



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 17.09.2018

CORAM:

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**THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN**

Crl.O.P. (MD) .No.14907 of 2015

and

M.P. (MD) No.1 of 2015

1. Kalaiselvan
2. Ganesan
3. R.Senthilvel Murugan
4. S.Mathiselvan
5. T.Pasupathi
6. M.Subramanian
7. A.Syed Mushthafa
8. R.Devaraj
9. O.Murugananthan
- 10.M.Ramachandra
- 11.P.Sakthivel
- 12.M.Palaniyappan
- 13.Chinnan
- 14.T.Arumugam
- 15.S.Narayanan
- 16.P.Rajendiran
- 17.S.Krishnan
- 18.R.Sekar
- 19.PL.Sundaram
- 20.K.Arul
- 21.V.Subramani
- 22.P.Gopal
- 23.Abdul Samadh
- 24.Murugan
- 25.P.Krishnan
- 26.C.Muthaiah
- 27.N.Annadurai
- 28.S.Balasubramanian
- 29.S.Kannan
- 30.R.Asaithambi
- 31.R.Rajendiran

.. Petitioners

**Vs .**

1. State rep. by  
The Inspector of Police,  
Cantonment Police Station,  
Tiruchirappalli,  
Tiruchirappalli District.  
Crime No.743 of 2014



2. Uma Shankar  
Inspector of Police,  
Cantonment Police Station,  
Tiruchirappalli,  
Tiruchirappalli District.

... Respondents

**PRAYER:** This Criminal Original Petition has been filed under Section 482 of Criminal Procedure Code, to call for the records in S.T.C.No.1218 of 2015 on the file of the Judicial Magistrate No.II, Tiruchirappalli, Tiruchirappalli District and quash the proceedings as against the petitioners.

For Petitioners : Mr.C.Muthu Saravanan  
For Respondents : Mr.V.Neelakandan, APP

### **O R D E R**

This quash petition is filed to quash the criminal proceedings in S.T.C.No.1218 of 2015 on the file of the Judicial Magistrate No.II, Tiruchirappalli, thereby had taken cognizance for the offences under Section 8 of Tamil Nadu Gaming Act 1938 as against A1 to A10 and for the offence under Section 9 of Tamil Nadu Gaming Act, 1930 as against A11 to 31.

2.The charges as against the petitioners are that on 17.08.2014, at about 07.00 p.m., at the New VIP Club situated in the 6<sup>th</sup> Floor within the premises of Gajapriya Hotel near Trichy Central Bus Stand, within the jurisdiction of Trichy Corporation Cantonment Police Station, the petitioners 1 to 10/A1 to A10 with an intention to gain illegally, have given the place for gaming to play "vettu cheetu" to the petitioners 11-31/A11-31 and thereby the petitioners 1 to 10/A1 to A10 committed the offence under Section 8 of Tamil Nadu Gaming Act, 1930 and the petitioners 11to 31/A11-31 committed the offence under Section 9 of Tamil Nadu Gaming Act, 1930. The said criminal proceedings are under challenge in this quash petition.

3.The learned counsel appearing for the petitioners would raise the following grounds to quash the criminal proceedings:

(i)The learned Judicial Magistrate ought not to have taken cognizance of the offences under Sections 8 and 9 of Tamil Nadu Gaming Act, 1930, since the Act itself repealed and it is no more existence for the City of Tiruchirappalli. When the offence allegedly committed by the petitioners on 17.08.2014, the Tamil Nadu Gaming Act, 1930 is not in force and it has been substituted by the Chennai City Police (Extension to the Cities of Salem, Tiruchirappalli and Tirunelveli) Act, 1997 and hence, the Gaming Act is not applicable for the offences said to have been committed by the petitioners.

<https://hcservices.ecourts.gov.in/hcservices/>

(ii)The first respondent himself is a complainant and



investigating officer and it is not permissible under the criminal procedure code and also it is violation of Article 21 of Constitution of India.

(iii) The alleged place of occurrence is a hotel premises viz., Hotel Gajapriya and even as per the charge sheet, the necessary ingredients viz., running of common gaming house, which is primordial requisite for the offence are absent. Therefore, the entire charges are not at all made out as against the petitioners.

