

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.10.2018

CORAM

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

CRL.O.P.Nos.8232 and 8233 of 2012

1.M.Jayanthi @ Lakshmi
2.R.Moorthy

.. Petitioners in person
in both the Crl.O.Ps/Defacto
Complainant

Vs

1.The Commissioner of Police,
Greater Chennai,
Pantheon Road, Egmore,
Chennai-8.

2.The Inspector of Police,
(L & O) D-1, Triplicane Police Station,
Walaja Road, Cehnnai-5.

3.The Inspector of Police,
CB CID,
Sidco Electronic Complex,
Block No.3, 1st Floor,
Guindy Industrial Estate,
Chennai.

4.S.Sivaraj, Ex. MLA,
Rishvandiam Constituency,
Villupuram District, सत्यमेव जयते
No.34, 6th Cross Street,
Raja Annamalaipuram,
Chennai-600 028.

5.Adhishankar, M.P.,
Kallakurichi Constituency,
Villupuram District,
No.13A, Asanur Road,
Santhapettai, Tirukoilur Taluk,
Villupuram District.

.. Respondents in both
the Crl.O.Ps

PRAYER: Criminal Original Petition No.8232 of 2012 filed under Section 482 of the Code of Criminal Procedure to call for the records relating to CrI.M.P.No.3658 of 2011, dated 23.2.2012 on the file of XIII Metropolitan Magistrate, Egmore, Chennai and set aside the impugned order.

PRAYER: Criminal Original Petition No.8233 of 2012 filed under Section 482 of the Code of Criminal Procedure to issue directions to the 3rd respondent CB CID Poilice to carry out proper and impartial further investigation under Section 156(3) and 173(8) of Cr.P.C. in Crime No.575 of 2011 on the file of the 2nd respondent, D1 Triplicane Police Station, Chennai.

For Petitioners : Mrs.M.Jayanthi @ Lakshmi
Party-in-person

For Respondents : Mr.P.Govindarajan
Addl. Public Prosecutor
for R1 to R3

Mr.P.T.Perumal (for R5)

COMMON ORDER

Challenging the order dated 23.2.2012 of the learned XIII Metropolitan Magistrate, Egmore, Chennai, dismissing the protest petition being CrI.M.P.No.3658 of 2011, the petitioners have filed CrI.O.P.No.8232 of 2012.

2. CrI.O.P.No.8233 of 2012 has been filed seeking direction on the 3rd respondent to carry out proper and impartial further investigation under Section 156(3) and 173(8) Cr.P.C. in Crime No.575 of 2011 on the file of the 2nd respondent.

3. I heard Mrs.Jayanthi @ Lakshmi, 1st petitioner in-person and Mr.P.Govindarajan, learned Additional Public Prosecutor appearing for the respondents 1 to 3 and Mr.P.T.Perumal, learned counsel for the 5th respondent and also perused the materials available on record.

4. Pursuant to the orders of learned XIII Metropolitan Magistrate, Egmore, Chennai dated 25.4.2011 in CrI.O.P.No.1229 of 2011, the 2nd respondent registered the FIR in Crime No.575 of 2011 against the respondents 4 and 5 under Sections 294(b) and 506(ii) IPC. Upon investigation, the 2nd respondent filed a final report dated 11.7.2011 before the learned Magistrate as mistake of fact. Upon receipt of notice from the learned Magistrate, the petitioners have filed the protest petition

being CrI.M.P.No.3658 of 2011 seeking to order further investigation and to appoint fair and impartial police officer of CB CID or any other competent agency to further investigate the case in Crime No.575 of 2011 on the file of the 2nd respondent.

5. The learned Magistrate, by referring to the judgment of the Hon'ble Apex Court in Rita v. West Bengal and others, reported in (2009) 3 SCC 1051 and the order of this Court in CrI.R.C.(MD) No.313 of 2010 (E.Jeevan Kumar v. State and another), dismissed CrI.M.P.No.3658 of 2011, however, liberty was granted to the petitioners to approach the Court under Section 200 of Cr.P.C.

6. The petitioners in-person have challenged the impugned order of the learned Magistrate on the following grounds:

(a) The learned Magistrate can order re-opening of the investigation even after the police submits the final report.

(b) The power of the learned Magistrate under Section 156(3) Cr.P.C. to direct further investigation is an independent power and does not stand in conflict with the power of the State Government.

(c) It is open to the learned Magistrate not to accept the conclusion of the Investigating Officer and direct further investigation even after submission of the report as provided in Section 173 (8) of Cr.P.C.

(d) The impugned order is liable to be quashed on the ground that the learned Magistrate has not applied his mind while passing the order.

7. Resisting the Criminal Original Petitions, the learned Additional Public Prosecutor as well as the learned counsel for the 5th respondent submitted that an application for further investigation cannot be filed by the defacto complainant and the defacto complainant has no locus standi to file petition for further investigation or reinvestigation. They would submit that the learned Magistrate was right in dismissing the protest petition and prayed for dismissal of the Criminal Original Petitions.

