

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CRM-M-2621 of 2014 (O&M)
Date of Decision: 10.9.2015**

Kotak Mahindra Bank Limited and others

.....Petitioners

Vs.

State of Punjab and another

.....Respondents

CORAM : HON'BLE MR. JUSTICE RAMESHWAR SINGH MALIK

Present : Mr. R.S.Cheema, Sr. Advocate with
Mr. J.S.Mehndirattta, Advocate
for the petitioners.

Mr. Daljit Singh Virk, AAG, Punjab.

Mr. Vineet Sehgal, Advocate
for respondent No.2.

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

RAMESHWAR SINGH MALIK J.

Petitioners, by way of instant petition under Section 482 of the Code of Criminal Procedure ('Cr.P.C.' for short), seeks quashing of the impugned order dated 4.7.2013 (Annexure P-27) passed by the learned Judicial Magistrate 1st Class, Amritsar, whereby cancellation report presented by the investigating agency was not accepted and re-investigation was ordered.

Notice of motion was issued and re-investigation was stayed. Separate replies on behalf of respondents No.1 and 2 have been filed.

Learned senior counsel for the petitioners submits that the impugned order passed by the learned Magistrate is not only a non speaking and cryptic order but the same is an order without jurisdiction, as well. He further submits that learned Magistrate had no power to order re-investigation and he has exceeded his jurisdiction, while passing the impugned order, thereby directing the re-investigation. He also submits that it was mere wish of the complainant on the basis of which learned Magistrate has rejected the cancellation report. He concluded by submitting that neither the learned Magistrate has discussed anything as to why the cancellation report was prepared, nor he has discussed anything as to why the complainant was not agreeing with the cancellation report.

On the issue of rejection of cancellation report, learned senior counsel places reliance on the following judgments:-

- 1.State through CBI Vs. Raj Kumar Jain, JT 1998 (5) SC 127.
- 2.Guran Ditta Gaba Vs. State of Punjab, 1997 (1) CLR 371 (P&H)
- 3.Bhagwant Singh Vs. Commission of Police and another, (1985) 2 SCC 537.

Similarly, on the issue of jurisdiction of the learned Magistrate in directing the re-investigation, learned senior counsel places reliance on the following judgments:-

- 1.K. Chandrasekhar Vs. State of Kerala, 1998 (5) SCC 223
2. Ramachandran Vs. R. Udhaya Kumar and others, (2008) 5 SCC 413
3. Mithabhai Pashabhai Patel Vs. State of Gujarat (2009) 6 SCC 332

4. Vinay Tyagi Vs. Irshad Ali @ Deepak and others, (2013) 5 SCC 762
5. Mrs. Priyanka Srivastava and Another Vs. State of Uttar Pradesh, 2015 (2) RCR (criminal) 1034
6. Rupan Deol Bajaj Vs. Kanwar Pal Singh Gill, 1995 (6) SCC 194.

He prays for setting aside the impugned order, by allowing the present petition.

On the other hand, learned counsel for respondent No.2, while supporting the impugned order, submits that learned Magistrate did not exceed his jurisdiction, while passing the impugned order and the same deserves to be upheld. He further submits that since the cancellation report was prepared contrary to the facts of the case, learned Magistrate has rightly rejected the same. He concluded by submitting that since the complainant was the only aggrieved party, he has every right to disagree with the cancellation report, which has been rightly rejected by the learned Magistrate. He prays for dismissal of the present petition.

Learned counsel for the State was fully justified in submitting that since State has prepared and presented the cancellation report, let the present petition be disposed of, by passing an appropriate order.

Having heard the learned counsel for the parties at considerable length, after careful perusal of the record of the case and giving thoughtful consideration to the rival contentions raised, this Court is of the considered opinion that keeping in view the peculiar facts and circumstances of the case, instant one has been

found to be a fit case warranting interference at the hands of this Court, while exercising its inherent jurisdiction under Section 482 Cr.P.C. To say so, reasons are more than one, which are being recorded hereinafter.

Before proceeding further, it is pertinent to refer to the impugned order which, on the face of it, is a non-speaking and cryptic order. It reads as under:-

“Heard. Complainant Ashok Sachdeva identified by his counsel Sh. Munish Bajaj, Adv. has suffered statement today in the court that he has not agreed with the police investigation report/cancellation report given by the police authority. In view of the statement of the complainant, police file/cancellation report be sent to the concerned police station for re-investigation and judicial paper be consigned to the record room.”

