

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.02.2019

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN
Crl.O.P.No.2699 of 2019
and
Crl.M.P.No.1725 of 2019

P.Venkatesh ... Petitioner/De-facto Complainant

Vs.

State by,
The Inspector of Police,
Yercaud Police Station,
Salem District. ... Respondent/Complainant

PRAYER: Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, to set aside the order of taking cognizance in C.C.No.19/2018 on the file of the Judicial Magistrate-V at Salem dated 27.03.2018 and permit the petitioner to file a protest petition to canvas his rights.

For Petitioner : Mr.Anantha Narayanan,
Senior Counsel
For M/s.S.M.Nandhie Devhan

For Respondent : Mr.M.Mohamed Riyaz
Additional Public Prosecutor

O R D E R

The Criminal Original Petition has been filed as against the order of taking cognizance in C.C.No.19/2018 on the file of the learned Judicial Magistrate-V, Salem, dated 27.03.2018.

2. There are four accused persons, namely, (1) Govindaswamy (2) Thiyagu (3) Vinoth Kumar and (4) Venkatachalam.

3. Mr.Anantha Narayanan, learned Senior Counsel for the petitioner submitted that the occurrence relating to a land dispute between the petitioner/defacto complainant and the accused had taken place on 17.10.2016 at about 7.00 p.m. and the accused persons 1 to 4 have attacked the petitioner with wooden log, iron bar and stones, due to which, the petitioner sustained injuries, and therefore, a complaint was given and the respondent police have registered a case in Crime No.151/2016 for

the offences under Sections 294(b), 323, 324 and 506(ii) IPC.

4. The learned Senior Counsel for the petitioner further submitted that though there are very serious and specific overacts as against all the accused persons, while filing the charge sheet, the respondent police omitted the second and third accused and filed the charge sheet only as against the accused A1 and A4 for the offences under Sections 294(b), 323, 324 and 506(ii) IPC, before the learned Judicial Magistrate-V, Salem. Moreover, the learned Senior Counsel for the petitioner submitted that the learned Judicial Magistrate-V, Salem, without even verifying the fact that whether the closure report in respect of A2 and A3 sent to the de-facto complainant or not, mechanically have taken cognizance for the offences under Sections 294(b), 323, 324 and 506(ii) IPC, only as against the accused A1 and A4. There are specific overacts as against the accused A2 and A3, even the respondent police failed to consider the same and filed a final report only as against A1 and A4 herein.

5. Per contra, the learned Additional Public Prosecutor submitted that the respondent police found that there is no specific overacts as against the accused A2 and A3 and therefore, have rightly filed a final report only as against the accused A1 and A4 for the offences under Sections 294(b), 323, 324 and 506(ii) IPC and now the learned Judicial Magistrate-V, Salem, have taken cognizance for those offences in C.C.No.19/2018 and issued summons to the defacto complainant.

6. Heard the learned Senior Counsel for the petitioner and the learned Additional Public Prosecutor for the respondent.

7. The petitioner is the defacto complainant, who lodged a complaint alleging that on 17.10.2016 at about 7.00 p.m. the accused persons A1 to A4 have attacked him with wooden log, iron bar and stones, as there was a land dispute between the petitioner/defacto complainant and accused. On receipt of the said complaint, the respondent police have registered a case in Crime No.151/2016 for the offences under Sections 294(b), 323, 324 and 506(ii) IPC as against the accused persons A1 to A4. After completing the investigation, the respondent police filed a final report on 15.02.2018 before the learned Judicial Magistrate-V, Salem, only as against the accused persons A1 and A4, by simply deleting the accused A2 and A3 from the charge sheet. There is absolutely no reasons stated in the charge sheet for deleting the accused A2 and A3 by the respondent. The learned Judicial Magistrate-V, Salem, without even verifying the said fact, have taken

cognizance for the offences under Sections 294(b), 323, 324 and 506(ii) IPC only as against A1 and A4.

8. It is settled law that while deleting or closing the case as against the accused, the complainant should be given notice. Atleast while taking cognizance, the learned Judicial Magistrate-V, Salem, ought to have issued notice to the de-facto complainant in respect of non taking cognizance as against the deleted accused persons.

