

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE AG.CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

SATURDAY, THE 31ST DAY OF JANUARY 2015/11TH MAGHA, 1936

WP(C).No. 28421 of 2014 (S)

PETITIONER :

V.S. ACHUTHANANDAN
S/O.SANKARAN, CANTONMENT HOUSE, PALAYAM
THIRUVANANTHAPURAM-695 001.

BY ADV. SRI.D.ANIL KUMAR

RESPONDENTS :

1. STATE OF KERALA, REP. BY THE CHIEF SECRETARY,
SECRETARIAT, THIRUVANANTHAPURAM-695 001.
2. DEPARTMENT OF HOME & VIGILANCE,
THROUGH PRINCIPAL SECRETARY, SECRETARIAT
THIRUVANANTHAPURAM-695 001.
3. DEPARTMENT OF FINANCE,
THROUGH PRINCIPAL SECRETARY, SECRETARIAT
THIRUVANANTHAPURAM, KERALA-695 001.
4. SH.OOMMEN CHANDY,
CHIEF MINISTER OF KERALA,
SERCETARIAT, THIRUVANANTHAPURAM,
KERALA STATRE - 695 001.
5. UNION OF INDIA
THROUGH SECRETARY, MINISTRY OF PERSONNEL
PUBLIC GRIEVANCES, AND PENSION
DEPARTMENT OF PERSONNEL AND TRAINING (DOPT)NORTH BLOCK
NEW DELHI, INDIA-110 001.
6. SH. P. J. THOMAS
S/O.P J JOSEPH, R/O.D 7 LIC OFFICERS QUARTERS
SECTOR-15, PART II, GURGAON
HARYANA STATE, INDIA-122 001.

7. JIJI THOMSON
DIRECTOR(FORMERLY MD
KSCSC LTD)PRESENTLY WORKING AS DIRECTOR
SPORTS AUTHORITY OF INDIA
JAWAHLAL NEHRU STADIUM COMPLEX, LODHI ROAD
NEW DELHI-110 003.

BY ADVOCATE GENERAL SRI.K.P. DANDAPANI
SPL. GOVT. PLEADER, SRI.C.S. MANILAL.
R5 BY ADV. SRI.N.NAGARESH, ASSISTANT SOLICITOR GENERAL

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
31-01-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS :

- P1:-A COPY OF THE PROCEEDINGS OF THE COUNCIL OF MINISTERS IN FILE NO 7561/B1/96/VIG CATEGORY NO 4196 DTD 11/9/2013 ALONG WITH NOTE RECOMMENDING WITHDRAWAL OF PROSECUTION IN CC NO 108/2011, IN SPECIAL COURT, THRISSUR ALONG WITH NOTE FOR THE COUNCIL OF MINISTERS.
- P2:-A TRUE COPY OF THE GOVT.ORDER (RT)NO 145/2013/VIG/DT 13/9/2013, PASSED BY HOME AND VIG.DT 13/9/2013 PASSED BY HOME AND VIG.DEPT (2ND RESP.).
- P3:-A TRUE COPY OF THE CENTRAL GOVT.SPECIAL CIRCULAR NO 110/91/EOP DTD 6/11/1991.
- P4:-A TRUE COPY OF THE GO NO 7561/B1/96/VIG DTD 31/12/1999 REQUESTING CENTRAL GOVT. SANCTION TO PROSECUTE 6TH AND 7TH RESP. HEREIN.
- P5: A TRUE COPY OF HTE REQUEST LETTER NO.7561/B1/96/VIG. DT. 24/1/2005 FROM THE 1ST RESP. TO WITHDRAW THE GOVT. REQUEST FOR SANCTION MADE VIDE EXT.P5.
- P6: A TRUE COPY OF THE GO (RT) NO.105/05/VIG./TVM. DT. 28/3/2005 GRANTING SANCTION FOR WITHDRAWAL OF PROSECUTION AGAINST ALL THE ACCUSED.
- P7: A COPY OF THE LETTER NO.107/1/2000-AVD.1 DT. 4/4/2005 DEPT. OF PERSONNEL GOVT. OF INDIA.
- P8: A TRUE COPY OF THE 4TH RESPONDENT'S LETTER DT. 4/4/2005 MAKING A REQUEST TO MINISTER OF STATE TO CLOSE THE FILE ONCE FOR ALL.
- P9: A TRUE COPY OF THE ORDER DT. 20/4/2006 IN CRL. A. NO.801/2003 PASSED BY THE HON'BLE SUPREME COURT.
- P10: A TRUE COPY OF THE GO(RT) NO.143/06/VIG. DT. 25/7/2006 CANCELLING EXT.P6 DT. 28/3/2005.
- P11: A TRUE COPY OF THE ORDER OF THE LT. ENQUIRY COMM. & SPECIAL COURT AT THRISSUR DT. 24/5/2012 IN CC. NO.108/2011.
- P12: A COPY OF THE REPRESENTATION DT. 30/7/2012 TO THE HOME DEPARTMENT.

