

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.11.2019

PRONOUNCED ON : 13.11.2019

CORAM:

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

Crl.RC.No.967 of 2019

R.Dharmalingam

Petitioner

Vs

1. State by Inspector of Police
CBCID (South) Coimbatore

Respondent/ Complainant

2. K.P.Ramasamy
3. K.P.Deivasigamani
4. K.P.Nataraj
5. Anandha Krishnan
6. N.J.Subramaniam

Respondents/A1 to A5

Prayer:- This Criminal Revision Petition is filed, against the order dated, 26.08.2019, made in Cr.MP.No.337 of 2019, by the Chief Judicial Magistrate, Coimbatore, dismissing the protest petition filed by the Revision Petitioner, prying before the Trial Court to include the names of other accused persons, whose names were found in the First Information Report, dated 30.12.2016, registered in Cr.No.2 of 2016, on the file of the 1st Respondent Police.

For Petitioner : Mr.S.Jeyakumar

For Respondent : Mr.M.Mohamed Riyaz-APP

ORDER

1. This Criminal Revision Petition is filed, against the order dated, 26.08.2019, made in Cr.MP.No.337 of 2019, by the Chief Judicial Magistrate, Coimbatore, dismissing the protest petition filed by the Revision Petitioner, seeking to include the names of other accused persons, whose names were found in the First Information Report, dated 30.12.2016, registered in Cr.No.2 of 2016, on the file of the 1st Respondent Police.
2. The facts leading to filing of this Criminal Revision Petition are as follows:-
 - a) The brother of the Revision Petitioner, R.Ganesamoorthy, had lodged a complaint before Inspector of Police, Sulur Police Station, stating that they were owning an ancestral property in SF.No.138/1 and 138/2, situated in Neelambur Village, Coimbatore, measuring an extent of 4.5 acres. On 27.06.2006, the Petitioner and his brother along with their father, Ramukutty Gounder had sold the said 4 acres of land to the accused persons, namely, K.P.Ramasamy, K.P.Deivasigamani and K.P.Nataraj, who are the Respondents 2 to 4 herein, for a valuable sale consideration. The wife of the Petitioner, Parameswari had filed OS.No.245 of 2006, before the Subordinate Judge, Tiruppur and it was subsequently transferred to I Assistant Subordinate Judge, Coimbatore, in OS.No.72 of 2013, on behalf of her minor children, namely, Nandhini and Sampath against the Defendants/the Respondents 2 to 4 herein, claiming equal right of share over the ancestral property. Hence, enmity arose between the Petitioner's family and the Respondents 2 to 4 herein.

- b) While so, the Respondents 2 to 4 along with the Respondents 5 and 6 had created a forged agreement for sale, by forging the signature of the Petitioner and his family Members to sell 1.60 acres to the 6th Respondent. Using the forged agreement for sale dated, 15.03.2006, the 6th Respondent had filed OS.No.438 of 2009, seeking specific performance, before the District Judge, Coimbatore and the Petitioner had also filed his written statement in the said suit. The 2nd Respondent had criminally intimated the wife of the Petitioner to withdraw the said civil suit filed by her, stating that if she does not withdraw the suit, he will grab the land worth about Rs.20 crores mentioned in the agreement for sale.
- c) Hence, the Revision Petitioner had made a complaint before the Inspector of Police, Sulur Police Station, against the Respondents 2 to 5. Though CSR.No.555 of 2014 was issued, neither the First Information Report was registered nor any investigation was done by the Sulur Police, since the Respondents 2 to 6 are politically much influential persons. Hence, the Petitioner had filed CrI.OP.No.9938 of 2015 before this Court, wherein by order dated, 22.04.2015, this Court had directed the Inspector of Police to conduct an enquiry, in accordance with law.
- d) In the mean time, the Petitioner had obtained an intimation from the Treasury Officer dated 31.10.2014, stating that the stamp paper for Rs.20/-, which was used to create the forged sale agreement, was issued to one T.C.Kurusamy/ Stamp Vendor, on 23.12.2008, vide Stamp Paper No.30AA477977. By using the stamp papers purchased in 2008,

the accused persons have created forged agreement for sale dated, 15.03.2006 and based on the said forged agreement, the 6th Respondent had instructed his counsel to withdraw the suit in OS.No.438 of 209 as if the suit was settled amicably. The Petitioner had instructed his counsel to make endorsement that the matter was not amicably settled and the agreement for sale was a forged one. Accordingly, endorsements were made.

- e) The Inspector of Police, Suler Police Station, without conducting enquiry, had closed the complaint on 10.08.2015, by colluding with the accused persons. Hence, the Revision Petitioner had filed CrI.OP.No.15024 of 2015 before this Court. This Court by order dated, 5.10.2015, had set aside the closure report dated 10.08.2015, directing the Inspector of Police to conduct a fresh enquiry on the aspect of forged document and to take action in accordance with law and directing the Deputy Superintendent of Police to monitor the investigation. Since no action was taken, the Petitioner had filed Cont.P.No.2768 of 2015, wherein by order dated, 22.03.2016, the concerned Police was directed to enquire into the matter. Again the Police Personnel had closed the case, stating that they were not in a position to ascertain as to whether the sale agreement was genuine.