9. In this regard, the learned Senior Counsel for the petitioner relied upon the order passed by this Court in Crl.R.C.No.939 of 2009 dated 21.01.2010. The relevant portion of which is extracted hereunder:-

"10. Though, there are several other grounds raised in the revision, now the learned Senior Counsel appearing for the petitioner, across the bar, would invite this Court only to adjudicate upon the issue whether the order taking cognizance, the order of committal, and all the consequential proceedings are vitiated for want of service of notice on the petitioner before the acceptance of the final report as laid down in Bhagwant Singh's case. The learned Senior Counsel would submit that he does not press for any adjudication in respect of other issues involved in the matter, but, he would, however, submit that all such issues may be kept open for the petitioner to raise before the learned Magistrate at the appropriate stage. In nutshell, the prayer of the learned Senior Counsel is to set aside the order taking cognizance by the learned Magistrate, order of committal and the order passed by the learned Additional Sessions Judge, which is impugned in this revision and to remit the matter back to the learned Magistrate for fresh order on the final report after affording sufficient opportunity to the petitioner and the other interested persons.

11. At the outset, a doubt arose, as to whether the plea for further investigation at the time of trial by the Court of Sessions can be entertained when the petitioner had not chosen to challenge the order taking cognizance by the Magistrate and the order of committal. In this regard, the learned senior counsel appearing for the petitioner would submit that though it is true that the petitioner should have challenged those two proceedings, nevertheless, he is not precluded from making

such a plea in this revision and this Court can exercise its power under Sections 482 and 483 of the Code to set things right by quashing all the above proceedings.

16. When the said law came to be again considered by the Hon'ble Supreme Court in Union Public Service Commission V. S.Papaiah 1998(3) Crimes 40 (SC), the same was reaffirmed. There are several such judgements rendered subsequently wherein the Hon'ble Supreme Court has followed the said law laid down in Bhagwant Singh's case [AIR 1985 SC 1285]. Thus, undoubtedly, it is a settled law as of now that before accepting a final report, where some of the accused, whose names find a place in the FIR, have been omitted, the learned Magistrate must issue notice to the defacto complainant. On receipt of such notice, the defacto complainant has got right to file a petition known as 'protest petition'. Only after hearing him, the learned Magistrate has to pass an order either accepting the final report in its entirety or rejecting the same and to proceed to take cognizance of the offence on the basis of the materials on record and the Court can direct further investigation or to treat the protest petition as a complaint in terms of Chapter XV of the Code of Criminal Procedure.

17. In para 16 of the judgement in S.Papaiah's case cited supra, the Hon'ble Supreme Court has held as follows:-

"Thus, for what we have said above we are of the opinion that the learned Magistrate was not justified in accepting the final report of the C.B.I. and closing the case without any notice to the appellant and behind its back. The order of the learned Magistrate dated March 6, 1995 closing the case and of November 4, 1995 dismissing the petition filed by the appellant as well as the order of the learned Sessions Judge dated March 8, 1996 dismissing the revision petition are set aside. The matter is remitted to the learned Metropolitan Magistrate for its disposal in accordance with law."

18. Applying the above law laid down in Bhagwant Singh's case cited supra and followed

in the other cases cited supra to the present case, it is crystal that the order of the learned Magistrate accepting the final report without notice to the petitioner is absolutely illegal and the same is, therefore, liable to be set aside. Consequentially, the order of committal of the case of the Court of Sessions for trial and all the consequential proceedings before the Court of Sessions are liable to be set aside.

19. Now, yet another question arises as to whether, in the absence of any specific challenge to the order of the learned Magistrate taking cognizance and the order of committal by filing appropriate petition, in this revision, which questions only the legality and correctness of the order passed by the learned Additional Sessions Judge, this Court can set aside the above orders of the learned Magistrate and the consequential proceedings. In this regard, it needs to be pointed out that though separate petition has not been filed to challenge the above proceedings, nevertheless, a specific ground has been taken before the learned Additional Sessions Judge as well as in this revision that the orders of the learned Magistrate are vitiated for want of notice as laid down in Bhagwant Singh's case."