(iv) The action of the first respondent is nothing but malicious prosecution and to wreck vengeance as against the petitioners, the present charge sheet has been laid, since the New VIP Club approached this Court in W.P.(MD) No.17203 of 2014, in which, this Court restrained the police personnels with conditions. Thus, the learned counsel appearing for the petitioners would pray for the quashment of the criminal proceedings as against the petitioners.

4. Per contra, the learned Additional Public Prosecutor would submit that the petitioners 1 to 10 are provided hotel premises viz., the sixth floor of Gajapriya Hotel, where the New VIP Club is situated to the petitioners 11 to 31 to play 'vettu cheetu' and as such, they committed offence under Sections 8 and 9 of Tamil Nadu Gaming Act, 1930. Further, he would contend that there are prima facie materials to establish that the petitioners have committed the offences as alleged by the prosecution. Thus, he prayed for dismissal of the quash petition.

5. Heard the rival submissions made on either side and perused the documents available on record.

6. Admittedly, the New VIP Club is situated in the sixth floor of hotel premises of Hotel Gajapriya near Trichy Central Bus Stand, Trichy. The said club is very familiar in Trichy and it is a registered club under the Societies Registration Act bearing Reg.No.95/96. Its main object is to promote the sports activities both indoor and outdoor games for the benefits of its members. The activities of the Club is in accordance with the provisions and bye-laws of the Society. As per the bye-laws of the Club, the indoor games such as Tennicoit, Shuttle Cork, Volley Ball, Carom Board, Chess, playing cards and badminton etc., are permitted without any monetary gain to the members of the Club or any other persons. On 17.08.2014, on receipt of secret information, the first respondent inspected the Club, which was permitted to use as a common gaming house.

7. Now, the question arises that whether playing cards is an offence or not?

8. As repeatedly held by the Hon'ble Apex Court of India and this court, the game of playing cards is not an offence per se. It is an offence only when it is carried on in a public place or in a



common gaming house as defined in the Public Gambling Act. The common gaming house is defined as follows:

"Common gaming-house.- "Common gaming-house", means any house, room, tent, enclosure, vehicle, vessel or any place whatsoever in which cards, dice, tables or gain of the person owning, occupying, using, or keeping such house, room, tent, enclosure, vehicle, vessel or place, whether by way of charge for the use of instruments of gaming or of the house, room, tent, enclosure, vehicle or place, or otherwise howsoever, and includes any house, room, tent, enclosure, vehicle, vessel or place opened, kept or used or permitted to be opened, kept or used for the purpose of gaming."

9. In this regard, the learned counsel appearing for the petitioner relied upon the judgment reported in **1990(2) MWN Crime 195 - Raman Nair & 13 Others & Durai Maharajan V. State**, wherein, this Court has held as follows:

"7. .... To decide a question whether a Club, where gaming in cards is carried on, is a gaming house or not, the relevant consideration is not whether any member of the club makes a profit but whether the club, as a person, occupying or using or keeping the house or room makes a profit. The fact that the police recovered huge sum of money on the table on the date in question is not sufficient to throw any light as to the club or the secretary of the club deriving anything from out of the money available on the table at the relevant time, may be going to the pockets of the members playing the game of cards. As already indicated, that is not sufficient to consider the premises of the club a gaming house under section 3 of the Act. Once the premises is not proved to be a gaming house, it goes without saying that the petitioners cannot be stated to have committed the offences under Sections 8 and 9 of the Act."

10. It has been repeatedly held that running of a common gaming house is a primordial requisite before a person could be convicted for an offence under Sections 8 and 9 of the Act and gaming is not an offence per se. Even assuming that the allegations put forth by the prosecution is true, it cannot be constituted an offence as alleged by the prosecution. In these circumstances, even if the prosecution is allowed to continue, in view of the facts and circumstance of the case, it would be a futile exercise and there is no scope for conviction. Therefore, the materials collected in support of the charges do not disclose the commission of any of the offence or make out a case against the petitioners/accused and as such, the entire criminal proceedings cannot be sustained.

