

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

WRIT PETITION NO. 5552 OF 2018

Arun Kumar Ramswarup Agarwal

...Petitioner

Versus

State of Maharashtra & Anr.

...Respondents

**WITH
WRIT PETITION NO. 5553 OF 2018**

Sunita Arunkumar Agarwal

...Petitioner

Versus

State of Maharashtra & Anr.

...Respondents

.....

Mr.Subhash Jha a/w. Ms.Sanjana Pardeshi, Ms. Hare Krishna Mishra and Mr.Ashish Jha I/b. Law Global Advocates for the Petitioner in WP No. 5552 of 2018.

Mr.Ghanshyam Upadhyay I/b. Law Juris for the Petitioner in WP No. 5553 of 2018.

Mr.A.R.Patil, APP for Respondent No.1-State.

Mr.Shyam M.Kalyankar for Respondent No.2.

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**CORAM: MRS.MRIDULA BHATKAR, J.
DATED : DECEMBER 21, 2018**

P.C.:

1. In these cases, after framing of charge, when the trial commenced, the original complainant/ first informant moved an application under section 173 (8) of the Code of Criminal Procedure,

1973 ("the Cr.P.C.") seeking directions from the learned Magistrate in Case No. 397/PW/16 for further investigation.

2. The petitioners/accused are facing charges under sections 406, 420 read with 34 of the Indian Penal Code. By an order dated 13.11.2018, the learned Addl. Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai allowed the said application and directed the Investigating Officer, E.O.W. to carry out detailed further investigation under section 173 (8) of the Cr.P.C. as per law and submit the report to this Court. Against the said order, the petitioners/accused preferred Revision Application No. 1118 of 2018. By an order dated 29.11.2018, the learned Additional Sessions Judge, Greater Bombay dismissed the Revision Application and confirmed the order passed by the trial Court, and requested the trial Court to give a date for submission of further investigation report and monitor the same in view of the direction of the Hon'ble High Court to expedite the trial. Hence, these Writ Petitions.

3. In these Petitions, the following issue is involved:

Whether the Magistrate has power to pass an order of further investigation under section 173 (8) of the Cr.P.C. on application praying for further investigation is moved by the original complainant/ first informant?

4. I have heard submissions of the learned counsel for the petitioner, learned counsel for respondent No.2/ original complainant and also learned APP for respondent No.1/ State.

5. The learned counsel for the petitioner has relied on the following judgments :

(i) ***Amrutbhai Shambhubhai Patel Versus Sumanbhai Kantibhai Patel and others*** reported in ***(2017) 4 SCC 177***;

(ii) ***Athul Rao v. State of Karnataka & Anr.*** reported in ***2017 SCC OnLine SC 951***.

6. Per contra, the learned counsel for respondent No.2/original complainant has submitted that the learned Magistrate has ample power to direct further investigation under section 173 (8) of the Cr.P.C. He has further submitted that the judgment of the full bench of the Supreme Court in the case of ***Samaj Parivartan Samudaya and others Versus State of Karnataka and others*** reported in ***(2012) 7 SCC 407*** is binding on this Court. He has further submitted that in the case of ***Amrutbhai Shambhubhai Patel*** (*supra*) and also in the case of ***Athul Rao*** (*supra*), the judgment of ***Samaj Parivartan Samudaya and***

others (*supra*) was not considered and, therefore, these two judgments are *per incuriam*. He has relied on the judgment of the Single Bench of the Calcutta High Court **dated 07.09.2018 in CRR 2115 of 2017** in the case of ***Sri Indranil Mukherjee Vs. The State of West Bengal & Anr.*** He has further submitted that the learned Single Judge of the Calcutta High Court has taken a view that the order of further investigation on the application moved by the first informant can be passed by the Magistrate. The learned Magistrate has wide power and if at all, the investigating officer is having hand in gloves with the accused, then no effective investigation will be carried out by him.

7. The learned APP while supporting the orders passed by the learned Addl. Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai and the learned Additional Sessions Judge, Greater Bombay, has opposed these Petitions.

8. The apprehension of the learned counsel for respondent No.2/ original complainant that there is possibility of collusion between the investigating officer and the accused may be correct. It is true that if at all there is collusion between the investigating officer and the accused, then investigation can be diluted, however, it depends upon the facts and circumstances of each and every case. It is not open for the complainant to approach the learned Magistrate and seek order of

further investigation under section 173 (8) of the Cr.P.C. The police can investigate further after filing the report i.e., chargesheet in the Court. It is not necessary for the investigating officer to seek permission of the Court, but he is required to inform the Court that he is carrying out further investigation. The complainant is not left without remedy. Other remedy is available to him, however, not under section 173(8) of the Cr.P.C. The first informant/original complainant cannot move before the learned Magistrate under section 173 (8) of the Cr.P.C. This issue has no more *res integra* as it is decided in the case of **Amrutbhai Shambhubhai Patel** (*supra*) and subsequently in the case of **Athul Rao** (*supra*).

9. Paragraph No. 49 in the case of **Amrutbhai Shambhubhai Patel** (*supra*) is reproduced as under :-

“49. On an overall survey of the pronouncements of this Court on the scope and purport of Section 173 (8) of the Code and the consistent trend of explication thereof, we are thus disposed to hold that though the investigating agency concerned has been invested with the power to undertake further investigation desirably after informing the Court thereof, before which it had submitted its report and obtaining its approval, no such power is available therefor to the learned Magistrate after cognizance has been taken on the basis of the earlier report, process has been issued and the accused has entered appearance in response thereto. At that stage, neither the learned Magistrate suo motu nor on an application filed by the complainant/informant direct further investigation. Such a course would be open only on the request of the investigating agency and that too,

in circumstances warranting further investigation on the detection of material evidence only to secure fair investigation and trial, the life purpose of the adjudication in hand”.

10. In the case of ***Samaj Parivartan Samudaya and others*** (*supra*), the Supreme Court had no opportunity to deal with the issue directly. The Supreme Court has made observation on the point of powers of Magistrate, which are wide and those powers can be used under sections 202, 190 and 173 (8) of the Cr.P.C.

11. In the case of ***Sri Indranil Mukherjee*** (*supra*), the similar issue brought up before the learned Single Judge of the Calcutta High Court wherein it was observed that it is imperative for the Magistrate to grant further investigation because if the order impugned is allowed to be sustained, it will amount to arming the police with unbridled power to exonerate any person from the periphery of the investigation and it would be playing into the hands of the investigating officer.

12. The ratio laid down by the learned Single Judge of the Calcutta High Court is on the similar line and as per apprehension expressed by the learned counsel for respondent No.2 before this Court. However, with due respect, I do not subscribe the view taken by the learned Single Judge of the Calcutta High Court on the point of Magistrate's powers under section 173 (8) of the Cr.P.C.

13. In view of the settled principle of law on this point, I am of the view that the orders passed by the learned Addl. Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai and the learned Additional Sessions Judge, Greater Bombay are illegal and deserve to be set aside.

14. Writ Petitions are allowed accordingly.

(MRIDULA BHATKAR, J.)