ALAPPUZHA.

ANNEXURE.V TRUE COPY OF DEPOSITION OF PW1 IN C.C. NO.428/2009 BEFORE  
THE CJM COURT, ALAPPUZHA.

ANNEXURE.VI TRUE COPY OF DEPOSITION OF PW2 IN C.C. NO.428/2009 BEFORE  
THE CJM COURT, ALAPPUZHA.

ANNEXURE.VII TRUE COPY OF DEPOSITION OF PW3 IN C.C. NO.428/2009 BEFORE  
THE CJM COURT, ALAPPUZHA.

ANNEXURE.VIII TRUE COPY OF ORDER IN C.C. NO.428 OF 2009 DATED  
11-10-2011 OF CHIEF JUDICIAL MAGISTRATE COURT, ALAPPUZHA.

RESPONDENTS' ANNEXURES: NIL

/TRUE COPY/

P.S TO JUDGE

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**K. RAMAKRISHNAN, J.**

.....  
Crl.M.C.No.3838 of 2011

&

Crl.M.C.No.4087 of 2011  
.....

Dated this the 3<sup>rd</sup> day of March, 2015.

**O R D E R**

These two petitions were filed by the additional accused, who was implicated in C.C.Nos.428/2009 and 708/2009, both of Chief Judicial Magistrate Court, Alappuzha in the respective cases under section 319 of the Code of Criminal Procedure (hereinafter referred to as 'the Code' for short) challenging the order implicating him in these cases under section 482 of the Code.

2. C.C.No.428/2009 which is the subject matter in Crl.M.C.No.3838/2011 was taken on file on the basis of a final report filed in Crime No.357/2008 of Alappuzha north police station, which was in fact registered on the basis of a private complaint filed by the additional second respondent against three accused persons mentioned in the final report and also against two other persons including the present petitioner alleging offences under sections 403, 406 and 420 of the Indian Penal Code.

3. After investigation, the investigating officer filed

Annexure-IV report in Crl.M.C.No.3838/2011 against three accused persons alone alleging offences under sections 403 and 420 of the Indian Penal Code and that was taken on file as C.C.No.428/2009 on the file of the Chief Judicial Magistrate Court, Alappuzha. When the accused appeared in that case, after hearing both sides charge under sections 403 and 420 of the Indian Penal Code was framed and the same was read over and explained to them though pleaded not guilty and thereafter Pws 1 to 3 were examined and in the cross examination, it was brought out that apart from the accused persons, the present petitioner was also having some control over the management of Sreepadam funds, which is being managed by the Kshetrayogam and on that basis, the learned Magistrate invoking the power under section 319 of the Code, decided to include the present petitioner also as additional 4<sup>th</sup> accused in that case and issued summons to him to be tried along with the other accused persons already arrayed as additional fourth accused in that case by Annexure-VIII order in that case.

4. C.C.No.708/2009, which is the subject matter in

Crl.M.C.No.4087/2011, was taken on file on the basis of a final report filed in Crime No.307/2007 of Alappuzha north police station, which was registered on the basis of a private complaint filed by the second respondent in that case against six accused persons including the present petitioner and another alleging offences under sections 406 and 420 of the Indian Penal Code read with section 34 of the Indian Penal Code and after investigation, Annexure-IV final report in that case was filed only against six accused persons, who are facing trial, and that was taken on file as C.C.No.708/2009 by the learned Magistrate. In that case also, except one accused, others appeared and after hearing both sides, charge under sections 406 and 420 read with section 34 of the Indian Penal Code was framed and the same was read over and explained to them and they pleaded not guilty. Pws 1 to 3 were examined in that case also and on the basis of the evidence available on record, that was brought out in the cross examination of the witnesses, the learned Magistrate has formed an opinion that apart from the accused already arrayed as accused, the present petitioner also involved in the commission of the crime

and on that basis, invoking the power under section 319 of the Code, passed impugned Annexure-IX order in that petition implicating the present petitioner as additional 7<sup>th</sup> accused in that case. Both the impugned orders implicating the present petitioner in these cases are being challenged by the petitioner by filing these two petitions.

5. In Crl.M.C.No.3838/2011, originally State alone was made as the respondent and subsequently all the witnesses, who have been examined, were also arrayed as additional respondents 2 to 4 as per order in Crl.M.A.No.7639/2011 in Crl.M.C.No.3838/2011.