- f) Even after the directions of this Court in the Contempt Petition, forged sale agreement was not produced, though the accused persons were called for an enquiry. Finding that unless the First Information Report is registered, the Police has no authority to search the same and

investigate the matter, this Court on 4.4.2016 had directed the Police to register the First Information Report and produce the same before this Court on or before 12.04.2016 and posted the matter for reporting compliance on 12.04.2016. Thereafter, a case was registered in Cr.No.306 of 2016 against the accused persons for the offences under Sections 420, 468, 471 read with 472 of IPC and without conducting proper enquiry, notice dated 5.8.2016 was served on the Petitioner, stating that further action dropped. Hence, the Petitioner had filed CrI.OP.No.15756 of 2016, seeking transfer of investigation to the file of the Central Crime Branch, Coimbatore for reinvestigation. By order dated, 11.08.2016, this Court, while setting aside the closure report in Cr.No.306 of 2016, had transferred the case in Cr.No.306 of 2016 to the file of the Central Crime Branch, Coimbatore for reinvestigation.

- g) Even after transferring the case to CCB, Coimbatore, no action was taken by the Police against the accused. Hence, the Petitioner was constrained to file CrI.OP.No.23712 of 2016 for change of investigation from CCB to CBCID. By order dated, 22.11.2016, this Court had transferred the case to the 1st Respondent CBCID and directed the Inspector of Police, Sulur to hand over the case diary, relating to Cr.No.306 of 2016 to the Superintendent of Police, CBCID. On 30.12.2016, the Inspector of Police, CBCID, Coimbatore registered a case in Crime.No.2 of 2016, against the accused persons, namely, (1) K.P.Ramasamy, (2) K.P.Deivasigamani, (3) K.P.Nataraj, (4) Anandha Krishnan and (5) N.J.Subramanian, for the offences under

Sections 420, 468, 471 and 472 of IPC. However, the 1st Respondent Police did not take any action against the accused.

h) Since the 1st Respondent Police did not conduct investigation and failed to file final report, the Petitioner had filed CrI.OP.No.22787 of 2018, wherein this Court had directed the 1st Respondent Police to file charge sheet within two months. To safeguard the accused persons, the 1st Respondent Police had filed a closure report by deleting the names of the Respondents 2 to 5 herein on 26.12.2018. The Judicial Magistrate, without issuing notice to the Petitioner, had taken cognizance of the final report on 29.01.2019. Hence, the Petitioner had filed a protest petition in Cr.MP.No.337 of 2019, before the Chief Judicial Magistrate, Coimbatore, seeking to reject the notice issued by the 1st Respondent Police and to direct the Respondent Police to file charge sheet against the Respondents 2 to 5 herein. In and by the impugned order, the said protest petition was dismissed. Hence, this Criminal Revision Petition has been filed, seeking the reliefs as stated above.

3. On behalf of the 1st Respondent Police, a counter affidavit has been filed, stating the sequence of events till the transfer the case to them, denying each and every allegations made by the Petitioner and contending as under:-

a) As per the directions of this Court, the 1st Respondent Police had registered a case in Cr.No.2 o 2016 and conducted further investigation. During the course of the investigation, totally 31 witnesses were

examined and 78 documents were collected. The disputed forged document, dated 15.03.2006 was collected from the Petitioner and subjected to forensic examination. After conducting investigation, finding that the accused N.J.Subramanian, had fraudulently created the forged sale agreement to grab 1.60 acres of land belonging to the defacto complainant, the final report was filed against the accused N.J.Subramanian for the offences under Sections 420, 468, 471 and 472 of IPC and 467, 468, 471, 204, 420 read with 511 of IPC on 06.12.2018, which was taken on file in CC.No.324 of 2018 on 26.12.2018, by the Chief Judicial Magistrate, Coimbatore.

- b) The allegation that the Respondents 2 to 4 along with the Respondents 5 and 6 had created the forged documents, by forging the signatures of the Petitioner and his family Members, has not been proved in the investigation. The investigation revealed that the 6th Respondent alone had forged the signatures and created the alleged forged sale agreement dated 15.03.2006. The allegation of the Petitioner that the 2nd Respondent used to criminally intimidate the wife of the Petitioner to withdraw the suit was not supported by any evidence. The contentions contained in paragraphs 4 to 9 are matter of record.
- c) In the absence of any evidence against the Respondents 2 to 5, they cannot be charged though their names found mentioned in the First Information Report. Since the Petitioner is not the defacto complainant, no notice was served on him. The Trial Court had taken the final report on file only after the RCs notice was served on the defacto complainant

and reasonable opportunity was given to him to protest against the final report before taking the same on cognizance. Since there are no incriminating materials available against the the other accused named in the First Information Report, the Trial Court, finding that the Petitioner is not the defacto complainant, had rightly dismissed the protest petition.