RESPONDENTS' EXHIBITS :

NIL

/TRUE COPY/

PA TO JUDGE

ASHOK BHUSHAN, Ag.C.J. & A.M. SHAFFIQUE, J.

W.P.(C) No. 28421 OF 2014

Dated this the 30th day of January, 2015

JUDGMENT

Ashok Bhushan, Ag.C.J.

The challenge in this writ petition is to the order of Government of Kerala dated 13.09.2013 by which a decision has been taken to withdraw from the prosecution, by moving before the Court of Enquiry Commissioner and Special Judge, Thrissur, in CC No.108 of 2011. The case was charge sheeted under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 and Section 120B of IPC in which the then Chief Minister, K.Karunakaran, (since deceased) and 7 others were accused. The Writ Petition has been filed by the leader of opposition in the Kerala State Legislative Assembly praying for the following reliefs:

"i. Issue a writ or order in the nature of writ of declaration or any other appropriate order, writ or direction to declare that the Exhibit P1 proceedings in file No.7561/B1/96/Vig. Category No.4196 dt.11.9.2013 recommending cancellation of GO(Rt) No.143/2006/vig. dt. 25.7.2006 and revival of proceedings as per GO(Rt)

No.105/2005/vig. dt. 28.3.2005 for withdrawal of prosecution of CC No.108/2011 pending in the Court of Enquiry Commissioner & Special Judge, Thrissur as non-est, null and void; and

ii. To issue an appropriate writ or order or direction in the nature of mandamus certiorari or any other appropriate writ for order calling for the records leading to the decision of Exhibit P2 Govt. Order (Rt) No.145/2013/Vig. dt. 13.09.2013, Thiruvananthapuram passed by the Vigilance (B) Dept. Govt. of Kerala, 2nd respondent herein and quash the same; and

iii. Pass any other appropriate writ or order or direction and such other and further order (s) as this Hon'ble Court may deem fit and proper in the circumstances of the case."

2. The chronology of events from registration of First Information Report leading up to filing of this writ petition in so far as they are relevant for the purpose of present case need to be noted first.

3. Sri.K. Karunakaran was the Chief Minister of State of Kerala from 1991 to 1995. On 05.10.1991 he has written a letter to the Prime Minister of India seeking permission for the intention to import '30,000 Metric Tonnes' of 'Palmolein Oil' in

