



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

ORDERS RESERVED ON : 01.10.2018
ORDERS PRONOUNCED ON : 08.10.2018

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THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

CrIOP(MD)Nos.6978, 8533 and 12741 of 2018

and

CrIIMP(MD)Nos.3823, 3824, 3318, 3319 5825 and 5826 of 2018

CrI OP(MD)No.6978 of 2018

A.Rajendra

... Petitioner

Vs

1.The State represented by
The Deputy Superintendent of Police,
Tiruchendur,
Tuticorin District.
[Cr.No.59 of 2014],
DCB Tuticorin District,
Tuticorin.

2.M.Raveendran
Authorised Signatory,
M/s.RBJ Blue Star Enterprises,
No.16/169, Victoria Street,
Tuticorin - 628001.

... Respondents

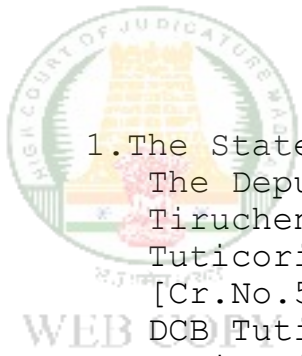
PRAYER:- Petition filed under Section 482 of Criminal Procedure Code, to call for the records pertaining to the order passed by the Learned Judicial Magistrate III, Tuticorin in CrI.M.P.No.2049 of 2017 in Crime No.59 of 2014 dated 16.12.2017 allowing the protest petition of the 2nd respondent and the consequential order dated 13.03.2018 taking cognizance and issuing summons to the petitioner and quash the same.

For Petitioner :Mr.Mohan for
for Mr.R.Diwakaran
For Respondent No.1 :Mr.M.Chandrasekaran,
Additional Public Prosecutor
For Respondent No.2 : Mr.S.Palanivelayudham
for Mr.N.Thinakaran

CrIOP(MD)No.8533 of 2018

D.Y.V.Victor

... Petitioner



1.The State represented by
The Deputy Superintendent of Police,
Tiruchendur,
Tuticorin District.
[Cr.No.59 of 2014],
DCB Tuticorin District,
Tuticorin.

2.M.Raveendran
Authorised Signatory,
M/s.RBJ Blue Star Enterprises,
No.16/169, Victoria Street,
Tuticorin - 628001.

... Respondents

PRAYER:- Petition filed under Section 482 of Criminal Procedure Code, to call for the records pertaining to the order passed by the Learned Judicial Magistrate III, Tuticorin in CrI.M.P.No.2049 of 2017 in Crime No.59 of 2014 dated 16.12.2017 allowing the protest petition of the 2nd respondent and the consequential order dated 13.03.2018 taking cognizance and issuing summons to the petitioner and quash the same.

For Petitioner	:	Mr.Mohan for for Mr.R.Diwakaran
For Respondent No.1:		Mr.M.Chandrasekaran, Additional Public Prosecutor
For Respondent No.2 :		Mr.S.Palanivelayudham for Mr.N.Thinakaran

CrIOP(MD)No.12741 of 2018

Rohit Kantilal Ravani

... Petitioner

Vs

1.RBJ Blue Star Enterprises,
16/169, Ground Floor,
Vicotria Stree,t
Thoothukudi - 628 001.
Thorought its Proprietor
Mrs.Esther Jeyarani

2.The State represented by
The Inspect of of Police/
The Deputy Superintendent of Police,
Tuticorin District.
[Cr.No.59 of 2014]

... Respondents

PRAYER:- Petition filed under Section 482 of Criminal Procedure Code, to call for the records relating to the C.C.No. 38 of 2018 pending on the file of the Judicial Magistrate court No. III, Thoothukudi, Thoothukudi District and quash the same.



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For Petitioner : Mr.T.S.R.Venkatramana
For Respondent No.2: Mr.M.Chandrasekaran,
Additional Public Prosecutor
For Respondent No.1 : Mr.S.Palanivelayudham
for Mr.N.Thinakaran

COMMON ORDER

These petitions have been filed by A-1, A-3 and A-2 respectively, seeking to quash the order dated 16.12.2017, wherein the Court below has taken cognizance of the protest petition filed by the second respondent and converted it into a private complaint and issued summons to the petitioners under Section 204 of CrPC.