4. This court heard the submissions of the learned counsel on either side.
5. The learned counsel for the Revision Petitioner would submit that the impugned order passed by the Judicial Magistrate is against the settled principles of criminal law and that the Judicial Magistrate failed to appreciate the factual aspects of the Prosecution in its proper perspective and failed to appreciate the contents of the statements of the Prosecution witnesses, recorded under Section 161(3) of Cr.PC by the 1st Respondent Police, before accepting the final report. He would further submit that the Judicial Magistrate also failed to appreciate the contents of the First Information Report, where the names of Respondents 2 to 5 find a place and that the Respondents 2 to 5 are the actual beneficiaries and the offences have been committed with their knowledge and that when final report has been filed, dropping them, the Judicial Magistrate erred in taking cognizance of the offence without proper application of mind and without putting the Petitioner on notice, so as to enable him to file a protest petition.
6. The learned counsel for the Revision Petitioner would further submit that the law mandates that when the Judicial Magistrate takes a view that there are no sufficient grounds to proceed against some of the accused persons

mentioned in the First Information Report, he should have given a notice to the informant and provide him an opportunity to be heard at the time of taking cognizance as laid down by the decisions of the Honourable Supreme Court. He would further submit that the Judicial Magistrate failed to appreciate the legal proposition that while taking cognizance of an offence to find out who is the real offender and once if he comes to the conclusion that apart from the persons arrayed as the accused by the Police some other persons are also involved, it is his duty to proceed against them by summoning them as additional accused and it is part of the proceedings while taking cognizance and the Judicial Magistrate need not wait till the stage of Section 319 of Cr.PC and that the Judicial Magistrate failed to appreciate the legal proposition that when the Investigating Officer with an ulterior motive did not send up other accused persons against whom prima facie incriminating materials are available, it is imperative for the Judicial Magistrate to order for further investigation.

7. The learned counsel for the Revision Petitioner would further submit that the law mandates notice on the victim and the Judicial Magistrate having found that the Petitioner is an interested person and a victim and on whose efforts, the case was registered and later transferred for further investigation, ought not to have taken cognizance of the final report without any notice being served on the Petitioner, when especially the persons against whom specific allegations having been made were dropped. The Judicial Magistrate erred in holding that since cognizance has already been taken on 27.12.2018, the belated protest application, dated 29.01.2019, is not maintainable. He would

further submit that the Judicial Magistrate also erred in rendering a finding that summoning of the additional accused is not proper at the stage when a private complaint under Section 200 of Cr.PC is pending and that after cognizance has been taken, the Court is empowered to add additional accused only by way of Section 319 of Cr.PC.

8. In support of his contentions, he would rely on the following decisions:-

1. AIR 1967 SC 1167 (Raghubans Dubey Vs. State of Bihar)
2. AIR 1985 SC 1285 (Bhagwant Singh Vs. Commissioner of Police)
3. AIR 2001 SC 2747 (M/s.SWIL Limited Vs. State of Delhi)
4. AIR 2009 SC 2932 (Kishan Lal Vs. Dharmendra Bafna and another)
5. 2010 2 MLJ CRL 833 (C.Ve.Shanmugam Vs. Deputy Superintendent of Police, Tindivanam)
6. 2011 3 MLJ CRL 8 (Madasamy Devar Vs. State of Tamil Nadu)
7. 2014 3 SCC 92 (Hardeep Singh Vs. State of Punjab)
8. 2014 3 SCC 306 (Dharam Pal Vs. State of Haryana)
9. 2015 1 SCC 48 (R.N.Agarwal Vs. R.C.Bansal)
10. 2017 4 MLJ CRL 606 (P.Swamy Vs. Nachimuthu and others)
11. 2018 3 MWN CRL 437 (S.Mathiyazhagan Vs. State)
12. 2018 SCC ONLINE CAL 615 (Indranil Mukherjee Vs. State of WB)
13. 2018 1 LW CrI 190 (Augustin and others Vs. State)
14. 2019 8 SCC 27 (Vishnu Kumar Tiwari Vs. State of UP)
15. 2019 SCC Online SC 1346 (Vinubhai Haribhai Malaviya and others Vs. State of Gujarat and another).

9. The learned counsel for the Revision Petitioner would further submit that as per the latest decision of the Honourable Supreme Court, dated 16.10.2019, reported in **2019 SCC Online SC 1346 (Vinubhai Haribhai Malaviya and others Vs. State of Gujarat and another)**, the three Judges Bench has even gone to the extent of holding that ceasing the supervisory jurisdiction of the

Magistrate to order further investigation midway through pretrial proceedings would amount to travesty of justice and that, the powers of ordering further investigation would be available at all stages and the Magistrate is not denuded of the power to order further investigation even at the post cognizance stage. He would ultimately contend that law mandates notice on the victim and when no notice has been served on the Petitioner prior to the Magistrate taking the final report on file, the dismissal of the protest petition as not maintainable on the ground that it has been filed after taking of cognizance is illegal and thereby would seek to set aside the impugned order.