6. Heard the counsel for the petitioner and the defacto complainant/first respondent in both the cases and the learned Public Prosecutor.

7. Since the question arose in both the cases is the same and the nature of evidence adduced in the cross examination of the witnesses and the circumstances under which the Magistrate has invoked the power under section 319 are same in both the cases, this Court felt that both the cases can be disposed of by a common order.

8. The learned senior counsel Sri.S.Sreekumar, appearing for the petitioner in both the cases submitted that the accused now arrayed in the cases were Chairman, Accountant and Board of Members of Sreepadam funds, which is an institution under Sree Khandakarma Kshetram, of which petitioner was the then President, and it has got its own byelaws and Board of Directors of that Kshetram being found selected from the members elected to the Kshetrayogam and Managing Director, Chairman and Secretary will be selected among the Directors and they will be administering the funds of that Society and it is being managed by Annexure-1 byelaws. The Kshetrayogam has no control over the same except supervisory power and funds were being managed by the Director Board of Sreepadam funds alone. Further, audit of the Sreepadam funds was conducted, in which it was found that there were a lot of irregularities and misappropriation of funds and loan being granted by accepting fake gold ornaments in the name of fictitious persons. The present petitioner filed a complaint, on the basis of which, a crime was registered as Crime No.275/2006 of Alappuzha north police station and after

investigation, final report was filed against the Chairman, Secretary and Board Members of Sreepadam funds and Accountants, who are the original accused in C.C.No.708/2009 and that was taken on file as C.C.No.136/2010 and that is pending before the same court. Further, neither in the 161 statement of the witnesses nor at the time when these witnesses were examined in chief, they have stated anything about the present petitioner or his involvement in the commission of the offence. But, only during cross examination when suggestions were made, they have given some affirmative answers which, according to the counsel for the petitioner, is not sufficient to attract the power under section 319 of the Code for the court to implicate the petitioner as additional accused. He had relied on the decisions reported in **Aboobacker Musaliar A.P v. Inspector of Police and Others** (2005 KHC 1332) and **Hardeep Singh v. State of Punjab and others** (2014 (3) SCC 92) in support of his case.

9. On the other hand, Sri. Salil Narayanan and Vinod Kumar, the counsel appearing for the defacto complainants in these cases submitted that at the stage of invoking the power

under section 319 of the Code, the court need apply its mind and satisfy itself that some other persons other than the accused already arrayed have also involved in the commission of the crime and that satisfaction is not necessary to the extent that they are likely to be convicted in the case. Further, if the court below had applied its mind and used discretion judicially then, the court cannot interfere in that discretion invoking the power under section 482 of the Code unless that order is perverse. He had also relied on the Constitution Bench decision of the Hon'ble Supreme Court relied on by the counsel for the petitioner in support of his case as well.

10. It is an admitted fact that the petitioner in both the cases was the President of Sree Khandakarma Kshetrayogam and it is also an admitted fact that Sreepadam funds was floated by the Kshetrayogam for the purpose of doing some activities for the benefit of the members of the Yogam. The case of the petitioner is that Sreepadam funds is governed by Annexure-I byelaws and it has got independent existence and Kshetrayogam has no control over the same. Further, during audit when it was found that there was misappropriation of

funds, it is on the basis of his complaint that a case has been registered and after investigation final report was filed against the Chairman, Secretary, Board of Directors and Accountant of Sreepadam funds and that case is now pending as C.C.No.136/2010 before the Chief Judicial Magistrate Court, Alappuzha. It is also an admitted fact that Crime No.307/2007 was registered by the Alappuzha north police on the basis of a private complaint filed by the defacto complainant in that case against eight accused persons including the present petitioner originally alleging offence under sections 406 and 420 read with section 34 of the Indian Penal Code which was forwarded to the police under section 156(3) of the Code and after investigation, the investigating officer deleted the first two accused persons in the complaint, who include the present petitioner and filed Annexure-IV final report only against six persons. It is also an admitted fact that another crime was registered as Crime No.357/2008 of the same police station on the basis of a private complaint filed by the defacto complainant in that case before the Magistrate court, which was forwarded to the police for investigation under section 156