11. Further, in this case, there is absolutely no mention in



the report about anybody running a common gaming house. There is no mention about the first petitioner permitting the use of the premises for gaming activities with a view to derive profit or gain for himself. Therefore, the place in which the petitioners played in 'vetty cheetu' and recovered huge sum by the respondents is not a common gaming house. Time and again, this Court has pointed out that gaming is not an offence per se but it is punishable only when it is carried on in a public place for commercialisation purpose and in a common gaming house with profit motive as contemplated under the Gaming Act. However, the law enforcing agencies ignoring the marked differences between play of games in a house or club and gaming activities carried in a common gaming house indulge in endless prosecution merely harass the innocent. Though the New VIP Club obtained orders to carry on lawful activities in the recreation club and petition to Superintendent of Police to direct the Inspector not to prohibit the running of club, the respondent has thought fit to raid the Club. It is nothing but malicious prosecution and it has to be curtailed.

12.The next question is whether final report laid by the prosecution under the Tamil Nadu Gaming Act, 1930 is sustainable?

13.On a perusal of the Tamil Naging Act, 1930, it is seen that previously the Madras City Police Act is applicable only to the Chennai City. Admittedly, the occurrence took place in 17.08.2014 and as such, the date on which the occurrence took place, the Tamil Nadu Gaming Act, 1930 is not in force and it has been substituted by the Chennai City Police (Extension to the Cities to Salem, Tiruchirapalli and Tirunelveli) Act, 1997 came into force and is applicable for the offences said to have been committed by the petitioners. This court is of the view that filing of final report under the wrong provision of the Act cannot be sustained. Therefore, the charge sheet laid by the respondent under the wrong provisions of the Act and taking cognizance of the offences by the trial Court are not sustainable under law.

14.The another point for consideration is that whether the defacto complainant can lodge the complaint and also investigate the case or not?

15.In this regard, the learned counsel appearing for the petitioners relied upon the judgment reported in **2018-1 L.W. (Cr1.) 49 - V.Shanmugam V. The Sub Inspector of Police, Mudaliarpur Police Station, Puthucherry**, wherein, this Court has held as follows:

"21. Another limb of contention by the Learned Senior counsel for the petitioner is that the defacto complainant cannot lodge the complaint and also investigate it. What is evident from the FIR is that he is not only the complainant, but also registered it himself and took up the case for investigation. In support of the said contention, the Learned Senior Counsel has relied upon the following judgments:



(i) The Hon'ble Supreme Court in the decision reported in 1996 (11) SCC 709 (Megha Singh v. State of Haryana), has observed as follows:

4. After considering the fact and circumstance of the case, it appears that there is discrepancy in the depositions of the P.WS 2 and 3 and in the absence of any independent corroboration such discrepancy does not inspire confidence about the reliability of the prosecution case. We have also noted another disturbing feature in this case. PW-3. Siri Chand, head Constable arrested the accused and no search being conducted by him a pistol and the cartridges were recovered from the accused. It was on his complaint a formal first information report was lodged and the case was initiated. He being complainant should not have proceeded with the investigation of the case. But it appears to us that he was not only the complainant in the case but he carried on with the investigation and examined witnesses under Section 161, Cr.P.C. Such practice, to say the least, should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation.

(ii) In the judgment reported in 2005 CrLJ 377 (State of Karnataka, Paper Town...v. Sheshadri Shetty and others), the Karnataka High Court, following Megha Singhs case, held as follows:

5. Smt. Nesargi, learned Counsel who represents the accused was very quick to point out to us that the spirit of the principle laid down by the Supreme Court was not that the Court would have to disregard the evidence of the Investigating Officer but it is her submission that the principle is much wider in so far as where the complainant happens to be the Investigating Officer and where he proceeds with the investigation that according to her, the entire investigation would be vitiated in law..

6. For purposes of resolving this rather complex legal issue, we have carefully applied our minds to the principle underlying the Supreme Court decision. The rule of fairness which is the bed-rock of criminal investigations pre-supposes impartiality and starting from this premise what emerges is that where the Investigating Officer is the complainant, he is offending the principle of impartiality as far as the quality of the investigation is concerned.