10. The learned Additional Public Prosecutor for the 1st Respondent Police would submit that though the names of the Respondents 2 to 5 found a place in the First Information Report, the 1st Respondent after conducting due investigation, finding no averments against the Respondents 2 to 5, had dropped their names in the final report and that the notice of closure was served on R.Ganesamoorthy, the defacto complainant, brother of the Petitioner and that the Petitioner had filed the protest application only on 29.1.2019 and the Judicial Magistrate, finding that cognizance has already been taken on 27.12.2018, had dismissed the protest petition, stating that it is not maintainable and that the Judicial Magistrate had found that if the protest petition is allowed, it would amount to setting aside or modifying its own order and thereby, had dismissed the protest petition.

11. Originally, at the time of filing the revision, the Petitioner had annexed a certified xerox copy of the order passed in CMP.No.337 of 2019, dated

26.08.2019. It is a single page order. The copy application had been made in No.142119 on 26.08.2019 and the copy had been issued on 28.8.2019. Strangely, during the course of the arguments, the Respondent had furnished a true xerox copy of the order made in CMP.No.337 of 2019, which is a detailed order, running to 15 pages. The copy application had been filed on 5.9.2019 in A.No.155 of 2019 and the copy had been delivered on 10.9.2019. This Court had called for the records from the lower Court and received them.

12.I have given my careful and anxious consideration to the rival contentions put forward by either side and thoroughly scanned through the entire materials available on record.

13.The issue to be decided is as to whether the procedure adopted by the Judicial Magistrate in taking cognizance of the final report without notice to the Petitioner and the order passed by him in dismissing the protest petition is proper or not?

14.For the sake of convenience, the relevant portions of the impugned order are extracted here under:-

“16. Questions to be decided: The following questions to be answered in this petition.

1. Once, cognizance has been taken by this Court, whether the protest application is maintainable or not? And
2. After perusing the materials on record, final report has been taken on file, whether this Court can set aside its own order dated 27.12.2018?

are the questions to be decided in this application. As

already discussed and in view of the principles laid down by the Honourable Supreme Court and the Honourable High Court, the protest application should be decided while perusing the final report and taking cognizance. Once cognizance has been taken by the Magistrate, there cannot be second cognizance against additional accused, whose name found in the First Information Report, but if committed, the cognizance can be taken by the sessions Judge against additional accused. After cognizance has been taken, the Magistrate may add the additional accused by way of Section 319 of Cr.PC, which would come into operation in the course of any inquiry into or trial of an offence or treat the protest petition as a Private Complaint under Section 200 of Cr.PC. In the present case on hand, the private complaint has already been separately filed by the Petitioner, which has been taken on file as Cr.MP.No.426 of 2019 and as such, the present protest petition is not maintainable and no separate order is necessary. Further, the reliefs prayed for in the protest application is not at all maintainable and without any basis. Added to that this Court has no jurisdiction to set aside its own order dated 27.12.2018. Since, the Private complaint is pending, this Court has not gone into the merits of the case. Considering all aspects, this Court finds that the present application is not maintainable, which is liable to be dismissed.

17. The remedy available to the Petitioner is that

1. to proceed with the private complaint under Section 200 of Cr.PC or
2. approach the Honourable High Court under Section 482 of Cr.PC and Article 226 of the Constitution of India to set aside the order of this Court, dated 27.12.2018.

“18. In the result, this Court is of the view that

1. The reliefs prayed for in the present application are not maintainable.
2. No protest petition was filed or pending, while perusing the final report and taking cognizance on 27.12.2018.
3. Since cognizance had already been taken on 27.12.2018, the

belated protest application dated 29.01.2019 is not maintainable.

4. If the protest petition is allowed, it would amount to setting aside or modifying its own order, but it has no powers to set aside its own order dated, 27.12.2018.
5. Since the protest petition has to be treated as a private complaint, which is also filed on the same day and pending in Cr.MP.No.426 of 2019 for consideration, the question of allowing protest petition does not arise.
6. Without deciding the private complaint under Section 200 of Cr.PC, which is pending in Cr.MP.No.426 of 2019, the summoning additional accused, though whose names are do find a place in the First Information Report is not proper at this stage.
7. After cognizance has been taken, it is empowered to add the additional accused by way of Section 319 of Cr.PC, which would come into operation in the course of any inquiry or trial of an offence and not at this stage.”

As a fall out and consequence of the aforesaid discussion, this petition is devoid of merits, it deserves to be and is accordingly, dismissed.”

15. Admittedly, in this case on hand, the Petitioner is a victim and he is an interested person. Though the complaint had been given by the brother of the Petitioner, only at the instance of the Petitioner, the case has been registered initially and thereafter, the closure report filed by the earlier investigating agency has been set aside and only at the instance of the Petitioner, the case has been transferred to the file of the present 1st Respondent Police and as such, the Petitioner being a victim, has locus-standi to maintain the protest petition and is entitled to be heard before final report is taken on file. Admittedly, no notice has been given to the Petitioner

by the Magistrate before the final report was taken on file. The Magistrate had dismissed the petition, stating that it has been filed after cognizance has been taken and thereby, it is not maintainable.

