

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 10TH DAY OF APRIL 2015/20TH CHAITHRA, 1937

Crl.Rev.Pet.No. 31 of 2013 ()

**AGAINST THE ORDER IN C.M.P.NO.1561/2010 IN C.C.NO.306/2011 OF THE JUDICIAL
FIRST CLASS MAGISTRATE COURT - III, KOTTAYAM DATED 06.10.2012.**

REVISION PETITIONER(S)/PETITIONER/ACCUSED:

**V.G.VINODKUMAR, DEPUTY SUPERINTENDENT OF POLICE,
THIRUVALLA,
(FORMERLY CIRCLE INSPECTOR OF POLICE,
KOTTAYAM EAST)**

**BY ADVS.SRI.ALAN PAPALI
SRI.SOJAN MICHEAL**

RESPONDENT(S)/COUNTER PETITIONER/COMPLAINANT AND STATE:

- 1. STATE OF KERALA - REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM 682 031.**
- 2. SAINABA NAZEER, EDATTUPARAMBIL HOUSE,
NEAR ARMED RESERVE CAMP,
KEEZHUKUNNU, KOTTAYAM 686 001.**

R1 BY PUBLIC PROSECUTOR SMT.V.H.JASMINE.

**THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON
06.04.2015, THE COURT ON 10-04-2015 PASSED THE FOLLOWING:**

APPENDIX

PETITIONER'S ANNEXURES

- ANNEXURE I : TRUE COPY OF THE COMPLAINT DATED 12.09.2007 SENT BY THE 2ND RESPONDENT TO THE CHIEF JUDICIAL MAGISTRATE, KOTTAYAM.
- ANNEXURE II : TRUE COPY OF THE WOUND CERTIFICATE ISSUED BY THE TALUK HEADQUARTERS HOSPITAL, KANJIRAPPALLY DATED 30.04.2007 IN RESPECT OF THE 2ND RESPONDENT.
- ANNEXURE III : TRUE COPY OF THE WOUND CERTIFICATE ISSUED BY THE TALUK HEADQUARTERS HOSPITAL, KANJIRAPPALLY DATED 30.04.02007 IN RESPECT OF THE SON OF THE 2ND RESPONDENT.
- ANNEXURE IV : TRUE COPY OF THE SWORN STATEMENT OF THE 2ND RESPONDENT DATED 24.09.2007.
- ANNEXURE V : TRUE COPY OF THE FINAL REPORT DATED 27.04.2007 IN CRIME NO.220/2007 OF THE KOTTAYAM EAST POLICE STATION.
- ANNEXURE VI : TRUE COPY OF THE COMPLAINT FILED BY THE POLICE CONSTABLE GOPAKUMAR BEFORE THE S.H.O., KOTTAYAM EAST POLICE STATION DATED 27.04.2007.
- ANNEXURE VII : TRUE COPY OF THE PETITION FILED BY THE PETITIONER BEFORE THE COURT BELOW AS CRL.M.P.NO.1561/2010 IN C.C.NO.15/2007 DATED 29.10.2010.
- ANNEXURE VIII : TRUE COPY OF THE ORDER DATED 06.10.2012 IN C.M.P.NO.1561/2010 IN C.C.NO.306/2011 OF THE COURT OF THE JUDICIAL FIRST CLASS MAGISTRATE - III, KOTTAYAM.

RESPONDENT'S ANNEXURES

NIL

//True Copy//

P.A. To Judge

Bb

C.R.

K. Ramakrishnan, J.

=====

Crl.R.P.No.31 of 2013

=====

Dated this, the 10th day of April, 2015.

ORDER

Accused in C.C.No.306/2011 on the file of the Judicial First Class Magistrate Court - III, Kottayam has filed this revision against the order in C.M.P.No.1561/2010 in C.C.No.306/2011.

