

HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

*THE HONOURABLE Dr. JUSTICE B. SIVA SANKARA RAO

+ Criminal Petition No.2811 of 2017

31.12.2018

#Between:

Kanumuri Venkata Subba Raju,

...Petitioner/ accused

AND

State of AP rep. by Sub Inspector
Of Police, Atreyapuram Police Station,
Through the Public Prosecutor,
High Court of Judicature at Hyderabad
And another

... Respondents

!Counsel for the petitioner : M/s Tera Rajinikanth Reddy
R.Giri Kumar

Counsel for the 1st respondent : Public Prosecutor
Counsel for the 2nd respondent : M/s Challa Gunaranjan

<Gist :

>Head Note:

? Cases referred:

¹ 2013 5 SCC 762

² AIR 2001 SC 2721

³ 1985 (2) SCC 537

⁴ 1989 (2) SCC 132

⁵ 2016 8 SCC 774

⁶ (2014) 3 SCC 306

⁷ (2011) 9 SCC 527

⁸ AIR 2007 SC 2739

⁹ 2007 14 SCALE 263

¹⁰ 2017 (4) SCC 177

¹¹ (2014) 3 SCC 92

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

Criminal Petition No.2811 of 2017

ORDER :

The petitioner is Sri Kanumuri Venkata Subba Raju native of East Godavari District, Andhra Pradesh is a resident of USA filed the petition representing through his father as Special Power of Attorney(for short, 'the SPA') impugning the docket order of the learned Addl.Judl.Magistrate of First Class(for short, 'the AJMFC'), Kothapet, East Godavari in CrI.M.P.No.978 of 2013, dt.26.06.2014. A private complaint filed by the 2nd respondent/ complainant before the AJMFC, Kothapet, who referred the same to police u/ sec.156(3) of CrPC, for registration and investigation and the police, Atreyapuram Police Station registered the same as Cr.No.47 of 2012 for the offences punishable u/ sec.3, 406, 408, 415, 417, 420 r/w 34 IPC and after investigation filed final report referring the case is civil in nature. It is aggrieved by the same, the complainant filed an application before the Court in CrI.M.P.No.978 of 2013 seeking further investigation in which a note was put up which speaks "*The petitioner/ defacto-complainant prays through his counsel that the Hon'ble Court may be pleased to order to direct the police to conduct re-investigation to place truth before the Hon'ble Court.*" Based on that, the learned Magistrate passed docket order dt.29.11.2014 which speaks "*Heard, received the petition, satisfied with the reasons mentioned in the petition. Hence, the complaint forwarded to DSP, Amalapuram for re-investigation and DSP, Amalapuram is directed to investigate the matter and file report by 08.08.2014.*" The matter from 08.08.2014 coming for report of the DSP, Amalapuram to 08.09.2014 on which day ordered to issue show cause notice to the DSP, Amalapuram, for not complying the orders of the Court and the Sub Inspector of Police, Amalapuram present and filed memo duly signed by DSP, Amalapuram seeking further time for filing report, on which heard and extended time till

29.12.2014 and meantime note was put up on the docket order showing that the Chief Judicial Magistrate, Rajahmundry, passed order dt.29.11.2014 saying the entire Crime No.47 of 2012 transferred to II AJMFC, Kakinada(Designate Court for CID) as per the Memo filed by the DSP,Rajahmundry,dt.29.11.2014. On 29.12.2014, the docket order shows that the complainant absent, petition filed and allowed and orders of the Chief Judicial Magistrate(for short, 'the CJM') vide Dis.No.1225/ 15.12.2014 are received. Hence, the office is directed to transfer FIR and entire crime record in Cr.No.47 of 2012 of Atreyapuram Police Station to II AJMFC, Kakinada(Designated Court of CID). With reference to the memo of the DSP, Regional Office, CID, Rajahmundry dt.29.11.2014 (even date), the CJM, at Rajahmundry, passed the order which speaks *"Pursuant to the memo filed by the Deputy Superintendent of Police, Regional Office, CID, Rajahmundry, under reference cited above, the Judicial Magistrate of the First Class, Kotahpet is hereby directed to transfer the FIR, and entire crime record in Cr.No.47/2012 U/s.3,406,408,415, 417 and 420 r/w 34IPc and Sec.156(3) Cr.P.C. of Atreypuram Police Station to the Court of the II Additional Judicial Magistrate of First Class, Kakinada (designated Court of C.I.D)"*.

