

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

TUESDAY, THE 21ST DAY OF NOVEMBER 2023 / 30TH KARTHIKA,
1945

CRL.MC NO. 9631 OF 2023

CRIME NO.3/2023 OF VACB, THIRUVANANTHAPURAM,
Thiruvananthapuram

AGAINST THE ORDER/JUDGMENT CRMP 1483/2023 OF ENQUIRY
COMMISSIONER & SPECIAL JUDGE, THIRUVANANTHAPURAM

PETITIONER/S:

GOPAKUMAR V.G.
AGED 50 YEARS

BY ADVS.
R.BINDU (SASTHAMANGALAM)
R.JAYAKRISHNAN
G.RAJAGOPAL (KUMMANAM)

RESPONDENT/S:

- 1 THE DEPUTY SUPERINTENDENT OF POLICE
VIGILANCE AND ANTI-CORRUPTION BUREAU, SPECIAL
INVESTIGATION UNIT-II, THIRUVANANTHAPURAM, PIN
- 695001
- 2 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, PIN - 682031

OTHER PRESENT:

SRI.A.RAJESH-SR.PP

THIS CRIMINAL MISC. CASE HAVING COME UP FOR
ADMISSION ON 21.11.2023, THE COURT ON THE SAME DAY PASSED
THE FOLLOWING:

K. BABU, J

Crl.M.C.No.9631 of 2023

Dated this the 21st day of November, 2023

O R D E R

The petitioner, accused in Vigilance Crime No.3/2023/SIU-II, challenges the order dated 21.10.2023 passed by the Enquiry Commissioner and Special Judge, Thiruvananthapuram in C.M.P.No.1483 of 2023. The petitioner faces charge under Section 7(a) of the PC Act, 1983 (Amendment 2018).

2. The prosecution case is as follows:-

The petitioner, while, working as Secretary, Vellanadu Grama Panchayat, demanded a sum of Rs.10,000/- from One Aswathy wife of Baiju for issuing pass for removing soil from her property. The *de facto* complainant lodged a statement on 23.08.2023 before the Vigilance and Anti-Corruption Bureau. The

Vigilance laid a trap. The de facto complainant handed over the trap money to the petitioner. He received the same, but he could not be arrested at the spot. He fled away from the scene on seeing the vigilance team. The Vigilance team chased him in a car and arrested him from Kattakkada Junction, a place which is 18kms away from the spot where the trap money was handed over. The phenolphthalein test conducted turned negative.

3. The case of the petitioner is that the entire story narrated by the Vigilance is against the truth. According to the petitioner, he never demanded and accepted the money. The petitioner pleads that what actually transpired at the scene of occurrence could be ascertained by watching the CC TV footages available in the nearby shop rooms.

4. Therefore, the petitioner filed application before the Court below under Section 91 Cr.P.C. to issue summons to the proprietors of four nearby shop rooms,

cited by him to produce the hard disk of CC TVs. The Trial Court dismissed the application holding that the petitioner/ accused has no right to make an application under Section 91 and pray for production of documents at this stage.

5. The said order is under challenge in this Crl.M.C.

6. The learned counsel for the petitioner submits that the preservation of CCTV footages is highly required to establish his defence during the trial. The learned Special Government Pleader (Vigilance) submits that the petitioner cannot invoke the provisions of Section 91 Cr.P.C. at this stage. The learned counsel for the petitioner relied on ***Nitya Dharamananda v. Gopal Sheelum Reddy*** [(2018) 2 SCC 93] and ***Gokul Raj v. State of Kerala*** [2021(4) KHC 143] in support of his contentions. The learned Special Government Pleader

relied on ***State of Orissa v. Debendra Nath Padhi*** [(2005) 1 SCC 568] in support of his contentions.

7. It is profitable to extract Section 91 of Cr.P.C., which reads thus:-

“91.Summons to produce document or other thing

(1) Whenever any Court or any officer-in-charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed--

a) to affect sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers Books Evidence Act, 1891 (13 of 1891); or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.”

8. The powers conferred under Section 91 are enabling in nature aimed at arming the court or any officer-in-charge of a police station concerned to enforce and ensure the production of any document or other things necessary or desirable for the purpose of any investigation, enquiry, trial or other proceedings under the Code by issuing summons or a written order to those in possession of such materials.

