Madasamy Devar Vs State and Jabarullah

Court: Madras High Court (Madurai Bench)

Date of Decision: Dec. 23, 2010

Acts Referred: Constitution of India, 1950 â€" Article 135, 227
Criminal Procedure Code, 1973 (CrPC) â€" Section 173, 386, 482, 483
Penal Code, 1860 (IPC) â€" Section 147, 148, 342, 379, 447

Hon'ble Judges: S. Palanivelu, J

Bench: Single Bench

Advocate: S. Murugan and K. Samidurai, for the Appellant; P. Rajendran, Government Advocate and R. Alagumani, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

S. Palanivelu, J.
The revision petition had laid a complaint on 22.4.2007 before Sambavar Vadakarai Police Station and the same was

registered in Cr. No. 61 of 2007 under Sections 147, 148, 447, 342, 506(ii) and 379 (NP) I.P.C. In the complaint he had alleged that he is

supervising the coconut thope belonging to A.R.S. Ramalingam, that on 24.7.2007 at about 10.00 a.m. one Jabarullah S/o Peer Mohammed and

20 other persons, whose names are not known to the complainant, but they could be identified by him, entered into the coconut thope, plucked

coconut and removed in tractors, that he received information at 4.00 p.m. and proceeded to the occurrence place where he saw about 20

henchmen under the leadership of the first accused trespassed to the coconut thope and removed about 20,000/-coconuts worth about Rs.

50,000/-by tractors bearing Registration No. TN-76-B-3700, TN-72-Z-1375 and TDT 8560, that while the complainant prevented them along

with 5 other persons, they criminally intimidated them, that they were detained in the thope by the trespassers upto 10 p.m. and while the accused

left the place in Maruti Amni Van bearing Registration No. TN-76-B-4154, they threatened him that they would kill him if he identified them.

2. After the investigation, the first Respondent laid a charge sheet before the Judicial Magistrate Court, Tenkasi under Sections 447, 342, 506(2)

and Section 379 (NP) I.P.C against Jabarullah and three named persons. The learned Judicial Magistrate took cognizance of the offences and

assigned C.C. No. 230 of 2008. He proceeded with the trial of the case. As many as 14 witnesses were examined before the learned Judicial

Magistrate and the case was posted for hearing arguments of both sides. At that time, the Petitioner filed an application u/s 173 Cr.P.C.(Protest

Petition) requesting the Court to order for further investigation by some other police station. For the said purpose he intended to file a writ petition

before the High Court and to adjourn the case by two months to enable him to get the orders.

3. In the said petition he has raised so many grounds for ordering reinvestigation. Both the Respondents filed objections to the petition by the

complainant/Petitioner. The learned Judicial Magistrate, Shencottah has dismissed the petition filed by this Petitioner by observing that he is not

entitled to seek for reinvestigation of further investigation as per the decision of the Supreme Court in 2009 SAR (Cri) 851 [Reeta Nag v. State of

West Bengal]. Hence this revision.

4. Even though in the protest petition and the present revision petition, various other grounds have been raised by the Petitioner for ordering

reinvestigation or further investigation, for the disposal, it is sufficient to deal with only one issue in this matter, i.e., whether the learned Judicial

Magistrate issued notice to the complainant before taking cognizance of the offence against the accused? If not, what is the legal consequences?

5. After hearing the learned Counsel for both sides, this Court on 1.7.2010 passed a direction calling for a report from the Judicial Magistrate,

Shenkottah, Tirunelveli District, as to whether notice was issued from the Court concerned to the defacto complainant before taking cognizance of

the offence after filing of the final report in this case. Responding to this, the learned Judicial Magistrate submitted a report stating that final report

u/s 173 Cr.P.C in Cr. No. 61 of 2007 of Sambavarvadakarai Police Station was filed before the Judicial Magistrate, Tenkasi on 27.11.2007 and

the same was taken on file on the same date as C.C. No. 438 of 2007 u/s 447, 342, 506(2) and 379 I.P.C., that no notice was issued to the

defacto complainant from the Judicial Magistrate, Tenkasi, at the time of taking cognizance, subsequently Sambavarvadakarai Police Station was

brought under Judicial Magistrate, Tenkasi and consequently the said CC. No. 433 of 2003 was transferred to the Judicial Magistrate, Shencottah

and the same was taken on file on 4.8.2008 as C.C. No. 230 of 2008 under the above sections by the learned Judicial Magistrate, Shencottah

and that no notice was issued to the defacto complainant from the Judicial Magistrate, Shencottah also.