connection with Dasara and Deepawali festivals. The Central Government, on 06.11.1991, issued a Circular laying down certain terms and conditions for import of goods. On 18.11.1991 the then Chief Secretary of State of Kerala as per the request of Secretary, Food and Civil Supplies Department submitted a proposal seeking prior approval for import of 15,000 MT of Palmolein Oil through M/s. Power & Energy Pvt. Ltd. Government of India, Ministry of Civil Supplies and Public Distribution, granted prior approval by letter dated 26.11.1991 to import required quantity of Palmolein Oil in accordance with the terms and conditions stipulated in Circular dated 16.11.1991. On 27.11.1991 the council of Ministers approved the import of Palmolein Oil as per the parameters laid down in Circular dated 06.11.1991. On 29.11.1991 the Kerala State Civil Supplies Corporation Ltd. has entered into two separate agreements with M/s. M/s. Power & Energy Pvt. Ltd. and M/s.Mala Corporation, Singapore. The price of Palmolein Oil was not included in the agreement. The price was subsequently fixed on 24.01.1992 at the market price of 405 USD as against 392.25 USD, the

average price of import by STC loosing Rs.2.32 Crores. The Comptroller and Auditor General in its report dated 02.02.1994 for the year ending 31.03.1993 took exception to the procedure adopted for import of Palmolein by the State Government.

4. The Left Democratic Government came into power on 20.05.1996. Government requested the Director of Vigilance to submit enquiry report into the allegations raised pertaining to Palmolein Oil deal. After conducting a preliminary enquiry, a criminal case as V.C.1/1997/SCT was registered in March 1997 by the Vigilance under Section 120B of IPC and also in relation to the offence under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 against late K.Karunakaran the then Chief Minister and seven others. K.Karunakaran filed a writ petition in the High Court for quashing the FIR which petition was dismissed against which a criminal appeal was filed. The Apex Court vide judgment dated 29.03.2000 reported in [(2000) 3 SCC 761] (**K.Karunakaran v. State of Kerala and another**) dismissed the appeal and refused to quash the FIR. A charge sheet was submitted in the case on which CC No.6/2003 under

Section 13(2) r/w Section 13(1)(d) of the Prevention of Corruption Act and Section 120B of IPC was registered.

5. The State Government had granted sanction for prosecution. A letter dated 31.12.1999 was also written to the Central Government requesting for sanction to prosecute Sri.Jiji Thomson IAS and Sri.P.J.Thomas, IAS. A letter dated 24.01.2005 was written by State Government to Central Government informing the decision of the State Government to withdraw the prosecution. A decision was taken by the State Government with approval of council of Ministers dated 28.03.2005 to move the Court of Enquiry Commissioner and Special Judge, Thiruvananthapuram for withdrawal of prosecution in CC No.6 of 2003. The Central Government asked for certain clarification by letter dated 04.04.2005. The Chief Minister had written a letter dated 04.04.2005 informing the Cabinet decision to withdraw the prosecution and drop the case. The Central Government was requested to close the file.

6. Sri.K.Karunakaran, as he then was, had filed Criminal Appeal No.801 of 2003 against the judgment of the High

Court by which the High Court held that no sanction was necessary since appellant was not holding the office. The Apex Court by judgment and order dated 06.12.2006 disposed of the said appeal. In the said judgment, reported in **K.Karunakaran v. State of Kerala** [(2007) 1 SCC 59], the Apex Court has noted two facts that the Chief Secretary of the State has filed an affidavit on 24.11.2005 informing that the State Government wanted to withdraw the prosecution and another affidavit that there is no intention to withdraw the prosecution. The aforesaid facts have been noted in paragraph 7.

7. In Criminal Appeal No.801 of 2003 a clarification was sought by the State of Kerala regarding the filing of application for withdrawing the prosecution as per its earlier decision dated 28.03.2005. The Apex Court vide order dated 20.04.2006 has issued following orders clarifying that the prosecutor could be at liberty to file application for withdrawal:

“Heard learned counsel for the Appellant in CrI.A. 801/03 and counsel for the petitioner in SLP (CrI.) No.2684/03.

Counsel for the Appellant points out that in view of the

order passed on 10.04.2003 staying further proceedings of the pending case, the public prosecutor is not in a position to file an application to withdraw the prosecution. We make it clear that despite the order of this court, the prosecutor would be at liberty to file application for withdrawal.”