A bare reading of the abovesaid impugned order would show that learned Magistrate exceeded his jurisdiction, while directing the re-investigation. It is so said, because learned Magistrate was not vested with the said jurisdiction to order the re-investigation. In fact, it is the settled proposition in view of the law laid down by the Hon'ble Supreme Court in Vinay Tyagi's case (supra).

The relevant observations made in para 22, 23, 40 and 46 of the judgment in Vinay Tyagi's case (supra), which can be gainfully followed in the present case, read as under:-

“Further investigation” is where the Investigating Officer obtains further oral or documentary evidence after the final report has been filed before the Court in terms of Section 173 (8). This power is vested with the Executive. It is the continuation of a previous investigation and, therefore, is understood and described as a ‘further investigation’. Scope of such investigation is restricted to the discovery of further oral and documentary evidence. Its purpose is to bring the true facts before the Court even if they are discovered at a subsequent stage to the primary investigation. It is commonly described as ‘supplementary report’. ‘Supplementary report’ would be the correct expression as the subsequent investigation is meant and intended to supplement the primary investigation conducted by the empowered police officer. Another significant feature of further investigation is that it does not have the effect of wiping out directly or impliedly the initial investigation conducted by the investigating agency. This is a kind of continuation of the previous investigation. The basis is discovery of fresh evidence and in continuation of the same offence and chain of events relating to the same occurrence incidental thereto. In other words, it has to be understood in complete contradistinction to a ‘reinvestigation’, ‘fresh’ or ‘de novo’ investigation.

However, in the case of a ‘fresh investigation’, ‘reinvestigation’ or ‘de novo investigation’ there has to be a definite order of the court. The order of the Court unambiguously should state as to whether the previous investigation, for reasons to be recorded, is

incapable of being acted upon. Neither the Investigating agency nor the Magistrate has any power to order or conduct 'fresh investigation'. This is primarily for the reason that it would be opposed to the scheme of the Code. It is essential that even an order of 'fresh'/'de novo' investigation passed by the higher judiciary should always be coupled with a specific direction as to the fate of the investigation already conducted. The cases where such direction can be issued are few and far between. This is based upon a fundamental principle of our criminal jurisprudence which is that it is the right of a suspect or an accused to have a just and fair investigation and trial. This principle flows from the constitutional mandate contained in Articles 21 and 22 of the Constitution of India. Where the investigation ex facie is unfair, tainted, mala fide and smacks of foul play, the courts would set aside such an investigation and direct fresh or de novo investigation and, if necessary, even by another independent investigating agency. As already noticed, this is a power of wide plenitude and, therefore, has to be exercised sparingly. The principle of rarest of rare cases would squarely apply to such cases. Unless the unfairness of the investigation is such that it pricks the judicial conscience of the Court, the Court should be reluctant to interfere in such matters to the extent of quashing an investigation and directing a 'fresh investigation

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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(8) and Section 156(3) 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(6) 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(2) cannot be construed so restrictively as to deprive the Magistrate of such powers particularly in face of the provisions of Section 156(3) and the language of Section 173(8) itself. In fact, such power would have to be read into the language of Section 173 (8).*
- 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.*
- 6. It has been a procedure of proprietary that the*

police has to seek permission of the Court to continue 'further investigation' and file supplementary chargesheet. This approach has been approved by this Court in a number of judgments. This as such would support the view that we are taking in the present case.

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The Code does not contain any provision which deals with the court competent to direct 'fresh investigation', the situation in which such investigation can be conducted, if at all, and finally the manner in which the report so obtained shall be dealt with. The superior courts can direct conduct of a 'fresh'/'de novo' investigation, but unless it specifically directs that the report already prepared or the investigation so far conducted will not form part of the record of the case, such report would be deemed to be part of the record. Once it is part of the record, the learned Magistrate has no jurisdiction to exclude the same from the record of the case. In other words, but for a specific order by the superior court, the reports, whether a primary report or a report upon 'further investigation' or a report upon 'fresh investigation', shall have to be construed and read conjointly. Where there is a specific order made by the court for reasons like the investigation being entirely unfair, tainted, undesirable or being based upon no truth, the court would have to specifically direct that the investigation or proceedings so conducted shall stand cancelled and will not form part of the record for consideration by the Court of competent jurisdiction."