16. Though several decisions have been relied on by the learned counsel for the Revision Petitioner, this Court deems it appropriate to refer to the following decisions in the subsequent paragraphs, which would be sufficient and relevant for deciding the case and the issue on hand.

17. In 2017 2 CTC 241 (Chinnathambi @ Subramani Vs. State), a Full Bench of this Court, in paragraph 44, had held as under:-

“44. We sum up our conclusions as follows:-

(i) An order of the Magistrate taking cognizance of offences on a police report is a judicial order.

(ii) An order of a Magistrate ordering further investigation on receiving a police report is a non judicial order.

(iii) An order of a Magistrate accepting a negative police report after hearing the parties is a judicial order.

(iv) An order of a Magistrate recording the report of the police as “undetectable” is not a judicial order.

(v) The power of the Magistrate to permit the police to further investigate the case as provided under Section 173(8) of the Code is an independent power and the exercise of the said power shall not amount to varying, modifying, or cancelling the earlier order of the Magistrate on the report of the police, notwithstanding the fact whether the said earlier order is a judicial order or a non judicial order of the Magistrate.

(vi) For seeking permission for further investigation under Section 173(8) of Cr.P.C. by the police, the earlier order, either judicial or non judicial, passed by the Magistrate on the report of the police need not be challenged before the higher forum.

(vii) The power to grant permission for further investigation under Section 173(8) of Cr.P.C. after cognizance has been taken on the police report can be exercised by the Magistrate only on a request made by the investigating agency and not, at the instance of anyone other than the investigating agency or even suo motu. [vide judgement of the Hon'ble Supreme Court in Amrutbhai Shambhubhai Patel v. Sumanbhai Kantibhai Patel, 2017 (2) Scale 198].

(viii) The power to grant permission for further investigation under Section 173(8) of Cr.P.C. can be exercised by the Magistrate before accepting the negative police report thereby acting on the protest petition by the victim or the de facto complainant. [vide Kishan Lal v. Dharmendra Bafna, (2009) 7 SCC 685]

(ix) We clarify that anyone who is aggrieved by any order made by the Magistrate on a police report as aforesaid in subparagraphs (i) to (iv) hereinabove may approach the higher forum for remedy, if any."

18. In 2018 1 LW CrL 190 (**Augustin and others Vs. State**), this Court has held as under:-

"8. This Court is of the view that the mere act of taking of cognizance would not automatically bring into play the decision of the Apex Court in Amrutbhai Shambhubhai Patel v Sumanbhai Kantibhai Patel and others [MANU/SC/0104/2017 : 2017-2-LW (CrL.) 185 : 2017 (2) Scale] to the effect that after taking of cognizance none but the investigation agency can seek further investigation. We cannot be oblivious to the particular circumstances that visit the particular case. When it is brought to notice that de facto complainant has not been put on notice of the final report filed in the case, this Court would view the matter placing itself at the stage when the final report was filed before the Magistrate. What follows would be that at such stage, petitioner/de facto complainant had a right to file a protest petition and seek further investigation. Though petitioner in filing CrL.M.P. No. 5599 of 2008 in C.C. No. 122 of 2008 has spoken of further investigation or re-investigation and also informed the particular agency by whom he seeks such investigation, the valid right of de facto complainant to have his protest petition considered on merits cannot be defeated on mere technicalities or errors in wording. This Court

would consider the prayer that would be maintainable before it and ignore that which is not. A reading of the order of the Court below reveals that it has totally failed to consider the material/factual aspects of the matter. The particular grievance of petitioner/de facto complainant is of commission of offences u/s. 463, 477-A and 467 IPC i.e., offences of forgery, falsification of accounts and cheating. Material records necessary to bring home such offence have not been gathered by the investigation agency. Although learned counsel for petitioner has sought to impress upon this Court that this Court may issue suitable directions for further investigation by way of orders in Crl.O.P. No. 27092 of 2009, considering that the offences alleged in the instant case are all matters of record, this Court is of the view that it would be appropriate to direct Court below to treat Crl.M.P. No. 5599 of 2008 in C.C. No. 122 of 2008 as a protest petition.”

19. This Court feels it appropriate to refer to the relevant paragraphs in the decision of the Honourable Supreme Court reported in **2019 8 SCC 27 (Vishnu Kumar Tiwari Vs. State of UP)**, wherein observations have been made with regard to the procedure for taking cognizance and requirement of notice to an informant. It was held as under:-

“21. In regard to the filing of protest petition by the informant who filed the first information report, it is important to notice the following discussion by this Court: (Gangadhar Janardan Mhatre case [Gangadhar Janardan Mhatre v. State of Maharashtra, (2004) 7 SCC 768 : 2005 SCC (Cri) 404] , SCC pp. 772-74, paras 6 & 9).