Though the Government Pleader has tried to salvage the position by contending that the Court should totally disregard the evidence of the I.O. P.W. 8



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and examine the question as to whether the prosecution case is established on the basis of the remaining evidence, we need to point out that this procedure would not pass the legal test of fairness. The reason for this is because in his capacity as the Investigating Officer, P.W. 8 has not only given evidence at the trial but P.W. 8 is really the main architect of the prosecution cases. Everything that P.W. 8 has done right from the recording of evidence to the drawing up of panchanamas and the like would be hit by the lurking suspicion that if he is the complainant in the cases he may not be acting impartially. It is precisely this underlying principle which effects the quality of the whole of the prosecution case because P.W./ 8 as the Investigating Officer is the architect of that edifice. Therefore, though initially it did appear to us that the submission canvassed by Smt. Nesargi was not on the strong side, on a total review of the legal position we find that the learned Counsel was right in advancing the submission because the principle laid down in Megha Singh's Case would virtually render the investigation as tainted and if this is the position, it is virtually the end of the prosecution case.

7...One of the submissions canvassed by the learned Government Pleader was that a scrutiny of the present investigation will indicate that there is not the slightest hint of bias or partiality and therefore the Court should not bend over backwards and apply the principle in a vacuum and virtually shoot down the prosecution case. This argument is not altogether correct because the principles of ethical jurisprudence hold good irrespective of what the consequences are. Where the law prescribes a prohibition to the Investigating Officer being the complainant, such as a situation in which the law would preclude a prosecutor from being a witness at a trial or a situation in which where the prosecutor is absent, the Presiding Officer takes over the role of the prosecutor. The law prescribes a certain bar for valid reasons, there can be no compromise and if the bar is transgressed then the consequences are automatic. It would be too dangerous to accept the argument that the Court should still test the material to find out whether there are traces of bias.

12. Before parting with this judgment, we need to remind the prosecuting authorities that the error which has occurred in the present case ought never to be repeated and the Director General of Police still bring it to the notice of all Investigating Officers



in the state that there is a legal bar to an Investigating Officer functioning in the dual capacity of the complainant also and that this error should not be repeated because it would virtually vitiate even an otherwise reasonably good investigation.

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(iii) The Apex Court followed the ratio in Megha Singhs case in the judgment reported in (2005) 5 SCC 258 (Mukhtiar Ahmed Ansari v. State) and acquitted the accused. However, the view of the Apex Court has been distinguished by the Apex Court in many cases including the case reported in (2015) 3 SCC 220 (Vinod Kumar v. State of Punjab) following the judgment reported in (2004) 5 SCC 230 (Jeevanantham v. State) holding that unless the defacto complainant, who also happens to be the investigation officer, is personally biased and prejudiced and personally interested to get conviction to the accused, the contention cannot be sustained."

Considering the said decisions along with the facts of the present case, in the present case, the first respondent is the complainant as well as the investigation officer. The first respondent is personally biased and prejudiced and personally interested to get conviction to the petitioner, since already, the first petitioner approached this Court in W.P.(MD) No.17203 of 2014 and obtained order against the first respondent. Therefore, the entire investigation is vitiated.

16.In view of the same, this Court is of the view that the continuous of the prosecution as against the petitioners will be a futile exercise and it will be a waste of time and energy. As such, this criminal original petition deserves to be allowed by quashing the said proceedings as against the petitioners.

17.In the result, this criminal original petition is allowed and the criminal proceedings in S.T.C.No.1218 of 2015 on the file of the Judicial Magistrate No.II, Tiruchirappalli, Tiruchirappalli District is hereby quashed as against the petitioners herein. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (AD-I)

/True Copy/

Sub Assistant Registrar (CS-IV)



To

1. The Judicial Magistrate No.II,  
Tiruchirappalli.

2. The Inspector of Police,  
Cantonment Police Station,  
Tiruchirappalli,  
Tiruchirappalli District.

3. The Additional Public Prosecutor,  
Madurai Bench of Madras High Court,  
Madurai.

+ 1 CC TO Mr.C.MUTHU SARAVANAN, ADVOCATE IN SR No. 84873

ARUL

TE/VB/PM/SAR-4 : 22/10/2018 : 9P/5C

Cr1.O.P. (MD) .No..14907 of 2015 and  
M.P. (MD) No.1 of 2015  
17.09.2018