2. From what is referred supra, coming to the petition of the complainant in CrI.M.P.No.978 of 2013, it is averred of accused deceived and caused wrongful loss to the complainant of about 4.5Crores and a private complaint filed was referred to police for investigation on 10.05.2012 from which the Cr.No.47 of 2012 was registered by the SHO, Atreyapuram who examined the complainant and two more witnesses viz: Ch.Sridhar and Rajesh Agarwal who aware of the facts and earlier mediated between the accused and the complainant to settle the issue but for the past one year, there is no progress in the investigation and the complainant was not called by the police for further investigation though he is waiting to

cooperate to the police in the investigation. While so, to his shock and surprise on 16.04.2013 he was served information by registered post stating police filed referred report of the case is civil in nature before the learned AJFCM, Kothapeta and advised to approach the Court for any grievance. After receipt of private complaint except registering FIR and examining two witnesses besides the complainant, the police did nothing and police wantonly failed in ascertaining truth by investigation in relation to the financial fraud caused to the complainant. The final report dt.09.04.2013 filed before the JFCM on 09.04.2013 by police shows after obtaining legal opinion and from the permission of the superior police officer-the DSP, Amalapuram, the case referred as civil in nature but the police did not conduct proper investigation and did not even examine documents enclosed with the complaint and being influenced by the accused, the referred report was filed who washed off the hands and even the complaint averments in page 22 constitute liability civil as well as criminal. The investigating officer ignored Section 188CrPC and guidelines of the Apex Court in referring the case as civil in nature and it is not correct to say in India no law permits for prosecution of persons in such cases which fall under the same facts. Pending investigation the accused moved to High Court to quash the FIR vide CrI.P.No.5637 of 2012 that was ended in dismissal observing investigation shall go on and further held the plea taken by the accused constitutes only civil liability is negated and the same was not mentioned in the final report by police. As police did not conduct real investigation to place the truth before the Court, the Court is still empowered to conduct further investigation.

3. It is not even mentioned that the learned Magistrate did not accept the final report filed by the police. Before accepting the final report filed by police, there is no necessity of hearing the complainant by the learned Magistrate. Once such is the case, the final report if at all accepted

by the learned Magistrate but for to treat the petition as protest to proceed as a private complaint procedure from said protest against the police referred report in showing how the investigation is not proper and how cognizance can be taken by recording sworn statement of complainant and other witnesses by the Court with what referred facts of those already examined by the police during investigation. The learned Magistrate did not even resort to the recourse in its docket order referred supra which is no doubt mistakenly put up note as if asked for re-investigation in ordering by the impugned docket order, dt.26.06.2014 by the AJFCM, Kothapet in nominating the DSP Amalapuram for re-investigation contemplated by Section 156(3) CrPC and if at all to know progress of investigation and to conduct further investigation pending acceptance of the final report by the Magistrate. After acceptance the Magistrate has no power at all even to order further investigation, leave about the re-investigation is outside the power of the Magistrate from the settled expressions of the Apex Court which stated vividly by referring to 31 expressions earlier of the Apex Court and of some High Court's in Vinay Tyagi Vs. Irshad Ali¹ where it is held para-21 onwards that investigation can be initial investigation, further investigation, fresh/ de-novo/re-investigation and initial investigation is being conducted by the police in furtherance of registration of crime leading to filing of final report u/sec.173(1)CrPC within the police prerogative to investigate including from any order of Magistrate on any private complainant referred to police under Section 156 (3) CrPC. So far as the further investigation concerned, which is to collect further oral or documentary material after police final report filed, which is in terms of Section 173(8) CrPC vested with the police as executive power in continuation to the previous investigation to discover further oral or documentary material only from what they discovered at a subsequent