“6. There is no provision in the Code to file a protest petition by the informant who lodged the first information report. But this has been the practice. Absence of a provision in the Code relating to filing of a protest petition has been considered. This Court in Bhagwant Singh v. Commr. of Police [Bhagwant Singh v. Commr. of Police, (1985) 2 SCC 537 : 1985 SCC (Cri) 267] stressed on the desirability of intimation being given to the informant when a report made under Section 173(2) is under consideration. The Court held as follows: (SCC p. 542, para 4).

‘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.'

..... The informant is not prejudicially affected when the Magistrate decides to take cognizance and to proceed with the case. But where the Magistrate decides that sufficient ground does not subsist for proceeding further and drops the proceeding or takes the view that there is material for proceeding against some and there are insufficient grounds in respect of others, the informant would certainly be prejudiced as the first information report lodged becomes wholly or partially ineffective. Therefore, this Court indicated in *Bhagwant Singh case* [*Bhagwant Singh v. Commr. of Police*, (1985) 2 SCC 537 : 1985 SCC (Cri) 267] that where the Magistrate decides not to take cognizance and to drop the proceeding or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the first information report, notice to the informant and grant of opportunity of being heard in the matter becomes mandatory. As indicated above, there is no provision in the Code for issue of a notice in that regard."

22. This Court, in *Gangadhar Janardan Mhatre* [*Gangadhar Janardan Mhatre v. State of Maharashtra*, (2004) 7 SCC 768 : 2005 SCC (Cri) 404] , also stressed on the need to issue notice to the informant in the following discussion: (SCC p. 774, para 12).

"12. Therefore, the stress is on the issue of notice by the Magistrate at the time of consideration of the report. If the informant is not aware as to when the matter is to be considered, obviously, he cannot be faulted, even if protest petition in reply to the notice issued by the police has been filed belatedly. But as indicated in *Bhagwant Singh case* [*Bhagwant Singh v. Commr. of Police*, (1985) 2 SCC 537 : 1985 SCC (Cri) 267] the right is conferred on the informant and none else."

27. It is undoubtedly true that before a Magistrate proceeds to

accept a final report under Section 173 and exonerate the accused, it is incumbent upon the Magistrate to apply his mind to the contents of the protest petition and arrive at a conclusion thereafter. While the investigating officer may rest content by producing the final report, which, according to him, is the culmination of his efforts, the duty of the Magistrate is not one limited to readily accepting the final report. It is incumbent upon him to go through the materials, and after hearing the complainant and considering the contents of the protest petition, finally decide the future course of action to be, whether to continue with the matter or to bring the curtains down.

32. In the facts of this case, the High Court concluded that the Magistrate has not considered the protest petition by the second respondent complainant. Had it been the case where protest petition had not been considered at all, it may have been open to the court to come to the conclusion that an illegality had been committed in exercise of its jurisdiction to deal with the final report. ...

42..... In other words, necessarily, the complainant and his witnesses would have to be examined. No doubt, depending upon the material which is made available to a Magistrate by the complainant in the protest petition, it may be capable of being relied on in a particular case having regard to its inherent nature and impact on the conclusions in the final report.

43. It is true that law mandates notice to the informant/complainant where the Magistrate contemplates accepting the final report. On receipt of notice, the informant may address the court ventilating his objections to the final report. This he usually does in the form of the protest petition. In fact, in majority of cases when a final report is submitted, the Magistrate has to simply consider whether on the materials in the case diary no case is made out as to accept the final report or whether case diary discloses a prima facie case as to take cognizance. The protest petition in such situation simply serves the purpose of drawing Magistrate's attention to the materials in the case diary and invite a careful scrutiny and exercise of the mind by the Magistrate so it cannot be held that simply because there is a protest petition the case is to become a complaint case."

20. In a recent decision of the Honourable Supreme Court reported in 2019

SCC Online SC 1346 (Vinubhai Haribhai Malaviya and others Vs. State of

Gujarat and another), it was held as under:-

“38. There is no good reason given by the Court in these decisions as to why a Magistrate’s powers to order further investigation would suddenly cease upon process being issued, and an accused appearing before the Magistrate, while concomitantly, the power of the police to further investigate the offence continues right till the stage the trial commences. Such a view would not accord with the earlier judgements of this Court, in particular, **Sakiri** (supra), **Samaj Parivartan Samudaya** (supra), **Vinay Tyagi** (supra), and **Hardeep Singh** (supra); **Hardeep Singh** (supra) having clearly held that a criminal trial does not begin after cognizance is taken, but only after charges are framed. What is not given any importance at all in the recent judgements of this Court is Article 21 of the Constitution and the fact that the Article demands no less than a fair and just investigation. To say that a fair and just investigation would lead to the conclusion that the police retain the power, subject, of course, to the Magistrate’s nod under Section 173(8) to further investigate an offence till charges are framed, but that the supervisory jurisdiction of the Magistrate suddenly ceases mid-way through the pre-trial proceedings, would amount to a travesty of justice, as certain cases may cry out for further investigation so that an innocent person is not wrongly arraigned as an accused or that a *prima facie* guilty person is not so left out. There is no warrant for such a narrow and restrictive view of the powers of the Magistrate, particularly when such powers are traceable to Section 156(3) read with Section 156(1), Section 2(h), and Section 173(8) of the Cr.PC, as has been noticed herein above, and would be available at all stages of the progress of a criminal case before the trial actually commences. It would also be in the interest of justice that this power be exercised suo motu by the Magistrate himself, depending on the facts of each case. Whether further investigation should or should not be ordered is within the discretion of the learned Magistrate who will exercise such discretion on the facts of each case and in accordance with law. If, for example, fresh facts come to light which would lead to inculpating or exculpating certain persons, arriving at the truth and doing substantial justice in a criminal case are more important than avoiding further delay being caused in concluding the criminal proceeding, as was held in **Hasanbhai Valibhai Qureshi** (supra). Therefore, to the extent that the judgements in **Amrutbhai Shambubhai Patel** (supra), **Athul Rao** (supra) and **Bikash Ranjan Rout** (supra) have held to the contrary, they stand overruled. Needless to add, **Randhir Singh Rana v. State (Delhi Administration)** (1997) 1 SCC 361 and **Reeta Nag v. State of West Bengal and Ors.** (2009) 9 SCC 129 also stand overruled.