9. On the scope of Section 91 Cr.P.C. the Apex Court in ***State of Orissa***, observed thus:-

“25.Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is “necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code”. The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference

to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. Insofar as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it, whether police or accused. If under Section 227, what is necessary and relevant is only the record produced in terms of Section 173 of the Code, the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. Under Section 91 summons for production of document can be issued by court and under a written order an officer in charge of a police station can also direct production thereof. Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may be initiated to compel production thereof.

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27.Insofar as Section 91 is concerned, it was rightly held that the width of the powers of that section was unlimited but there were inbuilt, inherent limitations as to the stage or point of time of its exercise, commensurate with the nature of proceedings as also the compulsions of necessity and desirability, to fulfil the task or achieve the object. Before the trial court the stage was to find out whether there was sufficient ground for proceeding to the next stage against the accused. The application filed by the accused under Section 91 of the Code for summoning and production of document was dismissed and order was upheld by the High Court and this Court. But observations were made in para 6 to the effect that if the accused could produce any reliable material even at that stage which might totally affect even the very sustainability of the case, a refusal to look into the material so produced may result in injustice, apart from averting an exercise in futility at the expense of valuable judicial/public time, these observations are clearly obiter dicta and in any case of no consequence in view of conclusion reached by us hereinbefore. Further, the observations cannot be understood to mean that the accused has a right to produce any document at the stage of framing of charge having regard to the clear mandate of Sections 227 and 228 in Chapter 18 and Sections 239 and 240 in Chapter 19.

28.We are of the view that jurisdiction under Section 91 of the Code when invoked by the accused, the necessity and desirability would have to be seen by the court in the context of the purpose — investigation, inquiry, trial or other proceedings

under the Code. It would also have to be borne in mind that law does not permit a roving or fishing inquiry.”

10. ***Nitya Dharamananda***, the decision relied on by the petitioner was dealing with a case in which the Investigating Officer failed to produce certain documents along with the charge sheet. The accused therein filed an application seeking to summon those documents left by the Investigating Officer on the ground that the deliberate suppression of the documents would prejudice the accused. Considering those circumstances, the Apex Court in paragraph 5 of the judgment observed thus:-

“5.It is settled law that at the stage of framing of charge, the accused cannot ordinarily invoke Section 91. However, the court being under the obligation to impart justice and to uphold the law, is not debarred from exercising its power, if the interest of justice in a given case so require, even if the accused may have no right to invoke Section 91. To exercise this power, the court is to be satisfied that the material available with the investigator, not made part of the charge-sheet, has crucial bearing on the issue of framing of charge.”

11. ***Gokul Raj***, the Division Bench judgment, relied

on by the petitioner has no relevance in the present fact situation as the same relates to the preservation of certain call details of the Investigating Officer. The facts considered in ***Nitya Dharmananda*** also are not squarely applicable to the facts under consideration.

12. In ***State of Orissa***, the Supreme Court has taken note of the inherent limitations as to the stage or point of time of exercise of power under Section 91 in paragraph 27 of the judgment extracted above.

13. The necessity and desirability of invocation of power under Section 91 would have to be judged commensurate with the stage or point of time it is exercised. The petitioner in his application has stated that the Vigilance has not conducted procedures as claimed by them as noted in the mahazar or remand report.

The allegations of the petitioner are not focused on

any desirability or necessity of requiring the documents sought to be summoned. Therefore, I am of the view that, the petitioner is not entitled to invoke Section 91 Cr.P.C. at this stage. The court below has rightly rejected the application, which requires no interference. The Crl.M.C. stands dismissed.

Sd/-

K.BABU, JUDGE

kkj

APPENDIX OF CRL.MC 9631/2023

PETITIONER ANNEXURES

- Annexure 1 TRUE COPY OF THE CASE DIARY IN VIGILANCE CRIME NO. 03/2023/SIU-II ON THE FILES OF THE COURT OF THE ENQUIRY COMMISSIONER AND SPECIAL JUDGE (VIGILANCE), THIRUVANANTHAPURAM DATED 23.08.2023
- Annexure 2 TRUE COPY OF THE PETITION IN CRL. M.P. NO. 1483/2023 ON THE FILES OF THE COURT OF THE ENQUIRY COMMISSIONER AND SPECIAL JUDGE (VIGILANCE), THIRUVANANTHAPURAM DATED 29.09.2023
- Annexure 3 CERTIFIED COPY OF THE ORDER IN CRL. M.P. NO. 1483/2023 PASSED BY THE COURT OF THE ENQUIRY COMMISSIONER AND SPECIAL JUDGE, THIRUVANANTHAPURAM DATED 21.10.2023