(2013) 10 MAD CK 0168

Madras High Court

Case No: Criminal R.C. No. 1535 of 2011 and M.P. No. 1 of 2011

N. Jagannathan and Others	APPELLANT
Vs	
State	RESPONDENT

Date of Decision: Oct. 31, 2013

Citation: (2014) 1 LW(Cri) 359 : (2013) 4 MLJ(Cri) 546

Hon'ble Judges: S. Vimala, J

Bench: Single Bench

Advocate: R. Muniapparaj, for the Appellant; C. Iyyapparaj, Govt. Advocate (Crl. side) for R1 in Crl. R.C. No. 1535 of 2011 and for Respondents in Crl.O.P. No. 10912/2013 and Mr. Ramesh Kannan for R2 and R3 in Crl. R.C. No. 1535 of 2011, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

S. Vimala, J.
On the death of the complainant, whether the proceedings/the prosecution initiated by him, automatically abates or the proceedings can be allowed to be continued by the representative of the complainant, provided he is found to be a fit person?

is the issue raised in the revision petition.

A. Under what circumstances, the Investigating Agency is competent to order/conduct fresh/de novo/re-investigation, in respect of a case, where already a final report is filed in terms of Section 173(2) Cr.P.C. ?;

B. Whether it is imperative for the official ordering re-investigation to give a specific finding with regard to the fate of investigation already conducted and also about the final report so filed before the Court of Magistrate ?

C. Whether further investigation can be ordered a) in the absence of any new facts coming to the notice; or b) when investigation has to be carried out from a different angle, keeping in view of further materials coming to the notice; or c) when certain

aspect of the matter having been omitted to be considered ?

are the three issues canvassed in Criminal Original Petition.

By the impugned order dated 16.02.2013 (i.e., nearly after five years) of the Director General of Police, Crime Branch CID, the case registered in D6 Anna Square Police Station Crime No. 187 of 2008 u/s 34, 201, 409, 463 and 464 IPC was ordered to be transferred, to the Crime Branch CID, for the purpose of re-opening the case for further investigation. This order is sought to be quashed in Crl.O.P. No. 10912 of 2013.

Brief Facts:

2. One Robert Jayakumar filed a complaint on 25.04.2008 against the petitioners/accused alleging offences under Sections 34, 201, 409, 463 and 464 of IPC. This was taken on file by the learned XIII Metropolitan Magistrate, Egmore, in C.M.P. No. 1512 of 2008. It was forwarded to D-6 Anna Square Police Station on 09.06.2008. Based on the complaint, the Inspector of Police of Anna Square Police Station, conducted enquiry and closed the case as mistake of fact on 19.09.2008.

2.1. On 26.12.2004, on account of Tsunami, several lakhs of people vanished and their belongings perished. In the same incident, the memorials of two legendary leaders, i.e., Arignar Anna Memorial and M.G. Ramachandran Memorial, located at Marina Beach, Chennai, also got affected. Government of Tamil Nadu initiated several relief measures to re-generate the life and limb of the people. It also took steps to restore the memorials of the national leaders. The renovation work was entrusted to petitioners 1 to 4 and it was carried out by petitioner No. 5, Contractor. The allegation was that all of them colluded together and committed misappropriation of money worth Rs. 4,74,130/-.

2.2. When the final report was received by the learned Metropolitan Magistrate on 16.10.2008, a protest petition was filed by the defacto complainant, (since deceased) on 28.01.2010. Due to the death of the complainant on 01.05.2010, the counsel made an endorsement that the petition would be dismissed as not pressed. Accordingly, the petition was dismissed as not pressed. Thereafter, the co-brother of the defacto complainant, Thiru. Jayapal Mohan, filed a substitute application on 28.07.2011, to get himself substituted in the place of the former complainant, Robert Jayakumar. By order dated 15.09.2011, the learned Magistrate issued notice to the petitioners to appear before the Court and to file a counter.

2.3. As against the said order, the petitioners/accused filed Crl. R.C. No. 1535 of 2011 and obtained an order of stay on 18.11.2011, which was being extended from time to time. The Joint Commissioner of Police advised D-6 police station to re-open the case and the respondent investigated the case and closed it as mistake of fact vide R.C.S. No. 32 of 2012. This report was filed before the concerned Magistrate. Thereafter, the second respondent, Director General of Police, Crime Branch CID,

issued the impugned memorandum dated 16.02.2013 for re-opening of the case for further investigation. This is sought to be quashed in the Criminal Original Petition.