2. The case of the petitioner in the petition was that, second respondent had come to the police station on 27.04.2007 at 11.15 a.m., for an enquiry about the progress of the investigation of a complaint filed against her husband and when the complainant was informed that the case was referred, she uttered obscene and abusive words against the police and on the instructions of the petitioner who was present in the police station, second respondent and her son were arrested and a case was registered as Crime No.220/2007 of Kottayam East police station alleging offence under Section 294(b) of Indian Penal Code and after investigation, Annexure V final report was filed against the

second respondent and her son before the Judicial First Class Magistrate Court - I, Kottayam and it was taken on file as C.C.No.307/2011 of that court and thereafter, it was transferred to Judicial First Class Magistrate Court - III, Kottayam where it is now pending. The second respondent sent Annexure I complaint to the Chief Judicial Magistrate by post along with Annexure II and III wound certificates and the learned Chief Judicial Magistrate has forwarded the complaint to Judicial First Class Magistrate Court - II, Kottayam for enquiry and disposal and the learned magistrate has numbered the same as C.M.P.No.1349/2007 and after taking Annexure IV sworn statement, the learned magistrate took cognizance of the case as C.C.No.15/2007 against the revision petitioner alleging offence under Sections 341, 506(ii), 354 and 323 of Indian Penal Code. Thereafter, the case was transferred to Judicial First Class Magistrate Court - III, Kottayam where it was taken on file as C.C.No.306/2011. The petitioner filed Annexure VII petition for discharge on the ground that taking cognizance of the case is bad for want of sanction under Section 197(2) of Code of Criminal Procedure. The learned magistrate, by Annexure VIII order, dismissed the application

which is being challenged by the petitioner by filing the above revision.

3. Though notice was sent to the second respondent, she did not appear.

4. Heard the Counsel for the revision petitioner Shri.Alan Papali and Smt.V.H.Jasmine, Public Prosecutor appearing for the first respondent and perused the records.

5. The Counsel for the revision petitioner submitted that transfer of the case to another court by Chief Judicial Magistrate without taking cognizance is bad under Section 192 (1) of Code of Criminal Procedure as Chief Judicial Magistrate will be getting power to transfer a case to another court only after taking cognizance. He had also argued that, even assuming that the case was transferred, it must be transferred to a court having jurisdiction to entertain the complaint and it was made over to Judicial First Class Magistrate Court, (Mobile) Kottayam and as such, the transfer is bad in law and that court should not have taken cognizance of the case and conducted enquiry and that is without jurisdiction. Thirdly, he had also argued that, it will be seen from the deposition of CW1 - the complainant in the case that the complaint was filed

in respect of an incident occurred in which she was arrested and released on bail and that relates to Anneuxre V case. when the complainant came to the office of the petitioner who was working as Circle Inspector of Police at that time and abused him, since he was in official duty at that time and if any person causes nuisance, he is entitled to use reasonable force to remove her and even if that is done, it cannot be said that it will not come under either in the course of discharge of official duty or in discharge of his official duty and if it is done in discharge of his official duty, then, he is entitled to get protection under Section 197(2) of Code of Criminal Procedure and without sanction, cognizance should not have been taken by the magistrate and in this case, no such sanction has been produced and as such, the taking of cognizance is bad. He had further argued that, even if the entire allegations are accepted, no offence is made out and as such, he is entitled to get discharge and the court below was not justified in dismissing the application. He had relied on the decisions reported in **Sankaran Moitra Vs. Sadhna Das and Another [(2006) 2 Supreme Court Cases (Cri) 358]**, **Rizwan Ahmed Javed Shaikh and others Vs. Jammal Patel and others [AIR**

2001 Supreme Court 2198], Sunil Kumar Vs. State of Kerala [2007 (4) KLT 359], Unni Rajan Vs. State of Kerala and Another [2012 (2) KHC 707], Moosa Vallikkadan Vs. State of Kerala [2010 (3) KLT 437] in support of his case.

6. On the other hand, the learned Public Prosecutor submitted that, even without taking cognizance, Chief Judicial Magistrate has got power to transfer a case to some other court and that court, by virtue of that transfer, will get jurisdiction to entertain the case and that cannot be questioned later. Public Prosecutor relied on the decisions reported in **Gopal Das Sindhi and others Vs. State of Assam and another [AIR 1961 Supreme Court 986]** and **Anil Saran Vs. State of Bihar and Another [1995 Supreme Court Cases (Cri) 1051]** in support of their case.