¹ 2013 5 SCC 762

stage to the initial investigation from which final report filed to file from such further investigation as supplementary report to supplement the primary investigation and it does not effect by wiping out directly or indirectly initial investigation covered by the final report and the basis of discovery of fresh material is in continuation of same offence and chain of events relating to same occurrence as a complete contra-distinction to re-investigation or fresh investigation or de-nova investigation for which, there must be definite order of the Court and neither investigating agency nor the Magistrate are empowered to do so but for by the constitutional courts with wide plenitude power to exercise sparingly that too in rarest of the rare cases and that too where the earlier investigation is unfair to the judicial conscience of the Court otherwise Court should be reluctant to interfere. It was also observed so far as further investigation after final report from initial investigation to conduct by police within their right u/ sec.173(8) CrPC concerned, the procedural propriety requires to seek a permission of the Magistrate concerned, to do and to file supplementary chargesheeting, the power of the learned Magistrate to direct further investigation from police final report filed to exercise sparingly in exceptional cases to meet the ends of justice. So far as the constitutional Courts, power of fresh or de-novo or re-investigation which are the synonymous accusations including the power to transfer investigation from one agency to other to meet the ends of justice where the facts so demand that to be exercised by the superior Courts sparingly and when the Court circumspection by invoking u/ sec.482 or Article 226 of the Constitution of India that too by a specific order and for reasons to be recorded if at all the earlier investigation is entirely interfered but tainted, undesirable are being based on no truth. Even the expressions of the Apex Court in Hemant Dhasmana vs Central Bureau Of Investigation² to Section 173(8) CrPC by the Special Court with

²AIR 2001 SC 2721

the Magistrate Powers, by quoting with approval from the expressions of Bhagwant Singh Vs. Commissioner of Police³ a 3 Judge Bench of at the option of the learned Magistrate from the police investigation and report u/ sec.173(2) CrPC is to accept the police report and drop the proceedings or to disagree with the report and to take cognizance of the offences and issue process against any of the accused from any sufficient ground for proceeding further or the court may direct further investigation to be made by police before acceptance of the final report. It also quoted the other 3 Judge Bench expression in M/s India Carat Private Limited Vs.State of Karnataka⁴ in similar lines was a Magistrate got power to defer with the police final report under Section 173(2) CrPC and at para-21 in Hemant(supra) observed that the Magistrate could not direct a particular Police Officer or an Officer of particular rank should conduct further investigation u/ sec.173(8) CrPC. Referring to and relying upon Vinay Tyagi supra, in the 2 Judge Bench expression Chandrababu @ Moses Vs. State Transport Inspector of Police⁵, it was observed that the Magistrate's order directing further investigation is proper, to direct by another investigating agency is not sustainable and fresh or de-nova or re-investigation can be ordered only by the superior Courts within their inherent powers in the rarest of rare cases and Magistrate has no such power. It also referred constitution Bench expression of the Apex Court in Dharampal Vs. State of Haryana⁶ Chandrababu Supra on the scope of the Magistrate's power to accept or not the final report from Magistrate got power to defer with the police opinion expressed in the final report if at all to take cognizance, leave about remedy of the complainant to raise protest for the Magistrate to consider on said protest by following the procedure to take cognizance after recording the sworn statement of the complainant and other witnesses

³ 1985 (2) SCC 537

⁴ 1989 (2) SCC 132

⁵ 2016 8 SCC 774

⁶ (2014) 3 SCC 306

if any. So far as the scope under Section 188CrPC concerned, the expressions of the Apex Court in Thota Venkateshwarlu Vs. State of Andhra Pradesh⁷ is very clear that the power is for post-cognizance enquiry or investigation from the wording of Section with the proviso and for that the earlier expressions of the Apex Court in Ajay Agarwal in saying without permission of the Central Government for the offences committed by native national even outside India post-cognizance trial or enquiry cannot be proceeded. The bar has no application thereby to the police investigation or before acceptance of final report for further investigation by the learned Magistrate if at all, leave about the complainant pending investigation can ask as laid down in Sakiri Vasu Vs. State of Uttar Pradesh⁸ from the power of Magistrate u/ sec.156 and 157 to direct progress of investigation including for further investigation. However the fact remains after final report of the police under Section 173(2) CrPC filed and accepted by the Magistrate, but for any further investigation, the police if at all to do under Section 173(8) CrPC, the Magistrate has no power to reopen accepted final report to direct further investigation where it is accepted to close the case from mistake of fact or mistake of civil in nature or the like by not chosen to take cognizance deferred with police opinion and not chosen to direct further investigation before its acceptance by the learned Magistrate. It is observed in Sarabjit Rick Singh vs Union of India⁹ that at para-35 referring to however earlier that if the final report of the police has been accepted by the Magistrate and no appeal or revision was filed against the order of Magistrate accepting final report, then that is the end of the matter. However, if the Magistrate has not yet passed any order on the police report, he may do so in accordance with law for further investigation if not or the like. Even the latest 2 Judge Bench expression of the Apex Court in