43. We, therefore, set aside the impugned High Court judgement insofar as it states that post-cognizance the Magistrate is denuded of power to order further investigation. ...”

21. In 2019 SCC Online SC 1346 (**Vinubhai Haribhai Malaviya and others Vs. State of Gujarat and another**), referred to above, the three Judged Bench has overruled the earlier decision of the Honourable Supreme Court reported in 2017 4 SCC 177 (**Amrutbhai Shambubhai Patel v. Sumanbhai Kantibai Patel**) with regard to the finding that the power to grant permission for further investigation under Section 173(8) of Cr.PC, after cognizance has been taken on the police report can be exercised by the Magistrate only on the request made by the investigating agency and not at the instance of anyone else or even suo motu and thereby setting aside clause (vii) of paragraph 44 of the decision of the Full Bench of this Court reported in 2017 2 CTC 241 (**Chinnathambi @ Subramani Vs. State**).

22. The proposition of law from the above decision is that the power of the Magistrate to permit the police to further investigate the case as provided under Section 173(8) of the Code is an independent power and the exercise of the said power shall not amount to varying, modifying, or cancelling the earlier order of the Magistrate on the report of the police, notwithstanding the fact whether the said earlier order is a judicial order or a non judicial order of the Magistrate.

23. The Magistrate has the power to order further investigation of the offence till

the stage when the trial commences. A criminal trial does not begin after cognizance is taken, but only after charges are framed. Article 21 of the Constitution of India demands no less than a fair and just investigation. To say that a fair and just investigation would lead to the conclusion that the police retain the power, subject, of course, to the Magistrate's nod under Section 173(8) to further investigate an offence till charges are framed, but that the supervisory jurisdiction of the Magistrate suddenly ceases mid-way through the pre-trial proceedings, would amount to a travesty of justice, as certain cases may cry out for further investigation so that an innocent person is not wrongly arraigned as an accused or that a *prima facie* guilty person is not so left out.

24. In view of the principles laid down in the above said decisions, what emerges is that:-

- i. when on consideration of the report made by the Officer In charge of a Police Station under Section 173(2)(i)(g) of Cr.PC, if the Magistrate is not inclined to take cognizance of the offence or that the Magistrate decides not to take cognizance of the offence or takes a 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. The Petitioner as a victim is entitled to be put on notice before cognizance is taken.
- ii. The informant is not prejudicially affected, when the Magistrate decides

to take cognizance and to proceed with the case. But, where the Magistrate decides that sufficient grounds do not subsist for proceeding further and drops the proceeding or takes a view that there is material for proceeding against some and there are insufficient grounds in respect of others, the informant would certainly be prejudiced as the First Information Report lodged becomes wholly or partially ineffective.

iii. Further, where the Magistrate decides not to take cognizance and to drop the proceedings or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the First Information Report, notice to the informant and grant of opportunity of being heard in the matter becomes mandatory. The stress is on the issue of notice by the Magistrate at the time of consideration of the report. If the informant is not aware as to when the matter is to be considered, he cannot be faulted, even if protest petition in reply to the notice issued by the police has been filed belatedly since the right is conferred on the informant.

iv. The power of the Magistrate to permit the Police to further investigate the case as provided under Section 173(8) of Cr.PC is an independent power and the exercise of such power shall not amount to varying, modifying or cancelling the earlier order of the Magistrate on the report of the Police, notwithstanding the fact that whether the said earlier order is a judicial order or a non judicial order of the Magistrate.

25. In this case, it is a situation where though specific allegations have been

made against the Respondents 2 to 5 in the First Information Report with regard to scam made in respect of the high value lands, by creating false bogus and forged documents and a contention was put forth for initiating criminal proceedings against all those who are involved in such a scam, the 1st Respondent Police had filed the final report, dropping them and filed the final report against only one accused, the 6th Respondent herein. The Petitioner had not been put on notice and the Judicial Magistrate has accepted the final report and had taken cognizance on 27.12.2018. Further, the order taking cognizance of the final report on 27.12.2018 does not disclose due application of mind.