When the order passed by the learned Magistrate is read in view of the abovesaid law laid down by the Hon'ble Supreme Court, this Court feels no hesitation to conclude that the impugned order is wholly misconceived, besides being patently illegal and an order without jurisdiction, which cannot be sustained.

The next question that falls for consideration of this Court is, as to whether the learned Magistrate was duty bound to record reasons in his order, as to why he was not agreeing to accept the cancellation report.

In this regard, Justice P.N.Bhagwati, speaking for a Constitution Bench in Bhagwant Singh's case (supra), set the controversy at rest. The relevant observations made in para 4 of the judgment, read as under:-

Now, when the report forwarded by the officer-in charge of a police station to the Magistrate under sub-section (2)(i) of Section 173 comes up for consideration by the Magistrate, one of two different situations may arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may do one of three things: (1) he may accept the report and take cognizance of the offence and issue process or (2) he may disagree with the report and drop the proceeding or (3) he may direct further investigation under sub-section (3) of Section 156 and require the police to make a further report. The report may on the other hand state that, in the opinion of the police, no offence appears to have been committed and where such a report has been made, the

Magistrate again has an option to adopt one of three courses: (1) he may accept the report and drop the proceeding or (2) he may disagree with the report and taking the view that there is sufficient ground for proceeding further, take cognizance of the offence and issue process or (3) he may direct further investigation to be made by the police under sub-section (3) of Section 156....

Similarly, the Hon'ble Supreme Court in para 6 of its judgment in Raj Kumar Jain's case (supra), held as under

“As regards the directions for further investigation, it is, of course, true that the Special Judge has power to so direct if he finds, on consideration of the police report that the opinion formed by the Investigating Officer seeking discharge of the respondent is not based on full and complete investigation, as observed by this Court in Abhanandan Jha Vs. Dinesh Mishra [AIR 1968 SC 117]. Unfortunately, however, in issuing the above direction the Special Judge has not given any reason whatsoever which prompted him to direct further investigation nor does it appear that he has gone through the police report and its accompaniments.”

A bare reading of the abovesaid observations made by the Hon'ble Supreme Court in Bhagwant Singh's case (supra) as well as Raj Kumar Jain's case (supra), leaves no room for doubt that the learned Magistrate was duty bound to record reasons, as to why he

was disagreeing with the cancellation report. In this view of the matter, answer to the question posed hereinabove is and has to be in the affirmative and it is held that learned Magistrate must have recorded cogent reasons, for not agreeing with the cancellation report, however, he failed to do so. In this situation, it is held that since the impugned order has been found suffering from patent illegality for want of cogent reasons, besides being an order without jurisdiction, the same is liable to be set aside, for this reason also.

As per the scheme of the Code of Criminal Procedure, as and when a cancellation report is prepared under Section 173 (2) by the investigating agency and same is presented before the learned court of competent jurisdiction, it is not the will of the complainant which would be a guiding factor for acceptance or rejection of the cancellation report. Instead, it is the satisfaction of the court based on appropriate reasons, which shall be the guiding factor for accepting or rejecting the cancellation report.

So far as the present case is concerned, a bare reading of the impugned order would show that learned Magistrate has failed to apply his judicious mind before passing the impugned order, thus, fell in serious error of law. Under these circumstances, it is unhesitatingly held that since the impugned order is an order without jurisdiction, the same cannot be sustained.

No other argument was raised.

Considering the peculiar facts and circumstances of the case noted above, coupled with the reasons aforementioned, this Court is of the considered view that present petition deserves to be

allowed. Consequently, the impugned order dated 4.7.2013 (Annexure P-27) passed by the learned Judicial Magistrate 1st Class, Amritsar, is hereby set aside. The case is remanded back to the learned Magistrate with a direction to decide it afresh on merits, at an early date, keeping in view the observations made hereinabove.

Resultantly, with the abovesaid observations made and directions issued, present petition stands allowed, however, with no order as to costs.

(RAMESHWAR SINGH MALIK)
JUDGE

10.9.2015
Ak Sharma