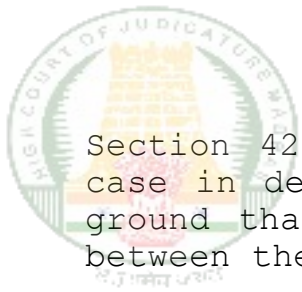
2.The brief facts that are necessary to decide these petitions are as follows:

2.1.The petitioners herein are the company and its Directors. The second respondent company undertakes dredging works. The second respondent entered into a contract with the petitioner company, whereby a work order was granted in favour of the second respondent towards dredging work at Vishagapattinam Port Trust. This contract was entered into between the parties on 18.05.2013. The petitioner company was not satisfied with the work carried out by the second respondent therefore, notice was issued on 03.03.2014, terminating the contract. The second respondent initiated arbitration proceedings against the petitioner company and its Directors on 24.04.2014 and the same is pending.

2.2.In the meantime, a complaint was given by the second respondent against the petitioners before the Superintendent of Police, Thoothukudi on the allegations that the second respondent had certified invoice for claiming mobilisation charges for a sum of Rupees Seven Crores and out of the same the second respondent was made to send Rupees Six Crores to A-2 and this amount was not repaid by A-2. The further allegations that was made in the complaint is that the total amount paid and credited to the second respondent company was shown as Rs.72,09,159/- and total TDS amount paid to IT department was shown as Rs.72,091.59. This TDS deduction was made even without paying the amount to the second respondent.

2.3.It is to be noted here, that this allegation made in the complaint runs contrary to the stand taken in the reply notice dated 18.02.2014 given by the second respondent wherein, the second respondent does not talk about the said amount and only claims for the amounts due to them pursuant to the work carried out by the second respondent.

2.4.The complaint given to the Superintendent of Police, Thoothukudi, was forwarded to the Inspector of Police, District Crime Branch, Thoothukudi and an FIR came to be registered in Crime No.59 of 2014 against the petitioners for an offence under



Section 420 of IPC. The District Crime Branch, investigated the case in detail and filed a closure report on 07.11.2015, on the ground that the entire case is civil in nature and the dispute between the parties is pending before a civil forum

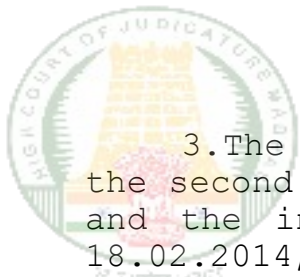
2.5. The second respondent filed a protest petition before the Judicial Magistrate -I, Thoothukudi. The Judicial Magistrate after considering the entire facts and circumstances of the case dismissed the protest petition filed by the second respondent in CrI MP No.151 of 2016, by an order dated 23.03.2016.

2.6. The second respondent filed CrI OP (MD) No.6413 of 2016 before this Court seeking for change of investigation. The second respondent also filed CrI OP (MD) No.19645 of 2016, before this Court challenging the dismissal of the protest petition filed before the Court below. This Court took all the petitions and heard altogether. This Court by an order dated 06.03.2017 set aside the order passed by the Court below in the protest petition and remanded the matter back to the Judicial Magistrate -I, Thoothukudi for afresh disposal on the closure report. This Court also directed the Court below to nominate any other Police Officer, in case further investigation is ordered.

2.7. Pursuant to the orders passed by this Court, the learned Judicial Magistrate -I, Thoothukudi by an order dated 18.04.2017, ordered further investigation in Crime No.59 of 2015 and directed the Superintendent of Police, Thoothukudi to nominate an Investigating Officer. The Superintendent of Police, Thoothukudi, nominated the Deputy Superintendent of Police, Thiruchendur Division to conduct the further investigation. The Deputy Superintendent of Police, Thiruchendur Division, conducted a detailed investigation and based on the materials and statements recorded from the witnesses, came to a categorical conclusion that the entire case is civil in nature, arising out of a business transaction between the parties and filed a closure report before the Judicial Magistrate-III, Thoothukudi on 10.08.2017.

2.8. The second respondent again filed a protest petition before the Court below in CrI MP No.2049 of 2017. The investigating officer also filed a detailed reply by placing reliance upon various materials and statements recorded from the witnesses, for the protest petition filed by the second respondent.

2.9. The Court below passed an order dated 16.12.2017 whereby, the Court below treated the protest petition as a private complaint and posted the case for recording sworn statement of the complainant as required under Section 200 of CrPC. Subsequently, on 13.03.2018, the Court below after recording sworn statement of the second respondent passed an order, taking cognizance of the complaint and issued summons to the petitioners. It is this order that has been put to challenge before this Court in the above petitions.