(3) of the Code against five accused persons including the present petitioner and after investigation, the investigating officer deleted the name of the first two accused persons in the complaint which include the present petitioner and filed Annexure-IV final report only against three accused persons, who were facing trial in that case, and that was taken on file as C.C.No.428/2009 on the file of the Chief Judicial Magistrate Court, Alappuzha. On the basis of the final report filed in Crime No.307/2007, the court has taken cognizance of the case as C.C.No.708/2009. It is also an admitted fact that Pws 1 to 3 were examined in both the cases and in the cross examination of accused 1 and 2 certain suggestions were given regarding the management of Sreepadam funds and involvement of the present petitioner and that was affirmed by the witnesses. It was on that basis that the learned Magistrate had invoked the power under section 319 of the Code to implicate the present petitioner as additional 4<sup>th</sup> accused in C.C.No.428/2009 and 7<sup>th</sup> accused in C.C.No.708/2009.

11. Section 319 of the Code reads as follows:

**"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 under arrest or upon a summons, 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 sub-section (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.

12. A reading of section 319 of the Code will go to show that if the court is satisfied on the basis of the evidence that

persons other than the accused arrayed in the case have involved in the commission of the crime, then the court can implicate them also as additional accused to be tried along with other accused persons, who were already in the party array. Section 319(4) of the Code says that in such cases the evidence will have to be re-opened and denova trial has to be conducted giving opportunity for the additional accused also to participate in the proceedings. The question as to when and under what circumstances and what is the nature of evidence on which the court can invoke section 319 of the Code has been considered and settled by the Constitution Bench of the Hon'ble Supreme Court in the decision reported in **Hardeep Singh's case** (cited supra) and after evaluating and considering the decisions on this aspect summarized the position as follows:

“117. We accordingly sum up our conclusions as follows:

**b. Questions (i) and (iii)**

**What is the stage at which power under  
Section 319 CrPC can be exercised?**

AND

**-Whether the word “evidence” used in Section 319(1) CrPC has been used in a comprehensive sense and includes the evidence collected during investigation or the word “evidence” is limited to the evidence recorded during trial?**

Answer

117.1 In Dharam Pal case, the Constitution Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of the investigation. Such cognizance can be taken under Section 193 CrPC and the Sessions Judge need not wait till “evidence” under Section 319 CrPC becomes available for summoning an additional accused.

117.2 Section 319 CrPC significantly uses two expressions that have to be taken note of i.e. (1)inquiry (2) trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under sections 200, 201, 202 CrPC, and under Section 398 CrPC are species of the inquiry contemplated by section 319 CrPC. Materials coming before the court in course of such inquiries can be used for corroboration of the evidence recorded in the court

after the trial commences, for the exercise of power under Section 319 CrPC, and also to add an accused whose name has been shown in Column 2 of the charge-sheet.

117.3 In view of the above position the word “evidence” in Section 319 CrPC has to be broadly understood and not literally i.e. As evidence brought during a trial.

**Question (ii)- Whether the word “evidence” used in Section 319(1) CrPC could only mean evidence tested by cross examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?**

**Answer**

117.4. Considering the fact that under Section 319 CrPC a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4) CrPC the proceeding against such person is to commence from the stage of taking of cognizance, the court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.

**Question (iv)-What is the nature of the satisfaction required to invoke the power under Section 319**

**CrPC to arraign an accused? Whether the power under Section 319 (1) CrPC can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?**

**Answer**

117.5. Though under Section 319(4) (b) CrPC the accused subsequently impleaded is to be treated as if he had been an accused when the court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 CrPC would be the same as for framing a charge.\* The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.

**Question (v)** -Does the power under Section 319 CrPC extend to persons not named in the FIR or named in the FIR but not charge-sheeted or who have been discharged?

**Answer**

117.6. A person not named in the FIR or a person though

named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 CrpC provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, insofar as an accused who has been discharged is concerned the requirement of Sections 300 and 398 CrPC has to be complied with before he can be summoned afresh."