7. It is an admitted fact that the second respondent went to the office of the revision petitioner to enquire about a case filed by her on 27.04.2007 at about 11.15 a.m. According to the revision petitioner, when it was informed to her that, that case was referred by the police, she hurled abusive and obscene words and that prompted him to order

arrest of the second respondent and accordingly, a crime was registered as Crime No.220/2007 of Kottayam East police station alleging offence under Section 294(b) of Indian Penal Code against the second respondent and her son. It is also an admitted fact that after investigation, Annexure V final report was filed in that case and it was taken on file as C.C.No.307/2011 on the file of the Judicial First Class Magistrate Court – I, Kottayam and thereafter, it was transferred to Judicial First Class Magistrate Court – III, Kottayam where it is now pending. It is also an admitted fact as seen from the allegations in the revision petition that, the second respondent had sent Annexure I complaint by post along with Annexure II and III wound certificates to Chief Judicial Magistrate, Kottayam and it is seen from the records that, without taking cognizance of the case, learned Chief Judicial Magistrate, Kottayam had made an endorsement on the complaint that “made over to Judicial First Class Magistrate Court – II, Kottayam for enquiry and disposal as per law” and this endorsement was made on 14.09.2007. It is seen from the complaint that after receipt of the same, the Judicial First Class Magistrate - II, Kottayam had ordered “register a C.M.P

and put up” by endorsement dated 15.09.2007 on the complaint and it was numbered as C.M.P.No.1349/07 and thereafter, notice was issued to the complainant. When she appeared, her sworn statement was taken as Annexure IV and thereafter, the learned magistrate had taken cognizance of the case as C.C.No.15/2007 against the first accused in the complaint alone who is the revision petitioner herein alleging commission of offences under Sections 354, 323, 341, 506(ii) of Indian Penal Code. It is also in a way admitted by the Counsel for the revision petitioner that he filed a Criminal Miscellaneous Case before this court for quashing the proceedings under Section 482 of Code of Criminal Procedure, but, no order of stay was granted and thereafter, he filed Annexure VII petition for discharge and in the mean time, the case was transferred to Judicial First Class Magistrate Court – III, Kottayam where it was re-numbered as C.C.No.306/2011 and that court had dismissed the application by Annexure VIII order which is under challenge in the revision. It is fairly conceded by the Counsel for the revision petitioner that, after Annexure VIII order, the Criminal Miscellaneous Case filed by the petitioner was dismissed as withdrawn.

8. The first contention raised by the Counsel for the revision petitioner was that, the transfer of the case to Judicial First Class Magistrate Court – II, (Mobile) Kottayam by the Chief Judicial Magistrate without taking cognizance and without assigning any number to that complaint is illegal as under Section 192(1) of Code of Criminal Procedure, this can be exercised by the Chief Judicial Magistrate only after taking cognizance. The other contention was that, even if the transfer was made, the Judicial First Class Magistrate Court - II, (Mobile) Kottayam should not have entertained the complaint as that court is without any jurisdiction and not competent to take any complaint. Third contention was that, since the incident alleged was done in discharge of his official duty even if there is some excess, he is entitled to get protection under Section 197(2) of Code of Criminal Procedure and without prior sanction from the Government for prosecuting him, taking cognizance of the case by the magistrate is illegal and on that ground, he is entitled to get discharge.

9. The order that is being challenged now is only the dismissal of the application for discharge filed by the

petitioner. Though the first two contentions are not available for consideration in this case, for an academic purpose, this court feels that, that also can be answered.

10. Section 192 of Code of Criminal Procedure reads as follows:

192:- "Making over of cases to Magistrates:-

(1) Any Chief Judicial Magistrate may, after taking cognizance of an offence, make over the case for inquiry or trial to any competent Magistrate subordinate to him.

(2) Any Magistrate of the first class empowered in this behalf by the Chief Judicial Magistrate may, after taking cognizance of an offence, make over the case for inquiry or trial to such other competent Magistrate as the Chief Judicial Magistrate may, by general or special order, specify, and thereupon such Magistrate may hold the inquiry or trial."