6. The above said report submitted by the learned Judicial Magistrate, Shencottah would definitely show that neither the Judicial Magistrate,

Tenkasi nor the Judicial Magistrate Shencottah had issued notice to the defacto complainant before taking cognizance of the offences.

7. The learned Counsel for the Petitioner Mr. S. Murugan would strenuously contend that absence of notice to the defacto complainant before

taking cognizance would vitiate the entire subsequent proceedings and that when the investigating officer omitted some of the accused, about whom

there was mention in the F.I.R., the notice should have been issued to the complainant from the Court.

8. Contending contra, Mr. P. Rajendran, learned Government Advocate (Crl. Side) for the first Respondent and Mr. R. Alagumani learned

Counsel for R2 would submit that there is no legal flaw in the proceedings taken by the Judicial Magistrate, that the investigating officer on due

investigation of the case found that only 4 accused were involved in the case and he thought fit to delete other unnamed persons in the F.I.R.and

hence even if the notice were not sent to the defacto complainant anterior to taking cognizance of the offence, no adverse consequences would

follow.

9. The learned Counsel for the Petitioner in support of his contention placed much reliance upon a decision of this Court, reported in (2010) 2

MLJ (Cri) 833 [C. Ve. Shanmugam v. Deputy Superintendent of Police, Tindivanam Sub-Divisionand others] in which the learned Judge has

elaborately dealt with the subject following the principles laid down by the Honourable Supreme Court of India. The learned Judge has observed

that before accepting a final report where some of the accused whose names found place in the F.I.R.have been omitted, the learned Magistrate

must issue notice to the defacto complainant. The following cases have been referred and followed by the learned Judge.

1. (1985) 1 MLJ 536 [Bhagwant Singh v. Commissioner of Police

2. (2009)3 SCC (Cri) 76 [Dharmeshbhai Vasudevbhai v. State of Gujarat]

3. (2006) 2 MLJ (Cri) 779 [Popular Muthiah v. State rep. By Inspect of Police]

4. Union Public Service Commission Vs. S. Papaiah and others,

10. In Bhagwant Singh''s case the Apex Court has observed thus:

4. ... ...

There can, therefore, be no doubt that when, on a consideration of the report made by the officer in charge of a police station under Sub-section

(2)(i) of Section 173, the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity

of being heard so that he can make his submissions to persuade the Magistrate to take cognizance of the offence and issue process. We are

accordingly of the view that in a case where the magistrate to whom a report is forwarded under Sub-section (2)(i) of Section 173 decides not to

take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the

persons mentioned in the First Information Report, the magistrate must give notice to the informant and provide him an opportunity to be heard at

the time of consideration of the report. It was urged before us on behalf of the Respondents that if in such a case notice is required to be given to

the informant, it might result in unnecessary delay on account of the difficulty of effecting service of the notice on the informant. But we do not think

this can be regarded as a valid objection against the view we are taking, because in any case the action taken by the police on the First Information

Report has to be communicated to the informant and a copy of the report has to be supplied to him under Sub-section (2) (i) of Section 173 if that

be so, we do not see any reason why it should be difficult to serve notice of the consideration of the report on the informant. Moreover, in any

event, the difficulty of service of notice on the informant cannot possibly provide any justification for depriving the informant of the opportunity of

being heard at the time when the report is considered by the Magistrate.

11. In the above said C. Ve. Shanmugam''s case, the earlier judgment in S. Papaiah''s case has been referred to and identical view was taken. In

Bagawant Sing''s case, the Supreme Court held that accepting final report without notice to the defacto complainant is illegal, when the Judicial

Magistrate taken a view that there is no sufficient ground for proceeding against some of the persons in the F.I.R.. Taking cognizance of the

offence was held to have been vitiated and the committal of the case to the Court of Sessions for trial and all other consequential proceedings

before the Court of Sessions were set aside.