3. By the order dated 15.09.2011, the Court ordered notice in the substitution application as well as the second protest petition. This order was challenged in Crl. R.C. No. 1535 of 2011.

4. Both the Crl.O.P. and Crl. R.C. are taken up for common hearing and disposal.

5. The dates and events with reference to this case, as culled out from the facts presented, are detailed for easy reference:

Dates	Events
25.04.2008	Complaint filed
09.06.2008	Case registered
19.09.2008	Case referred as Mistake of fact
28.01.2010	I Protest petition filed
01.05.2010	Defacto complainant died
07.05.2010	First Protest petition dismissed as not pressed
25.07.2011	Letter of Secy. to Govt. to DGP to reopen
28.07.2011	Second Protest Petition by co-brother
24.08.2011	DGP proceedings to Commissioner to reopen
15.09.2011	Notice ordered by Magistrate in II Protest Petition Impugned in Crl. R.C. No. 1535 of 2011
18.11.2011	Crl. R.C. No. 1535 of 2011 filed and stay ordered
24.11.2011	Commissioner ordered to reopen
25.07.2012	Case reopened by D6 and referred as mistake of fact
29.12.2012	DGP, Ch-4, ordered to transfer the case to CBCID
16.02.2013	DGP, CBCID ordered to reopen and further investigation-against which Crl.O.P. No. 10912 of 2013 filed.

6. The first contention of the revision petitioners is that in respect of same and identical set of facts, there cannot be multiple complaints and as the case has been already closed as mistake of fact, the substitution application and the second protest petition are not maintainable. The decision reported in T.T. Antony Vs. State of Kerala and Others, is relied upon in support of the contention.

...There cannot be any controversy that sub-section (8) of Section 173 Cr.P.C. empowers the police to make further investigation, obtain further evidence (both oral and documentary) and forward a further report or reports to the Magistrate. In Narangs'' case (supra) it was, however, observed that it would be appropriate to conduct further investigation with the permission of the Court. However, the

sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of successive FIRs whether before or after filing the final report u/s 173(2) Cr.P.C. It would clearly be beyond the purview of Sections 154 and 156 Cr.P.C. nay, a case of abuse of the statutory power of investigation in a given case. In our view a case of fresh investigation based on the second or successive FIRs, not being a counter case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is underway or final report u/s 173(2) has been forwarded to the Magistrate, may be a fit case for exercise of power u/s 482 Cr.P.C. or under Article 226/227 of the Constitution.

6.1. The dictum laid down in the aforesaid decision cannot be disputed. But the protest petition has been filed only in respect of the first final report, under which the case has been closed as mistake of fact. After subsequent investigation, the case has been closed as mistake of fact, which is unwarranted, when the first report was pending consideration by the Court.

7. The second contention is that once the Commissioner of Police ordered reopening of the case in R.C. Crime No. 1 (1)/265/103915/2011 dated 24.11.2011, which was also investigated and closed as mistake of fact on 25.07.2012, the second order passed by the D.G.P. for re-opening of the case for further investigation is not maintainable.

7.1. It is further contended that even if fresh facts come to light, the police can make further investigation only after taking formal permission from the Court to make further investigation. In support of this contention, the decision reported in Ram Lal Narang Vs. State (Delhi Administration), is relied upon.

.... We think that in the interests of the independence of the magistracy and the judiciary, in the interests of the purity of the administration of criminal justice and in the interests of the comity of the various agencies and institutions entrusted with different stages of such administration, it would ordinarily be desirable that the police should inform the Court and seek formal permission to make further investigation when fresh facts come to light.

7.2. It is vehemently contended that no investigating agency is empowered to conduct a fresh/de novo/re-investigation, in relation to an offence for which it has already filed a report in terms of section 173(2) Cr.P.C. It is only upon the orders of the higher Court which is empowered to pass such orders that aforesaid investigation can be conducted, in which event, the higher court will have to pass a specific order with regard to the fate of investigation already conducted and the report so filed before the Court of the Magistrate. The decision reported in Vinay Tyagi Vs. Irshad Ali @ Deepak and Others, , is relied upon in support of the

proposition.

8. Why it is imperative for a Court of law to pass a specific order as to the fate of investigation, which, in its opinion, is unfair, tainted and in violation of settled principles of investigative canons, has been explained in the above decision, which is extracted below:

.. What ultimately is the aim or significance of the expression "fair and proper investigation" in criminal jurisprudence? It has a twin purpose. Firstly, the investigation must be unbiased, honest, just and in accordance with law. Secondly, the entire emphasis on a fair investigation has to be to bring out the truth of the case before the court of competent jurisdiction. Once these twin paradigms of fair investigation are satisfied, there will be the least requirement for the court of law to interfere with the investigation, much less quash the same, or transfer it to another agency. Bringing out the truth by fair and investigative means in accordance with law would essentially repel the very basis of an unfair, tainted investigation or cases of false implication.