⁷ (2011) 9 SCC 527

⁸ AIR 2007 SC 2739

⁹ 2007 14 SCALE 263

Amruta Bai S.Patel Vs. Sunita Bai¹⁰ including from paras-23 to 29 referring to Bhagwan Singh supra among others no way says Magistrate got power to order re-investigation even after acceptance of the final report filed by the police under Section 173(2) CrPC, for what it stated is under Section 154 to 157 read with 177 CrPC, from registration of the crime and sending report of the opinion to the Magistrate empowered to take cognizance of such offence on police report by investigation, the police to notify the informant and from the final report under Section 173(2) CrPC filed by completion of investigation for the Magistrate if at all to take cognizance under Section 190CrPC therefrom, informant who lodges the FIR does not fade away therewith and is very much concerned with the action initiated by the Station House officer pursuant to the report lodged and crime registered that not only can be of said report to be supplied to him on free of costs he has to be notified as to the decision of the final report if any referred report filed without charging the accused and the course open to the Magistrate on the police final report, even any referred report filed Magistrate would be left at liberty either to accept the report to drop the proceedings or disagree with the police referred report and to take cognizance if satisfy of grounds for proceeding further and issue process or would direct further investigation to be made by the police which are of noticeable at the pre-cognizance stage and can be opted by the Magistrate depending upon satisfaction of assessment of the material than on record. It also speaks before acceptance of the final report, the Magistrate may order further investigation under Section 156CrPC. Thus even from this, once the police final report accepted by the Magistrate, he is *functus officio* and cannot direct thereafter any further investigation but for if at all the police to conduct further investigation and file supplementary final report invoking Section 173(8) CrPC by the intimation to the Magistrate

¹⁰ 2017 (4) SCC 177

concerned. However what is the right of the defacto-complainant after police final report and its intimation is to raise a protest and from that as referred supra if at all final report once accepted and any cognizance taken even against the same or for some of the offences against all or some the accused may be respectively, the Magistrate is *Functus Officio* but for the power of hearing the accused also besides prosecution agency before framing of charges or not and otherwise under Section 319CrPC during trial. So far as proceeding under Section 319 Cr.P.C. concerned, the basis to proceed requires something more than material to frame charges that too during trial from any worth evidence to proceed as laid down by the Constitution bench of the Apex Court in Hardeep Singh Vs. State of Punjab¹¹

4. Thus the order of the learned Magistrate which no way discloses final report is accepted or not. The Magistrate within his power under Sections 156 and 157 CrPC can direct further investigation if at all by some Station House Officer or Investigating Officer and successor without naming any particular officer not by any other agency and for which it is not even from any request of the police but for at the instance of the defacto-complainant provided there is no acceptance or passing of orders on the final report by deferring to and taking cognizance for even some or other offences and even against some or other accused and even then there is no power for Magistrate to order for fresh or de-novo or re-investigation which power since available to the Constitution Courts. Once on final report of police, order passed by the learned Magistrate other than further investigation referred supra, by accepting or differing with same opinion of the Investigating Officer, the learned Magistrate is *functus officio*. Thereby said docket order of the learned Magistrate Kothapet, dt.26.06.2014 is unsustainable and is liable to be quashed and quashed accordingly.

¹¹ (2014) 3 SCC 92

5. Here that is not the end of the matter from what the subsequent docket proceedings of the learned Magistrate including the docket orders of the learned CMM showing the investigation taken up by the CBCID from which the case was transferred to the AJFCM, Kakinada having jurisdiction. Therefrom also it is made clear that the investigation of CBCID must confine to only further investigation including by re-examination of witnesses but not for *de-novo* investigation or fresh investigation by ignoring the earlier investigation in toto. In view of the above subsequent event supra even the Magistrate cannot order fresh investigation or further investigation after passing order on the police final report and the order of the learned Magistrate thereby unsustainable and now quashed supra that cannot be taken into consideration for the reason the order of the learned Magistrate for fresh investigation became infructuous. The CBCID can take up thereby further investigation as referred supra if at all by filing memo before the Magistrate Court concerned u/ sec. 173(8) CrPC and beyond that there is nothing to interfere or interdict the further investigation to be taken up or taken up by the CBCID police.

6. With the above clarification, the Criminal Petition is disposed of. Consequently, pending miscellaneous petitions, shall stand closed.

Dr. B.SIVA SANKARA RAO J,

Date:31.12.2018

Note: L.R.Copy to be marked.
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