26. The Petitioner being a victim is a person mandatorily entitled to notice as per law before acceptance of final report. The Judicial Magistrate had held that the protest petition filed on 29.10.2019 after cognizance being taken on 27.12.2018 is not maintainable and that allowing the protest petition would amount to setting aside or modifying its own order and that the protest petition has to be treated as a private complaint. The Judicial Magistrate had further held that without deciding the private complaint in CrI.MP.No.426 of 2019, summoning of additional accused, whose names do find a place in the First Information Report, is not proper and that after cognizance has been taken, the Court is empowered to add additional accused by way of Section 319 of Cr.PC which would come into operation in the course of any inquiry or trial of an offence and not at this stage.

27. In the light of the above decisions, this Court is of the opinion that the procedure adopted by the Judicial Magistrate, in taking cognizance of the

final report, dropping the names of the persons mentioned in the First Information Report, without notice to the Petitioner is illegal and further, dismissing the protest petition, on the ground of delay and observing that it is not maintainable and would amount to reviewing its own order is improper. The further finding that the other additional accused could be brought in only at the stage of Section 319 of Cr.PC is also improper. As such, the order taking cognizance on 27.12.2018 and the impugned order, dismissing the protest petition, are vitiated and accordingly, are liable to be set aside.

28. When the Petitioner/victim being a person interested in the complaint is not put on notice of the final report filed in this case, this Court would view the matter placing itself at the stage when the final report was filed before the Magistrate. What follows would be that at such stage, the Petitioner has a right to file a protest petition.

29. In the result, this Criminal Revision Petition is allowed in part. The order taking cognizance, dated, 27.12.2018 and the impugned order dated 26.08.2019, dismissing the protest petition filed by the Petitioner are set aside. The court below is directed to take up the protest petition in CrI.MP.No.337 of 2019 on its file, hear the Petitioner and pass orders on merits and in accordance with law, within a period of two months from the date of receipt of a copy of this order.

13.11.2019

Index:Yes/No

Web:Yes/No

Speaking/Non Speaking

Srcm

Note to Office:-

Issue on 14.11.2019

A.D.JAGADISH CHANDIRA, J.

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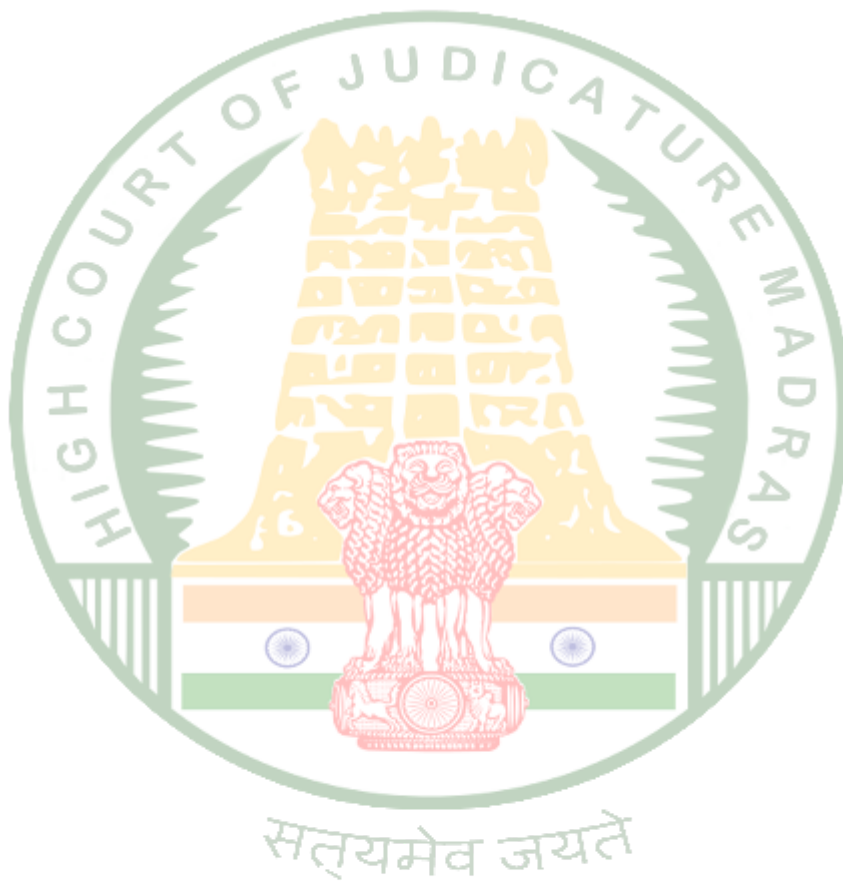
To:

1. The Chief Judicial Magistrate, Coimbatore
2. The Public Prosecutor, High Court, Madras
3. The Inspector of Police, CBCID (South) Coimbatore



Pre-Delivery Order in
Crl.RC.No.967 of 2019

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