13. Further, the nature of evidence to be appreciated and the satisfaction of the Magistrate to invoke the power under 319 of the Code have been considered and summarized in paragraphs 105 and 106 of the same judgment which reads as follows:

"105. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be

exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stranger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC the purpose of providing if “it appears from the evidence that any person not being the accused has committed any offence” is clear from the words “for which such person could be tried together with the accused”. The words used are not “for which such person could be convicted”. There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused”

14. It is clear from the above decision that what is required to be considered by the court while invoking the power under section 319 of the Code is whether on the basis of the

material collected during trial after final report is filed, if the court is satisfied that some other persons other than the accused arrayed as accused have also involved in the commission of the crime, then the court can invoke the power under section 319 of the Code and implicate them as accused in the case and it is not necessary for that court to come to the conclusion that the evidence collected is sufficient for conviction but what is required to be considered is whether that evidence is sufficient to proceed against the accused for the commission of the offence and satisfaction of the court regarding involvement of the accused in the commission of the crime and that satisfaction must be little more stronger than the framing of the charges but that does not mean that it must be satisfied that evidence is sufficient for conviction. With this principles in mind both the cases in hand have to be considered.

15. In both the cases, in the private complaint filed by the defacto complainant, the present petitioner has been shown as the second accused and it is also alleged that he was the Kshetrayogam President and the funds are being managed by all the accused persons and they have misappropriated the

funds. Though Annexure-1 byelaw was framed and there is a condition in the byelaw to get the funds registered under law, it was not registered and it is not a registered society. Further certain clauses in the byelaw namely clauses 5, 18 and 21 show that management of the funds and control of the Kshetrayogam over the same whether that control is only a supervisory one and they have no direct control over the management of the funds etc as contended by the counsel for the petitioner etc are matters to be considered by the court while appreciating byelaws on the basis of the evidence to be adduced before the court. Since it is an unregistered society and it is floated by the Khetrayogam, at this stage, it cannot be said that Khetrayogam has no control over the funds generated by the Sreepadam funds which has been floated by that Yogam. Further, the evidence of Pws 1 to 3 in both the cases deposed by them in the cross examination of accused 1 and 2 will go to show that they have deposited the amount on the belief and assurance that Kshetrayogam is managing the affairs of the funds and they also bonafide believed that Rajeevan was managing the affairs of the Sreepadam funds as well. They have also stated

that though suggestion was given to these witnesses that the present accused were only a name lenders and it was managed and administered by the present petitioner though affirmed by these witnesses, they have also stated that the accused persons who were already arrayed were also responsible for the misappropriation. Further, a reading of the impugned order passed by the court below will go to show that the court has considered all the materials that has been brought out in the cross examination of these witnesses in both the cases and came to the conclusion that apart from the accused arrayed in the case, present petitioner had also involved in the commission of the crime and prima facie formed an opinion that he has to be tried along with other accused persons. So it cannot be said, as submitted by the counsel for the petitioner that, without application of mind, simply and mechanically the court below had passed the impugned order. It is also settled law that if the discretion has been exercised by the court below in judicious manner with application of mind, it cannot be interfered by the higher courts either using the power of revision or inherent power under section 482 of the Code. So under the

circumstances and also in view of the discussions made above, it cannot be said that the impugned order passed by the court below in the respective cases is without application of mind and the evidence is not sufficient at this stage to come to the conclusion that involvement of the present petitioner has not been made out satisfactorily for the court to invoke the power under section 319 of the Code. I am not now expressing any opinion regarding the involvement of the petitioner or his role in the commission of the crime or whether a crime has been registered and final report has been filed in another case against the present accused persons are sufficient to exculpate him from the offence said to have been committed by him as opined by the court below for the purpose of implication under section 319 of the Code. All these matters have to be considered by the court below on the basis of evidence and take appropriate decision in the matter in accordance with law. So this Court finds no reason to interfere with the impugned order passed by the court below and both the petitions lack merit and the same are dismissed. If the petitioner applies before the court below for personal exemption since identity

of the accused is not in dispute, the court can pass appropriate orders in that application in accordance with law. Interim orders passed in Crl.M.A.No.7847/2013 in Crl.M.C.No.3838/2011 and Crl.M.A.No.7890/2011 in Crl.M.C.No.4087/2011 are vacated and they are dismissed. The court below is at liberty to appreciate the evidence on record and record appropriate finding against each persons in the case untrammelled by any observations made by this Court while disposing of these petitions.

With the above observations and directions, both the petitions are dismissed.

Sd/-  
**K. RAMAKRISHNAN, JUDGE.**

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/true copy/

P.S to Judge