8.1. In the very same decision, it has been held that no investigating agency is empowered to conduct a fresh or de novo or re-investigation in relation to the offence, for which, it has already filed a report in terms of Section 173(2) Cr.P.C. Even though, the order of D.G.P., CBCID, did not state that it is fresh/de novo/re-investigation and it uses the expression "further investigation", it is not explained as to the aspect on which further investigation is required. It is not even stated that fresh facts have been brought to the knowledge of the investigating agency. Therefore it is clear that only in order to avoid the legal hurdle, the term "further investigation" has been used.

8.2. The order passed by the D.G.P. did not specify the twin requirements as stated in the decision rendered in Vinay Tyagi"s case, cited supra. It is neither pointed out in what way the investigation is illegal nor it is explained that to unearth the truth, further investigation is required. The order did not state as to whether any new facts came to the notice and that whether investigation should be carried out from a different angle, keeping in view of further materials coming to his notice. It is also not explained as to whether certain aspect of the matter having been omitted to be considered. Under such circumstances, the order passed by the D.G.P. ordering re-investigation in the name of "further investigation" cannot be upheld.

8.3. The only reason given by the D.G.P., Tamil Nadu, in his communication dated 29.12.2012 is that the report of JC East Zone is not convincing or substantiated by proper evidence. This reason, which is vague, devoid of reasons, is neither sufficient nor sustainable.

9. Contending that the order passed by DGP, CBCID, would amount to abuse of process of law and it is in violation of the guidelines given by the Supreme Court of India and therefore, that order need to be set aside, the decision reported in State

of Haryana and others Vs. Ch. Bhajan Lal and others, , is relied upon, to highlight the guidelines:

... In the exercise of the extra-ordinary power under Article 226 or the inherent powers u/s 482 of the Code of Criminal Procedure, the following categories of cases are given by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guide myriad kinds of cases wherein such power should be exercised:

(a) where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused;

(b) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers u/s 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;

(c) where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused;

(d) where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated u/s 155(2) of the Code;

(e) where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;

(f) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;

(g) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

9.1. These guidelines are the general guidelines and they are not germane for this context, where further investigation has been ordered not by the Court, but by the investigating agency.

10. The contention of the petitioners/accused is that when the first protest petition has been dismissed as not pressed, the second protest petition ought to have been dismissed as not maintainable and ought not to have been entertained. Whether this contention could be accepted is the issue to be considered. It is true that the first protest petition has been dismissed as not pressed, (in view of the death of the defacto complainant). But, while considering the protest petition, the Magistrate has got several options. The Magistrate has not chosen to pass any of the following orders, with reference to the report filed u/s 173(2) Cr.P.C. As per the decision in Vinay Tyagi''s case, cited supra, the following are the powers of the Magistrate, which he is empowered to pass:

30. Having analysed the provisions of the Code and the various judgments as afore-indicated, we would state the following conclusions in regard to the powers of a magistrate in terms of Section 173(2) read with Section 173 and Section 156 of the Code:

1. The Magistrate has no power to direct ''reinvestigation'' or ''fresh investigation'' (de novo) in the case initiated on the basis of a police report.

2. A Magistrate has the power to direct ''further investigation'' after filing of a police report in terms of Section 173 of the Code.

3. The view expressed in (2) above is in conformity with the principle of law stated in Bhagwant Singh''s case (supra) by a three Judge Bench and thus in conformity with the doctrine of precedence.

4. Neither the scheme of the Code nor any specific provision therein bars exercise of such jurisdiction by the Magistrate. The language of Section 173 cannot be construed so restrictively as to deprive the Magistrate of such powers particularly in face of the provisions of Section 156 and the language of Section 173 itself. In fact, such power would have to be read into the language of Section 173.

5. The Code is a procedural document, thus, it must receive a construction which would advance the cause of justice and legislative object sought to be achieved. It does not stand to reason that the legislature provided power of further investigation to the police even after filing a report, but intended to curtail the power of the Court to the extent that even where the facts of the case and the ends of justice demand, the Court can still not direct the investigating agency to conduct further investigation which it could do on its own....