12. Adverting to the facts of the present case, it is true that the Petitioner has not mentioned the names of all the 20 persons. He has mentioned the

name of the first accused alone. But he has specifically stated in the complaint that he does not know names all the others, but they could be

identified by him. In such case, when the investigating officer deletes number of persons referred to in the F.I.R. and filed charge sheet against

remaining some persons, it is incumbent upon the Court to issue a notice to the defacto complainant before taking cognizance and hear him.

Following the above said decision, it is my considered view that admittedly, the Judicial Magistrate, Tenkasi has not issued notice to the de facto

complainant earlier to taking cognizance of the offence and hence all other subsequent proceedings have been vitiated, which are liable to be set

aside.

13. In the protest petition, the Petitioner has not categorically stated that he was not given notice by the Court before taking cognizance of the

offence. But in the revision petition, in the grounds it has been clearly mentioned that the version of the revision Petitioner was not believed by the

investigating officer with regard to the participation of 17 left out accused and in such case the Respondent police as well as the Judicial Magistrate,

Shencottah ought to have issued notice to the defacto complainant/Petitioner since regarding the left out accused 17 in number, the police report is

a negative one. This Court sees considerable force in this contention. Even though absence of notice to the Petitioner is not mentioned in the

protest petition, it cannot be a bar for him to raise it before this Court. In this context, in C. Ve. Shanmugam''s case supra the answer is available.

It has been observed that, the inherent power u/s 482 of the Code can always be exercised for which there is no provision, nor any prohibition in

the code. For this proposition a decision of the Suprme Court in Popular Muthiah''s case has been referred and followed by the learned Judge, in

which it is held as under:

While exercising its appellate power, the jurisdiction of the High Court although is limited but, in our opinion, there exists a distinction but a

significant one being that the High Court can exercise its revisional jurisdiction and/ or inherent jurisdiction not only when an application therefor is

filed but also suo motu. It is not in dispute that suo motu power can be exercised by the High Court while exercising its revisional jurisdiction.

There may not, therefore, be an embargo for the High Court to exercise its extraordinary inherent jurisdiction while exercising other jurisdictions in

the matter. Keeping in view the intention of the Parliament, while making the new law the emphasis of the Parliament being ''a case before the

court'' in contradistinction from ''a person who is arrayed as an accused before it'' when the High Court is seized with the entire case although

would exercise a limited jurisdiction in terms of Section 386 of the Code of Criminal Procedure, the same, in our considered view, cannot be held

to limit its other powers and in particular that of Section 482 of the Code of Criminal Procedure in relation to the matter which is not before it.

14. In Dharmeshbhai Vasudevbhai''s case supra also it has been held that the High Court, apart from exercising its supervisory jurisdiction under

articles 227 and 135 of the Constitution of India, has a duty to exercise continuous superintendence over the Judicial Magistrates in terms of

Section 483 of the Code of Criminal Procedure.

15. The above said illuminating judicial pronouncements would throw light on the subject clarifying that the High Court in its revisional jurisdiction

can exercise its suo motu power to set right the proceedings before the subordinate Courts.

16. In Reeta Nag''s case supra, the question of further investigation and reinvestigation was discussed and the Supreme Court has turned down the

claim of the defacto complaiant in seeking for further investigation. But the present revision has arisen on the ground that no notice was issued to

the defacto complainant before taking cognizance of the offence. If the Court enters into the discussion whether further investigation or

reinvestigation has to be ordered, then the decision in Reeta Nag''s case has to be followed.

17. In the light of the what have been stated above, I am of the firm view that taking cognizance by the Judicial Magistrate, Tenkasi without notice

to the defacto complainant is not lawful and the same gets vitiated. Consequently, all other proceedings including the proceeding involving

recording of evidence also are vitiated and they are also set aside. The revision deserves to be allowed.

18. In the result, the Criminal Revision Case is allowed, setting aside the cognizance taken by the Judicial Magistate, Tenkasi on the offences and

the same is set aside. The consequent proceedings including recording of evidence are also set aside.

19. The learned Magistrate, Shencottah is directed to issue notice to the defacto complainant as per the procedure and also the parties who are

concerned with the case, hear them and pass further orders in accordance with law. The other grounds raised by the defacto complainant are left

open to be agitated afresh in appropriate proceedings.