The above criminal appeal was finally decided on 06.12.2006.

8. The LDF Government again came to power in 2006 and took a decision on 25.07.2006 to cancel the earlier Government Order dated 28.03.2005 by which sanction was accorded for moving the Enquiry Commissioner and Special Judge for withdrawing the prosecution. It is useful to quote the order dated 25.07.2006 which is to the following effect:

“As per GO read above Sanction was accorded for moving the court of Special Judge and Enquiry Commissioner Thiruvananthapuram for withdrawing prosecution against all accused in connection with the import of Palmolein in CC.6/03 as provided u/s 321 of Criminal Procedure Code.

Government have now examined the whole matter in detail. It is hereby ordered to cancel the Go read above and to proceed and revive the Prosecution against all those accused in CC.No.6/03.”

The application was not moved in the case in pursuance of the earlier decision dated 28.03.2005. The case was subsequently

transferred to the Enquiry Commissioner and Special Judge, Thrissur and was pending as CC No.108 of 2011. The UDF Government took again a decision on 13.09.2013 to cancel the earlier Government Order dated 25.07.2006 to revive the earlier decision dated 28.03.2005 by moving the Court of Enquiry Commissioner and Special Judge for withdrawal of the prosecution. The decision dated 13.09.2013 was taken in pursuance of the decision of council of Ministers. On the strength of the decision dated 13.09.2013 the Public Prosecutor filed the application on 15.10.2013 in the Court as Crl. M.P. No.508 of 2013 seeking permission of the Court for withdrawing the prosecution. The application was filed under Section 321 Cr.P.C. By an order dated 13.01.2014 the trial court rejected the Crl.M.P. No.508 of 2013 filed by the Public Prosecutor for withdrawing the prosecution. Crl.M.P. No.508 of 2013 was objected by the petitioner as well as one Sunil Kumar. Against the order dated 13.01.2014 dismissing the Crl.M.P. No.508 of 2013 Government of Kerala filed Crl.R.P. No.139 of 2013.

9. The present writ petition has been filed by the petitioner in this Court on 22.10.2014 challenging the Government Order dated 13.09.2013 by which Government had

taken a decision to move for withdrawal of the prosecution in CC No.108/2011. Although the application filed by the Public Prosecutor being Crl.M.P. No.508 of 2013 was objected by the petitioner by filing Crl.M.P. 510 of 2013 and ultimately objections of the petitioner were upheld and Crl.M.P. No.508 of 2013 was dismissed by Trial Court on 13.01.2014, but in the writ petition petitioner did not make any mention of the order dated 13.01.2014 passed by the Trial Court rejecting the application of Public Prosecutor. The Crl.R.P. No.139 of 2014 has also been dismissed by this Court by judgment dated 08.01.2015 which was also placed before us at the time of hearing of this writ petition.

10. Sri.R.Sathish, learned counsel for the petitioner challenging the decision of Government of Kerala dated 13.09.2013 has submitted that the said decision is void and *non est*. He submits that the decision was actuated by bias which is apparent by letter dated 04.04.2005 written by the Chief Minister himself. Bias on the part of any member of council of Ministers disqualify the said person to participate in the decision making

process. The Chief Minister himself being suffering by actual bias, the decision of council of Ministers for withdrawing the prosecution falls on the ground. The Chief Minister has expressed his personal interest in the matter which is apparent from his letter dated 04.04.2005 written to the Government of India. He submits that even the note which was prepared for council of Ministers did not mention the complete facts. It is submitted that the Hon'ble Governor ought to have seen appraised of the letter dated 04.04.2005 of the Chief Minister. He submits that the decision of the council of Ministers is not in accordance with the rule of business framed under Article 166(3) of the Constitution of India. He submits that it is already found by the Apex Court that the decision to prosecute was not on account of any political vendetta. Council of Ministers itself was disabled in giving any aid and advise to Governor. Learned counsel for the petitioner in support of his submissions 'on bias' has placed reliance on the judgments of the Apex Court reported in **M.P. Special Police Establishment v. State of M.P. And others** [(2004) 8 SCC 788], **State of Punjab v. Davinder Pal Singh Bhullar and**