10.1. This decision coupled with the decision reported in Dhrup Singh and Others Vs. State of Bihar, , would go to show that the learned Magistrate has got powers to disagree with the police report and when the Court disagrees, the Court can order further steps as are detailed above. While the powers are available for the Magistrate to exercise, only when the matter is considered on merits, the contention that the dismissal of the first protest petition on technical grounds would be a bar

for the second protest petition being considered cannot be accepted. It is settled principle of law that under exceptional circumstances, the second protest petition can be entertained and in this case also, the exceptional circumstance of death of the complainant, has been brought on record. It is relevant to quote the observations made in decision of the Supreme Court in Shiv Shankar Singh vs. State Of Bihar & Anr. CRIMINAL APPEAL NO. 2160 of 2011 decided 22 November, 2011.

14. The Protest Petition can always be treated as a complaint and proceeded with in terms of Chapter XV of Cr.P.C. Therefore, in case there is no bar to entertain a second complaint on the same facts, in exceptional circumstances, the second Protest Petition can also similarly be entertained only under exceptional circumstances. In case the first Protest Petition has been filed without furnishing the full facts/particulars necessary to decide the case, and prior to its entertainment by the court, a fresh Protest Petition is filed giving full details, we fail to understand as to why it should not be maintainable.

Death of the complainant, being an exceptional circumstance, the second protest petition must be held to be maintainable.

10.2. What is the further step is the another issue ? After the death of the complainant, his co-brother wanted himself to be substituted in the place of the deceased-complainant. Contending that such petitions are maintainable, the decision reported in Macherla Kondian Vs. Ede Venkataratnam and Others, , is relied upon. As per this decision, if the Court is satisfied that the person sought to be impleaded is a fit person, the Court can order substitution. The relevant observations made in the said decision are as under:

18. In Muhammad Ibrahim Sahib Vs. Shaik Dawood, a Bench of the Madras High Court decided that a criminal prosecution u/s 323 I.P.C. did not abate by reason of the death of the person injured. The case depended on the interpretation of Section 89 of the Probate and Administration Act with which we are not concerned here. Further, in that case the entire prosecution had been closed and the entire defence evidence had been also closed by the time when the Advocate for the accused raised the contention that owing to the death of the person injured, the charge against the accused must be held to have been abated.

19. The learned Advocate for the appellant has relied on the decision of the Bombay High Court in Mahomed Azam Vs. Emperor, . In that case, the trustees of a mosque filed a complaint under Sections 426 and 143, I.P.C. against the accused. Before evidence was recorded, the complainant died. The accused applied for action u/s 247, Cri. P.C. on the ground that the complaint had abated by reason of the complainant''s death. The Magistrate rejected that application and allowed the proceedings to continue with a certain witness on record in place of the deceased complainant. The matter was taken on revision to the High Court. The latter observed as follows:

We are of opinion, therefore, in the present case of a non-cognizable offence instituted upon a complaint, the axiom of actio personalis moritur cum persona, in civil law confined to torts, does not apply, and that the trying Magistrate has discretion in proper cases to allow the complaint to continue by a proper and fit complainant, if the latter is willing. The Courts would always be on their guard against needless harassment of an accused by substituting a complainant, who is not a fit person.

10.3. Whether the person seeking substitution is a fit person to be substituted is the discretion of the Magistrate to consider. In other words, whether the fitness of the person to represent the deceased complainant would sub-serve the cause of justice is the matter to be considered by the Magistrate. So far as the protest petition is concerned, the protest petition, as originally filed by the deceased complainant, had been dismissed as not pressed only on technical ground, i.e., because of the death of the complainant. The first protest petition has not been considered on merits. Therefore, the dismissal of the first protest petition would not operate as a bar for the second protest petition being considered. But, the maintainability in terms of limitation and in terms of merits are matters to be considered by the Magistrate. Once the Magistrate issues notice, it is open to the petitioners/accused to contest the case with regard to the merits of the petition and also about the fitness of the person seeking substitution, apart from the limitation aspect. Therefore, when the opportunity has been adduced by issuance of notice, it is open to the petitioners/accused to contest the same before the Magistrate. Therefore, this revision petition challenging the issuance of notice ordered by the Magistrate deserves to be dismissed. Both the protest petition and the substitute petition are directed to be disposed of on merits, after affording reasonable opportunity to all parties concerned.

11. The original petition challenging the order passed by the D.G.P., CBCID, ordering further investigation by yet another investigating agency is quashed. In the result, the Criminal Revision Case stands dismissed and the Criminal Original Petition stands allowed. Consequently, connected M.Ps. are closed.