

Anand

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO.2845 OF 2016

Infrastructure Leasing & Financial.Petitioner
Services Ltd.

Vs.

The State of Maharashtra & anr. .Respondents

Mr.P.Badheka a/w. Mr.V.Unnikrishnan i/b. Cyril
A. Mangaldas, Advocate, for the Petitioner
Mr.V.V.Gangurde, APP, for the Respondent No.1 –
State

Mr.S.Punalekar a/w. Mr.R.Sheth & Ms Pooja Batra
i/b. Mr.M.S.Udhanwalla, Advocate, for the
Respondent No.2

CORAM : REVATI MOHITE DERE, J.

DATE : 25.08.2016

P.C.

. Heard learned counsel for the parties.

2. Rule. Rule is made returnable forthwith
with the consent of the parties and is taken up
for final disposal at the stage of admission
itself. Learned APP waives notice on behalf of
the Respondent No.1 – State and Mr.Punalekar
waives notice on behalf of the Respondent No.2.

3. By this Petition, the Petitioner has impugned the Order dated 23.06.2016 passed by the learned Metropolitan Magistrate, 23rd Court, Esplanade, Mumbai by which the learned Magistrate was pleased to pass the following order, the operative part of the order reads thus;

“ The Sr.Police Inspector is here by directed to re-investigate the matter u/s.173(8) of Cr.P.C. and submit his report within two months i.e. on or before 23/08/2016.”

4. Learned counsel for the Petitioner states that the Magistrate was not empowered to direct re-investigation under Section 173(8) of the Code of Criminal Procedure and that the law in this regard is well settled. He relied on the Judgment of the Apex Court in the case of **Vinay Tyagi vs. Irshad Ali Alias Deepak And Others**, reported in **(2013)5 Supreme Court Cases 762** and the Judgment of this Court rendered in the case

of **Hemant Dayalal Bhatt vs. State of Maharashtra and anr.** passed in **Cri. Appln.No.460 of 2013**. He submits that in view of the settled position of law, the impugned order ought to be quashed & set aside.

5. Learned counsel for the Respondent No.2 does not dispute the fact, that the learned Magistrate could not have directed re-investigation, in view of the judicial pronouncements in this regard. However, according to the learned counsel for the Respondent No.2, the Respondent No.2 had filed an Application seeking further investigation and not re-investigation, which is permissible in law. He submitted that the error appears to be inadvertent and that the learned Magistrate instead of directing further investigation, has directed re-investigation.

6. Perused the papers, in particular, the impugned order dated 23.06.2016 and the Application dated 19.10.2012. It appears that what was prayed for, by the Respondent No.2 in the Protest Petition was (i) that the report of the investigating officer be rejected; (ii) for an order for further investigation or in the alternative; (iii) that the Complainant be directed to lead evidence of himself and his witnesses in support of his case. Although there is some substance in the submission advanced by the learned counsel for the Respondent No.2, what cannot be ignored is the fact, that the learned Magistrate has ordered re-investigation which is impermissible in law and hence the impugned order will have to be quashed and set aside on this sole ground.

7. The Apex Court in ***Vinay Tyagi vs. Irshad Ali Alias Deepak And Others***, reported in ***(2013)5 Supreme Court Cases 762*** has observed as

under :

"40. 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:

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

40.2. A Magistrate has the power to direct 'further investigation' after filing of a police report in terms of Section 173(6) of the Code.

40.3. The view expressed in Sub-para 40.2 above is in conformity with the principle of law stated in Bhagwant Singh case (supra) by a three-Judge Bench and thus in conformity with the doctrine of precedent.

40.4. 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).

40.5. 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.

40.6. It has been a procedure of propriety that the police has to seek permission of the Court to continue 'further investigation' and file supplementary charge-sheet. 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."

8. Considering the aforesaid, the impugned Order dated 23.06.2016 passed by the learned Metropolitan Magistrate, 23rd Court, Esplanade, Mumbai, on Protest Petition is quashed and set aside. The matter is remitted back to the trial Court. The learned Magistrate to pass appropriate orders on the Protest Petition, after hearing the Respondent No.2. Learned counsel for the Respondent No.2 undertakes to file Vakalatnama within one week from today in this Petition.

9. Accordingly, the Petition is disposed of. Rule is made absolute on the aforesaid terms. It is made clear that the Petition has not been heard on merits.

Parties to act on the authenticated copy of this order.

(REVATI MOHITE DERE, J.)