others [(2011) 14 SCC 770] and **N.K. Bajpai v. Union of India and another** [(2012) 4 SCC 653]. In support of his submission that the rules of business, framed under Article 166 (3) of the Constitution, are mandatory, he has placed reliance on the judgment of Apex Court in **State of U.P. And others v. Pradhan Sangh Kshettra Samiti and others** [1995 Supp (2) SCC 305].

11. Learned Advocate General appearing for the State has submitted that this Writ Petition is now a futile exercise and infructuous, in view of the rejection of application filed by Public Prosecutor for withdrawal from prosecution in pursuance of decision of the Government dated 13.09.2013. Learned Advocate General submits that consequent to the decision dated 13.09.2013 of the State Government, cancelling earlier decision dated 25.07.2006 and permitting the Public Prosecutor to file application for withdrawal of prosecution, the application actually was filed by the Public Prosecutor on 15.10.2013, being CrI.M.P. No.508 of 2013, which was opposed by the petitioner by filing objection and ultimately was rejected by a detailed order dated

13.01.2014. The order of the State Government dated 13.09.2013 was actually given effect to and exhausted itself, hence it is not necessary to enter into various submissions raised by learned counsel for the petitioner challenging the decision dated 13.09.2013. He further submits that against the order dated 13.01.2014, the State Government has filed Crl. R.P. 139 of 2014. But the said Revision Petition was also dismissed by this Hon'ble Court vide its order dated 08.01.2015. The crux of the judgment of High Court is that the State Government will have to proceed with the prosecution and accused will have to face the prosecution. Hence the arguments sought to be raised need not be gone into in this writ petition.

12. We have considered the submissions of learned counsel for the parties and we have perused the records. The Prosecution against the then Chief Minister K.Karunakaran was initiated on submission of charge sheet, on which CC No.6 of 2003 was registered. The State Government had taken a decision to withdraw from prosecution and communication to that effect was sent to the Government of India on 24.01.2005. Council of

Ministers took a decision to withdraw from the prosecution and consequently Government Order dated 28.03.2005 was issued permitting the Public Prosecutor to file application in the Court for withdrawal of prosecution. But before the said application can be filed or proceeded with, a new Government, UDF came into power and took a decision on 25.07.2005 to cancel the earlier order dated 28.03.2005 and to proceed with the prosecution. In the meantime, the matter was taken to High Court and thereafter to the Apex Court by K.Karunakaran challenging the prosecution and there was a stay of the proceedings. The Apex Court dismissed the Criminal Appeal, Crl.App. No.801 of 2013, by order dated 06.12.2006. The criminal case was transferred to the Enquiry Commissioner and Special Judge, Thrissur wherein it was registered as CC No.108 of 2011. The State Government again took a decision on 13.09.2013 to withdraw from prosecution by cancelling the earlier decision dated 25.07.2006. In pursuance of the decision of the State Government dated 13.09.2013, the application was filed by the Public Prosecutor dated 05.10.2013 as Crl.M.P. No.508/2013. It was opposed by petitioner by filing