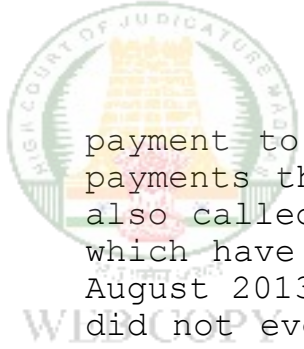
3.The learned Counsel for the petitioner would submit that the second respondent has tried to improve the case at every stage and the initial stand taken by him in his reply notice dated 18.02.2014, was improved in the first complaint given by him on 27.08.2014 and was further improved in the protest petition that was filed before the Court and the case which is purely civil in nature, is sought to be given a criminal colour. The learned Counsel for the petitioner would further submit that when the Court below took a decision to convert the protest petition into a criminal complaint and took cognizance of the same, the Court below ought to have considered the closure report filed by the Deputy Superintendent of Police, Thiruchendur, Division and ought to have seen if any materials that were produced by the second respondent was not considered by the concerned Police and only thereafter should have taken cognizance of the complaint and issued summons to the petitioners. According to the learned Counsel for the petitioner the order taking cognizance does not reflect any application of mind and mechanical order has been passed by the Court below. The learned Counsel for the petitioner further submitted that arbitration proceedings are still pending and the second respondent instead of agitating his rights in the proceedings, is attempting to recover the alleged dues from the petitioners by filing one complaint after another. The learned Counsel by the petitioner would submit that the order taking cognizance by the Court below and issuing summons to the petitioners, is liable to be set aside.

4.Per contra, the learned Counsel appearing for the second respondent would submit that it is well within the powers of the Court below to convert the protest petition into a private complaint and the same cannot be considered to be a second complaint. The learned Counsel would further submit that the Court below has applied its mind for taking sworn statement of the second respondent and therefore, the same cannot be interfered with by this Court at this stage. Therefore, the learned Counsel pleaded before this Court to dismiss the Criminal Original Petitions.

5.This Court has carefully considered the submissions made on either side.

6.On a careful reading of the entire materials placed on record, this Court is of the considered view that the dispute between the parties is clearly civil in nature.

7.The sum and substance of the grievance of the second respondent pertains to non payment of mobilisation charges and the dues for dredging work done by the second respondent at Vishagapattinam Port Trust. When the second respondent gave a reply notice dated 18.02.2014, the only grievance expressed by him was that the petitioners did not release the payment for the work carried out at the site and that the petitioner was making direct



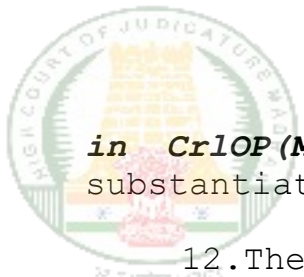
payment to the workers and the suppliers, instead of making the payments through the second respondent. The second respondent has also called upon the petitioners to pay all the pending invoices, which have already been submitted for the work carried out during August 2013 to January 2014. In this notice, the second respondent did not even whisper about Rupees Six Crores being taken away by A-2 or about the TDS deducted without making the actual payment to the second respondent. This improvement in the stand taken by the second respondent came up for the first time when the complaint was given to the Superintendent of Police, Thoothukudi District on 27.08.2014.

8. After the orders were passed by this Court, on an earlier occasion, the Court below ordered for further investigation and the further investigation was done by the Deputy Superintendent of Police, Thiruchendur Division. A thorough investigation was done by the investigating officer and his closure report runs to nearly 15 pages. The said Investigating Officer has dealt with each and every allegation made by the second respondent and has also discussed the various materials collected during the investigation and the statements taken from the witnesses and has come to a categorical conclusion that the second respondent has not established any case for cheating and the entire dispute between the parties is civil in nature, arising out of a business transaction.

9. When the protest petition is filed by the second respondent questioning the closure report filed by the Deputy Superintendent of Police, Thiruchendur Division, the Court below is left with three options. The first option is to disregard the closure report and take cognizance of the final report and issue summons to the accused person. The second option is to accept the closure report and issue refer charge notice to the *de facto* complainant to enable him to file a protest petition and the third option that is available to the Court below is to order further investigation on the protest petition filed by the *de facto* complainant.