8. It is apposite to mention that earlier the petitioners have approached this Court by filing W.P.No.16382 of 2011 seeking a writ of mandamus directing transfer of investigation from the file of the 2nd respondent to CB CID. By an order dated 19.10.2011, the said writ petition was dismissed by this Court, however, this Court granted liberty to the petitioners to approach the Criminal Court under Section 200 Cr.P.C. or any

other provision, which was applicable.

9. It appears that on 11.7.2011, the 2nd respondent has filed a final report as mistake of fact in FIR in Crime No.575 of 2011 before the learned Magistrate and after receipt of the final report, the learned Magistrate issued notice dated 10.11.2011 to the petitioners and upon receipt of the notice from the learned Magistrate, the petitioners have filed protest petition being CrI.M.P.No.3658 of 2011 on 21.11.2011 seeking further investigation.

10. The question which arises for consideration of this Court is whether the Magistrate, after accepting the closure report filed by the police, can order further investigation in the case.

11. Before dealing with the same, it would be appropriate to examine the relevant provisions and scheme of Cr.P.C. in relation to Section 156(3) Cr.P.C., which empower the Magistrate, who is competent to take cognizance in terms of Section 190 Cr.P.C., to order investigation as prescribed under Section 156(1) of Cr.P.C.

12. Section 190 Cr.P.C. provides that subject to the provisions of Chapter XIV of the Code, any Magistrate of the first class and any Magistrate of the second class specifically empowered in this behalf may take cognizance of any offence upon receipt of a complaint, facts of which constitute such offence, upon a police report of such facts or upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

13. Section 156 Cr.P.C. is reproduced below:

"156. Police officer's power to investigate cognizable cases.

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one, which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above mentioned."

14. Section 190 Cr.P.C. prescribes as under:

"190. Cognizance of offences by Magistrates. (1) Subject to the provisions of this Chapter, any Magistrate of the first class, specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

(a) Upon receiving a complaint of facts which constitute such offence;

(b) Upon it police report of such facts;

(c) Upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

15. As per the provisions of Sections 156(3), 169, 178 and 190 of Cr.P.C., the functions of the Magistrate and the police are entirely different, and the Magistrate cannot impinge upon the jurisdiction of the police, by compelling them to change their opinion so as to accord with his view. However, he is not deprived of the power to proceed with the matter. There is no obligation on the Magistrate to accept the report if he does not agree with the opinion formed by the police. The power to take cognizance notwithstanding formation of the opinion by the police has been provided for in Section 190 Cr.P.C.

16. If a protest petition is filed, the learned Magistrate has three options viz., (a) he may decide that there is no sufficient ground for proceeding further and drop the proceeding; (b) he may take cognizance of the offence under Section 190(1)(b) Cr.P.C. on the basis of the police report and issue process; (c) he may take cognizance of the offence treating the protest petition as complaint and thereafter proceed under Sections 200 and 202 of Cr.P.C., if necessary.

17. Whenever a final report is filed in the Court by the police, the notice is sent to the informant for filing the protest petition, against that final report. If the protest petition is filed by the informant and thereafter, if the learned Magistrate comes to the conclusion that on the basis of the evidence collected by the Investigating Officer, prima facie any offence is made out against the accused and there is sufficient ground to proceed further against the accused, he is empowered to take cognizance and summon the accused to face the trial for a particular offence only on the basis of the police report. The learned Magistrate is also empowered to proceed further adopting the procedure of a complaint case by treating

the protest petition as complaint and after recording the statements under Sections 200 and 202, Cr.P.C., if he is satisfied that on the basis of the allegations made against the accused prima facie any offence is made out against the accused and there is sufficient ground to proceed further, he is legally empowered to take cognizance and summon the accused to face trial.

18. In Criminal Appeal No. 1412/2014, (Rakesh & Anr. Vs State of U.P. & Anr.), arising out of SLP (Crl.) No.3308 of 2013, the Hon'ble Supreme Court held that there cannot be any doubt or dispute that only because the learned Magistrate has accepted a final report, the same by itself would not stand in his way to take cognizance of the offence on a protest/complaint petition.

19. The position is, thus, well settled that upon receipt of a police report under Section 173(2) Cr.P.C. a Magistrate is entitled to take cognizance of an offence under Section 190(1) (b) of Cr.P.C. even if the police report is to the effect that no case is made out against the accused. The learned Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) Cr.P.C. does not lay down that a Magistrate can take cognizance of an offence only if the Investigating Officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the Investigating Officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise of his powers under Section 190(1)(b) Cr.P.C. and direct the issue of process to the accused.

20. As stated supra, the learned Magistrate, after taking note of the liberty granted by this Court in W.P.No.16382 of 2011 to approach under Section 200 Cr.P.C., observed that the petitioners are not entitled to seek further investigation in this case. While disposing of the protest petition, the learned Magistrate also granted liberty to the petitioners to approach under Section 200 Cr.P.C. Since by an order dated 19.10.2011 in W.P.No.16382 of 2011 itself, liberty was granted to the petitioners to approach under Section 200 Cr.P.C., nothing prevented the learned Magistrate treating the protest petition as complaint and thereafter, proceed under Section 200 and 202 Cr.P.C. On the sole ground, the matter needs to be remanded to the learned Magistrate.