objection as Crl.M.P. No. 510/2013 and ultimately the Trial Court rejected the said application for withdrawal filed by the Public Prosecutor vide its detailed order dated 13.01.2014. The order of the State Government dated 13.09.2013 was implemented and the application filed on the strength of said order for withdrawal of prosecution having been rejected on merit by trial court on 13.01.2014, it is no longer necessary to enter into various submissions raised by learned counsel for the petitioner regarding correctness or otherwise of the decision of the council of Ministers dated 13.09.2013. The Trial Court having ultimately rejected the application for withdrawal from the prosecution, the prosecution is proceeding. As noted above, petitioner had opportunity before the Trial Court and had actually opposed the decision by filing objection which have been accepted by Trial Court. As noted above, against the order of Trial Court dated 13.01.2014, Crl.R.P. No.139/2013 has already been filed by the Government in this Court which has finally been decided by judgment dated 08.01.2015. This Court in its order dated 08.01.2015 has also observed that the prosecution has prima facie materials to

proceed with the trial. Following observations have been made by this Court in CrI.R.P. No.139/20134 in paragraphs 43 and 44:

"43. The Government Order on the basis of which the learned Public Prosecutor decided to withdraw from prosecution also does not explain what public interest is going to be served by such withdrawal. On an examination of the entire case records, and also the various grounds urged by the learned Public Prosecutor, I find that withdrawal from prosecution in this case will only serve the personal interests of the accused, that the long standing prosecution can be put an end to, and the accused persons would be let free from further trauma of prosecution wherein they will have to face serious allegations of corruption. This can not at all be the object of withdrawal from prosecution.

44. As already observed, I find on an examination of the entire case records, that the prosecution has prima facie materials to proceed for trial on the allegation that the alleged vicious deal made by the accused had caused some loss to the State exchequer by way of some unlawful benefits or profits gained by the accused, or some of them. In such a situation, the pre-trial termination by way of discharge, or the extreme step of closing the whole proceeding by way of orders under Section 482 of Cr.P.C. cannot be thought of or resorted to."

The High Court ultimately vide its judgment dated 08.01.2015 has recorded its ultimate conclusion in paragraph 45 (j) which is quoted below:

"45(j) In view of the above findings, all these proceedings are liable to be dismissed. I find that decision in the matter of withdrawal, and also discharge, was properly and rightly taken by the court below. That the finding of the trial court regarding competence of the Public Prosecutor is reversed by this Court, will not go to the benefit of the State and the accused. On the material aspects this Court's finding is that withdrawal cannot be allowed in this case in public interest, in exercise of the supervisory jurisdiction of the court. I do not find any illegality or irregularity or impropriety in the findings of the trial court or in the orders made by the trial court on withdrawal or on discharge. I do not find any reason or necessity for interference in the orders passes by the court below. The State will have to proceed with the prosecution, and the accused will have to face the prosecution in view of the serious allegations of corruption.

In the result, CrI.R.P. Nos.990/2013, 139/2014, 198/2014, 199/2014, 372/2014 and CrI.M.C No.1013/2013 are dismissed."

13. Learned counsel for the petitioner although contended that the decision of the State Government and Council

of Ministers dated 13.09.2013 is actuated by bias, we, however, do not find it necessary to enter into the submissions raised by learned counsel for the petitioner in view of subsequent events as noted above. It is relevant to note that although this writ petition has been filed by the petitioner on 22.10.2014 challenging the Government Order dated 13.09.2013 but petitioner did not mention about any details regarding the filing of application by the Public Prosecutor on 15.10.2013 and filing of objection by petitioner before the Trial Court and also rejection of the application by the Trial Court on 13.01.2014 which were relevant facts. In view of the fact that the application for withdrawal of prosecution has already been dismissed on merit by the Trial Court on 13.01.2014 which has already been affirmed by this Court by order dated 08.01.2015, the order dated 13.09.2013 of the State Government has been implemented and exhausted. We, however, make it clear that we have neither entered into the merits of the submissions nor are expressing any opinion on merits on the decision of Government dated 13.09.2013 and as and when any further cause of action

arises to the petitioner, to get the said issue threshed on, he shall be at liberty to do so.

Subject to the observation made as above, the Writ Petition is dismissed.

**Ashok Bhushan,
Acting Chief Justice.**

**A.M. Shaffique,
Judge.**

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