10. It is seen in the case on hand that the respondent police filed the charge sheet only as against the accused A1 and A4, and have not mentioned any reason for deleting the other accused persons in the charge sheet. Further, it is seen that no notice was served by the learned Judicial Magistrate-V, Salem, to the petitioner/defacto complainant, while taking cognizance only as against A1 and A4 and also no notice was served by the respondent to the petitioner while closing the charges as against A2 and A3. Therefore, the above order of this Court is squarely applies to the present case on hand.

11. In view of the above discussions, the order of the learned Judicial Magistrate-V, Salem, taking cognizance of the final report submitted by the respondent in C.C.No.19/2018 is hereby set aside and the learned Judicial Magistrate-V, Salem, is directed to issue notice to the petitioner/defacto complainant and permit him to file an objection or protest petition for deleting the accused A2 and A3 in Crime No.151/2016 and after sufficient opportunity of hearing to the petitioner, pass appropriate orders on the final report within a period of four weeks from the date of receipt of a copy of this order.

12. Accordingly, this Criminal Original Petition is disposed of. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS)

//True Copy//

Sub Assistant Registrar

raja
To

1. The Judicial Magistrate-V,
Salem.

2. The Inspector of Police,
Yercaud Police Station,
Salem District.

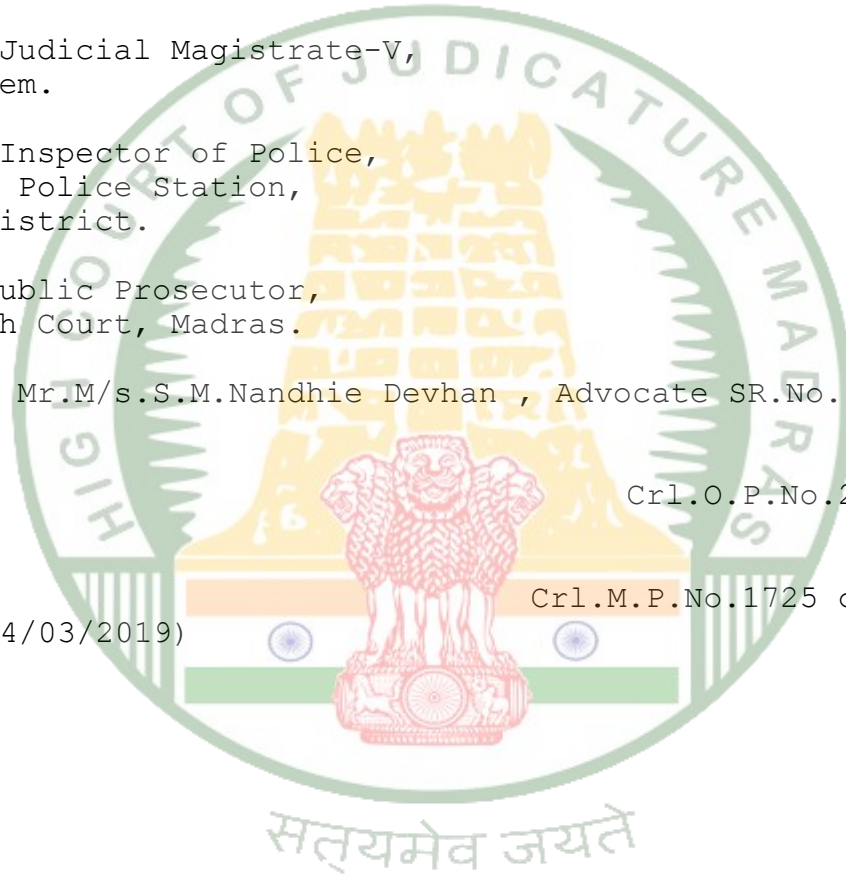
3. The Public Prosecutor,
High Court, Madras.

+1cc to Mr.M/s.S.M.Nandhie Devhan , Advocate SR.No. 14666

CrI.O.P.No.2699 of
2019
and

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A.SK(14/03/2019)



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