21. The learned Magistrate by referring to the decision of this Court in Crl.R.C. (MD) No.333 of 2010 dismissed the protest

petition by observing that the defacto complainants are not entitled to ask for further investigation and re-investigation, however, liberty was granted to the petitioners to approach under Section 200 Cr.P.C. Since serious allegations have been levelled against the private respondents/accused, the learned Magistrate ought to have treated the protest petition as complaint of the petitioners and thereafter, proceed with the matter as contemplated in the Code.

22. It is pertinent to note that while dismissing the protest petition, it is necessary to refer to the materials placed before the Court and a reasoned order has to be passed containing all such materials. Admittedly, in the case on hand, the learned Magistrate has not referred to any material placed before it.

23. Since by an order dated 19.10.2011 in W.P.No.16382 of 2011 itself, liberty was granted by this Court to the petitioners to approach under Section 200 Cr.P.C., if the protest petition is taken as complaint under Section 200 Cr.P.C. by the learned Magistrate, no prejudice would be caused to the private respondents/accused.

24. Though the petitioners urged various grounds to set aside the impugned order and also seeking direction on the 3rd respondent to carry out proper and impartial further investigation in this matter, this Court is not inclined to order re-investigation by CB CID as prayed for.

25. Since the reasoning assigned by the learned Magistrate in dismissing the protest petition is without any material, it would be appropriate to remand the matter to the learned Magistrate to take cognizance of the case, if he thinks fit, exercise of his powers under Section 190(1)(b) Cr.P.C. and direct the issue of process to the accused.

26. In view of the discussions made above, without going into the merits of the complaint, considering the nature and gravity of the offence alleged against the private respondents/accused and in order to render justice between the parties and also to instill confidence in the public mind, the matter is remanded to the learned XIII Metropolitan Magistrate, Egmore, Chennai to treat the protest petition (CrI.M.P.No.3658 of 2011) as complaint. The learned XIII Metropolitan Magistrate, Egmore, Chennai is directed to examine the complaint and thereafter, proceed under Section 200 and 202 Cr.P.C.

27. With the above observations and direction, both the Criminal Original Petitions are disposed of.

vs

Sd/-
Assistant Registrar(CS IV)

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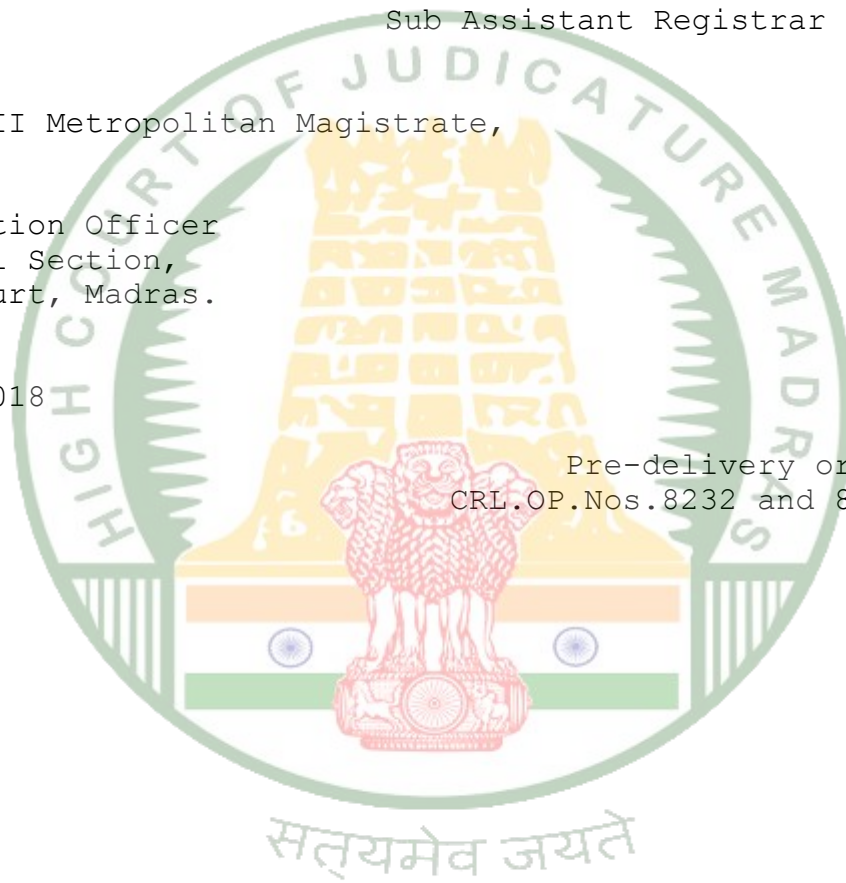
To Sub Assistant Registrar

1. The XIII Metropolitan Magistrate,
Chennai.

2.The Section Officer
Criminal Section,
High Court, Madras.

VGII(CO)
sm:1.11.2018

Pre-delivery order made in
CRL.OP.Nos.8232 and 8333 of 2012



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