10. If the Court below wants to convert the protest petition into a private complaint, it is open to the Court to do so, provided that the Court below had considered the entire closure report filed by the Police and it had come to a conclusion that the materials placed by the *de facto* complainant was not considered by the respondent Police or the *de facto* complainant has come up with some further materials in order to substantiate his case. This exercise has not been done by the Court below, while converting the protest petition into a private complaint and taking cognizance of the same.

11. The learned Counsel for the petitioner relied upon the judgments of this Court in **V. Ganesan and Another Vs. The Inspector of Police, and another in Cr1OP(MD) No. 14407 of 2012 dated 04.07.2018** and in **O. Krishna Pillai and others Vs. T. Petchinathan**



in **CrIOP(MD)No.15636 of 2011, dated 17.11.2017**, in order to substantiate his case.

12.The relevant portions of the judgment in in **V.Ganesan and Another Vs. The Inspector of Police, and another in CrIOP(MD) No.14407 of 2012 dated 04.07.2018** is extracted hereunder:

"6.As rightly contended by the learned counsel appearing for the petitioners, when the Protest Petition was filed, the Closure Report was already available on file. Therefore, the Court below ought to have closely scrutinized the material on record before taking the same on file and issuing summons to the accused. He placed reliance on the decision of the Hon'ble Supreme Court reported in (2015) 12 SCC 420-(Mehmood UL Rehman Vs. Khazir Mohammad Tunda and others). He drew the attention of this Court to paragraphs 20 to 22 in which it was held as follows:-

20.The extensive reference to the case law would clearly show that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the allegations in the complaint, when considered along with the statements recorded or the inquiry conducted thereon, would constitute violation of law so as to call a person to appear before the Criminal Court. It is not a mechanical process or matter of course. As held by this Court in Pepsi Foods Limited. to in motion the process of criminal law against a person is a serious matter.

21.Under Section 190(1)(b) Cr.P.C, the Magistrate has the advantage of a Police report and under Section 190 (1) (c) Cr.P.C, he has the information or knowledge of commission of an offence. But under Section 190 (1) (a) Cr.P.C., he has only a complaint before him. The Code hence specifies that ? a complaint of facts which constitute such offence?. Therefore, if the complaint, on the face of it, does not disclose the commission of any offence, the Magistrate shall not take cognizance under Section 190 (1) (a) Cr.P.C. The complaint is simply to be rejected.

22.The steps taken by the Magistrate under Section 190 (1) (a) CrPC followed by Section 204 CrPc should reflect that the Magistrate has applied his mind to the facts and the statements and he is satisfied that there is ground for proceeding further



in the matter by asking the person against whom the violation of law is alleged, to appear before the Court. The satisfaction on the ground for proceeding would mean that the facts alleged in the complaint would constitute an offence, and when considered along with the statements recorded, would, prima facie, make the accused answerable before the Court. No doubt, no formal order or a speaking order is required to be passed at that stage. The Code of Criminal Procedure requires speaking order to be passed under Section 203 Cr.P.C when the complaint is dismissed and that too the reasons need to be stated only briefly. In other words, the Magistrate is not to act as a Post Office in taking cognizance of each and every complaint filed before him and issue process as a matter of course. There must be sufficient indication in the order passed by the Magistrate that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation under Section 202 Cr.P.C, if any, the accused is answerable before the Criminal Court, there is ground for proceeding against the accused under Section 204 Cr.P.C, by issuing process for appearance. The application of mind is best demonstrated by disclosure of mind on the satisfaction. If there is no such indication in a case where the Magistrate proceeds under Sections 190 /204 Cr.P.C, the High Court under Section 482 Cr.P.C is bound to invoke its inherent power in order to prevent abuse of the power of the Criminal Court. To be called to appear before the Criminal Court as an accused is serious matter affecting one's dignity, self respect and image in Society. Hence, the process of Criminal Court shall not be made a weapon of harassment.?

7. The ratio laid down is that there must be due application of mind before issuing process. In the present case, there is absolutely nothing to indicate that there was any application of mind before cognizance was taken and process was issued to the accused. This Court is in full agreement with the aforesaid submission of the learned counsel appearing for the petitioner.

13. The relevant portion of the judgment ***in O. Krishna Pillai and others Vs. T. Petchinathan in CrIOP (MD) No. 15636 of 2011, dated 17.11.2017*** are extracted hereunder:

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

3. After detailed investigation, the law enforcing agency filed a closure report and the matter was referred as 'Mistake of Fact'. As against



the closure report, the respondent herein filed a petition under Section 482 Cr.P.C before this Court in Crl.O.P.(MD)No.10530 of 2008 on 10.11.2008, this Court issued a direction to the law enforcing agency to serve the referred notice to the respondent herein enabling him to proceed in accordance with law by filing a protest petition.