11. A perusal of Section 192 of Code of Criminal Procedure will go to show that, Chief Judicial Magistrate is entitled to transfer the case after taking cognizance, if he is intended to invoke the power under that Section. But, there is no bar for the Chief Judicial Magistrate to transfer a case to another court even on the administrative side. If the case has been transferred to some other court within his jurisdiction, then, that court will get jurisdiction to entertain that complaint for the purpose of complying with the direction of enquiry and disposal including an enquiry under Section 202 of Code of Criminal Procedure as Section 202 of Code of Criminal

Procedure says that, that power can be exercised by the magistrate to whom the case has been transferred to that court by the Chief Judicial Magistrate. This position has been considered by the Supreme Court in two decisions.

12. In the decision reported in **Gopal Das Sindhi and others Vs. State of Assam and another [AIR 1961 Supreme Court 986]**, the Honourable Supreme Court has held that the transfer of a case contemplated under Section 192 is only of cases in which cognizance of an offence has been taken. If the Additional District Magistrate has not taken cognizance of any offence when the complaint is presented to him, his sending the complaint to another Magistrate for disposal will not be a transfer of a case under Section 192. The sending of the complaint in such a case is by way of an administrative action and the magistrate who received the same without taking cognizance forwarding to the police for investigation under Section 156(3) of Code of Criminal Procedure cannot be said to be without jurisdiction and it cannot be said to be illegal as well and the original order of transfer cannot be challenged as illegal as the Chief Judicial Magistrate has got power to transfer a case even on the

administrative side. The same view has been reiterated and affirmed in the decision reported in **Anil Saran Vs. State of Bihar and Another [1995 Supreme Court Cases (Cri) 1051]**. In that case, the Honourable Supreme Court has held that a magistrate who receives the case on transfer and takes cognizance could not become incompetent to do so merely because the sanction of transfer of case to his file is not in accordance with law. The power to take cognizance has been conferred on a magistrate by Section 190(1) of the Code of Criminal Procedure and he would not be denuded of this power because, the case has come to his file pursuant to some illegal order of the Chief Judicial Magistrate. The former would be exercising his power of taking cognizance even in such a case because of his having received the complaint constituting the offence. It would not be material for this purpose as to how he came to receive the complaint directly or on transfer from Chief Judicial Magistrate. So, under the circumstances, if he takes cognizance of the case on the basis of the transfer, then, by virtue of the order of transfer he gets power to take cognizance of the case to conduct enquiry and proceed with the case as it was transferred to him by the superior court

namely., the Chief Judicial Magistrate. So, the submission made by the Counsel for the revision petitioner that the transfer by the Chief Judicial Magistrate and taking cognizance by the Judicial First Class Magistrate – II, Kottayam is illegal, cannot be accepted and the same is rejected.

13. Section 197 of Code of Criminal Procedure reads as follows:

197. "Prosecution of Judges and public servants:-

(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction-¹

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:

[Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted.]

(2) No court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class

or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

[(3A) Notwithstanding anything contained in sub-section (3), no Court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.]

[(3B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a Court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991, receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the Court to take cognizance thereon.]

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held."

¹In section 197, after the words, "except with the previous sanction", the words "save as otherwise provided in the Lokpal and Lokayuktas Act, 2013" shall be inserted.

14. There is no dispute regarding the propositions laid down in the decisions reported in **Unni Rajan Vs. State of Kerala and Another [2012 (2) KHC 707]**, **Balachandran**

P. C. Vs. State of Kerala and Anr. [2012 (3) KLJ 474], Ravada A. Chandrasekhar Vs. State of Kerala and Anr. [2012 (3) KLJ 490], Moosa Vallikkadan Vs. State of Kerala [2010 (3) KLT 437], Sankaran Moitra Vs. Sadhna Das and Another [(2006) 2 Supreme Court Cases (Cri) 358], Sunil Kumar Vs. State of Kerala [2007 (4) KLT 359], Rakesh Kumar Mishra Vs. State of Bihar and Others [(2006) 1 Supreme Court Cases 557] on the proposition that, if any act has been done in discharge of an official duty which constituted an offence, then, protection under Section 197 of Code of Criminal Procedure has to be given to them and without prior sanction of the Government, taking cognizance of the case against such public officer is bad in law. Further, the notification issued by the Government in the year 1977 extending the benefit of sanction provided to persons involved in maintenance of public order under Section 197(3) was extended to Kerala Police charged with maintenance of public order will available to persons engaged in law and order was considered by the Division Bench of this court in **Sarojini Vs. Prasannan [1996 (2) KLT 859]** and held that, that must be given to them also. This was affirmed

by the Honourable Supreme Court in the decision reported in **Rizwan Ahmed Javed Shaikh and others Vs. Jammal Patel and others [AIR 2001 Supreme Court 2198]** while considering similar notification issued by the Maharashtra Government in the same manner as done by the Kerala Government issuing notification of 1977 under Section 197(3) of Code of Criminal Procedure extending the benefit to Kerala Police Force engaged in maintenance of public order. Though the Section says that the protection need be given to persons who are removable by Government, by virtue of the notification under Section 197(3) of Code of Criminal Procedure extending that benefit to police officers of whatever cadre engaged in maintenance of public order will also get that benefit and by virtue of the decisions, the maintenance of public order includes law and order duty as well.

15. It is also settled law that, if the question as to whether a person has engaged in discharge of duty and in discharge of that duty he had committed any offence in respect of which a complaint has been filed itself has to be decided on the basis of evidence and if the allegations are not sufficient to infer for the court that it was done in discharge of his official

duty, then, court can defer the production of sanction for prosecution to a later stage and that aspect can be considered by the court on the basis of evidence at any stage. Further, in the petition filed by the petitioner, nothing has been mentioned as to the nature of discharge of duty that was carried on by him at the time when the alleged allegation of assault and outraging the modesty and threat to life causing fear etc., has alleged to have been committed. It is true that second respondent was charge sheeted by the police for allegedly involved in abusing the petitioner and that itself was under challenge by the second respondent as the allegation was that she was manhandled by the revision petitioner and caught hold of her knowing that it is likely to outrage her modesty and threatened her causing fear in her mind and wrongfully restrained her and thereafter, falsely implicated in a case and that case itself was foisted to escape from the consequences of the illegal act committed by the revision petitioner against her. It is true that in the sworn statement, she had stated that this incident is relating to an incident in respect of which, a case has been registered against her in which she was released on bail. That statement given by her is not sufficient to come to

the conclusion at this stage that she was admitting the fact that she had abused the revision petitioner and it is on account of that, a case has been registered and ended in filing Annexure V final report. Further, in Annexure V final report, the revision petitioner was shown as a witness and there is nothing mentioned that what was the duty that he was doing at that time and whether the consequent act of assault etc., is in discharge of that duty. Outraging the modesty of a woman and beating her when she came to the police station to enquire about certain thing cannot be at this stage said to be acts committed by the revision petitioner in discharge of his official duty which warrants a protection under Section 197(2) of Code of Criminal Procedure. So, under the circumstances and on the basis of the materials now available on record, it cannot be said that the magistrate has committed any illegality in dismissing the application for discharge filed by the petitioner for want of sanction under Section 197(2) of Code of Criminal Procedure and no interference is called for at this stage. The petitioner is at liberty to raise these contentions at the time of trial also and if the court finds on evidence that it is done in discharge of his official duty, that can be considered by the

court on the basis of evidence and dispose of the case in accordance with law at that time. So, no interference is called for of the order passed by the court below dismissing application for discharge evidenced by Annexure VIII order and the revision is liable to be dismissed.

In the result, the revision fails and the same is hereby dismissed. Interim order of stay granted as per order in Crl.M.A.No.112/2013 and extended from time to time is vacated and the Crl.M.A.No.112/2013 is dismissed. The court below can consider the question of personal exemption after taking bail by the petitioner as his identity is not in dispute in the case and pass appropriate orders in the application filed by the revision petitioner before that court on such application in accordance with law. Parties are directed to appear before the court below on 22.05.2015.

Office is directed to communicate this order and sent back the records to the court below immediately.

Sd/-
K.Ramakrishnan, Judge.

Bb

[True copy]

P.A to Judge