4. Aggrieved by the same, the respondent herein filed a protest petition before the Judicial Magistrate No.III, Nagercoil. Thereafter, the law enforcing agency has conducted a detailed investigation and filed a closure report on 06.12.2010. Being not satisfied with the earlier two closure report, the respondent herein filed a private complaint for the very same allegation before the Judicial Magistrate No.III, Nagercoil. Against which, the petitioners filed this petition under Section 482 Cr.P.C.

5.... In support of his contention, he has relied upon the decision of the Hon'ble Supreme Court Mehmood UL Rehman v. Khazir Mohammed Tunda & others reported in AIR 2015 Supreme Court 2195, it has been held as follows. The steps taken by the Magistrate under Section 190(1)(a) of Cr.P.C. Followed by Section 204 of Cr.P.C. Should reflect that the Magistrate has applied his mind to the facts and the statements and he is satisfied that there is ground for proceeding further in the matter by asking the person against whom the violation of law is alleged, to appear before the Court. The satisfaction on the ground for proceeding would mean that the fact alleged in the complaint would constitute an offence, and when considered along with the statements recorded, would, prima facie, make the accused answerable before the Court. No doubt, no formal order or a speaking order is required to be passed at that stage. The code of Criminal Procedure requires speaking order to be passed under Section 203 of Cr.P.C. when the complaint is dismissed and that too the reasons need to be stated only briefly. In other words, the Magistrate is not to act as a post office in taking cognizance of each and every complaint filed before him and issue process as a matter of course. There must be sufficient indication in the order passed by the Magistrate that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded, and the result of inquiry or report of investigation under Section 202 of Cr.P.C., if any, the accused is answerable before the Criminal Court,



of 2011 on the file of the Judicial Magistrate No.III, Nagercoil is quashed. Consequently, connected miscellaneous petitions are closed.

14.The above two judgments squarely apply to the facts of the case. As held by this Court, the order taking cognizance of the private complaint, ought to have reflected the application of the mind of the Court below, in considering the closure report, which is already available before the Court. There is absolutely no reference to the closure report in the order taking cognizance of the private complaint by the Court below. The Court below must have also taken into consideration the fact that the second respondent was repeatedly attempting to improve his case at every stage and the Court below did not take this important aspect into consideration. The Court below also did not take into consideration the fact that the dispute between the parties is already pending before the Arbitrator. The most important factor, which the Court below did not take into consideration is that the entire dispute is purely civil in nature and the second respondent instead of pursuing the remedy before the civil forum has attempted to give the dispute a criminal colour and has managed to keep the criminal case pending for the last four years. Not once, but twice the Police have thoroughly investigated this case and have filed closure reports. Therefore, some credence must be given for these closure reports and the Court below cannot completely disregard these closure reports and take cognizance of the private complaint independently.

15.The order of the Court below taking cognizance of the private complaint does not reflect any application of mind. The materials available on record does not make any offence under Section 120(b), 420, 423, 467, 468, 406, 471 and 506(i) of IPC. The Court below has mechanically passed an order taking cognizance of the private complaint by completely disregarding the closure reports filed by the Police. That apart, the continuance of the criminal proceedings against the petitioners is a clear abuse of process of Court and the interest of justice requires the entire proceedings to be quashed.

16.In the result, the order passed by the Court below in CrI MP NO.2049 of 2017, dated 13.03.2018, is hereby set aside and the entire proceedings in CC No.38 of 2018, on the file of the Judicial Magistrate-III, Tuticorin, is hereby quashed. Accordingly, the Criminal Original Petitions are allowed. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CO)

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To

1.The Judicial Magistrate-III,
Tuticorin,

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2.The Deputy Superintendent of Police,
Tiruchendur,
Tuticorin District.
DCB Tuticorin District,
Tuticorin.

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

+2 CC To MR.N.THINAKARAN, Advocate SR. NO.89077

+1 CC To MR.R.DIWAKARAN, Advocate SR. NO.89247

+1 CC To MR.T.S.R.VENKAT RAMANA, Advocate SR. NO. 89118

Pre delivery Common Order made in

CrIOP(MD)Nos.6978, 8533

and 12741 of 2018

08.10.2018

DSK

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