

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 21.03.2018

Delivered on : 15.03.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Crl.R.C.No.1560 of 2017

K.Ravichandran ... Petitioner /
Not party / Not party

-Vs-

1.M.Palanikumar ... 1st Respondent /
Petitioner /
Defacto Complainant

2.The State,
Rep. by Inspector of Police,
District Crime Branch,
Cuddalore,
Crime No.25/2010 ... 2nd Respondent /
1st Respondent /
Complainant

3.P.Venkatesan

4.P.Perumal ... 3rd and 4th Respondent /
2nd & 3rd Respondents /
Accused 1 & 2

Criminal Revision Case filed under Section 397 r/w 401 of Cr.P.C., against the order dated 22.09.2017 in CMP.No.2763 of 2017 i C.C.No.124 of 2016 on the file of Judicial Magistrate-II, Virudhachalam, wherein the application under Section 319 of Cr.P.C. filed by the 1st respondent herein was allowed against the petitioner.

For Petitioner : Mr. M.Sivavarthanan

For Respondents : Mr.B.Arulmozhimaran (for R2)
Government Advocate (Crl.Side)

No Appearance (for R1, R3 & R4)

JUDGMENT

This criminal revision petition is filed against the order dated 22.09.2017 in C.M.P.No.2763 of 2017 in C.C.No.124 of 2016 on the file of Judicial Magistrate-II, Virudhachalam, wherein the application filed by the 1st Respondent herein under section 319 of Cr.P.C was allowed against the revision petitioner.

2. The facts of the case are that the Petitioner was working as overseer at Srimushnam in Public Works Department from 20.11.2006 and the duty assigned to the Petitioner is to look after the maintenance of pelanthurai main channel which connects 22 lakhs in cuddalore district and to look after the irrigation structure in the 12000 Acres aiyacut area of the said channel. It is contended by the Petitioner that in srimushnam section of the velar basin division, sale of sand in PWD quarry is accounted and the Petitioner has to submit the remittance slips along with bank chalans, for the amount collected from sale of sand in his section, to the sub-division office at Virudachalam and the RM slip containing the sale of sand details will be submitted to the Divisional Office. It is contended by the Petitioner that the 1st Respondent herein was working as Executive Engineer, PWD, Velar Basin Division, Virudachlam from 14.09.2009 to 01.12.2011.

3. It is further contended by the Petitioner that there were no adequate staffs at Srimushnam PWD office, about 25 NMR workers were engaged to assist the department and the NMR workers used to deposit the cash into Government Account and this practice is followed for many years. It is contended by the Petitioner that the 1st Respondent herein was the Executive Engineer at relevant point of time and he had authorized usage of NMR workers for issuance of receipts and remittance of cash as against Rule 274 and 274 A of the Madras Financial Code, Volume I and Rule 299 of Tamil Nadu Public Works Department Code.

4. It is the case of Petitioner that during October, 2010 he enquired with the State Bank of India, Virudhachalam, Sub-Treasury and found that the remittance made to the bank for which were challans submitted to the sub-division office were not brought to the credit of the Executive Engineer's Account and no credits were made to the Government Account number. The Petitioner contends that he gave a complaint to the bank on 15.10.2010 regarding non-accounting of public money. However, the 1st Respondent herein who was the then Executive Engineer lodged a complaint against the Petitioner on 24.10.2010 to the Superintendent of Police, Cuddalore and FIR was registered by the 2nd Respondent against the Petitioner for offences under section 405, 406 and 420 of IPC in crime no.25 of 2010.

5. The Petitioner contends that the 2nd Respondent after thorough investigation had found that respondents 3 & 4 herein who were working as NMR workers at relevant point of time, are the real accused and dropped the name of the Petitioner. The 2nd Respondent by his communication dated 20.03.2012 intimated the Judicial Magistrate-II, Virudhachalam that he has dropped the Petitioner's name from the FIR in Crime No.25 of 2010 and the 2nd Respondent also sent communication dated 20.03.2012 to the Superintending Engineer, Velar Basin Division and to the Executive Engineer about dropping of Petitioner's name from FIR.

6. The Petitioner contends that the investigating officer conducted investigation and statements recorded by the witnesses revealed that N.M.R workers in srinushnam sections namely the 3rd & 4th respondent herein are the real culprits and the Petitioner herein is not accused and therefore he has dropped the name of the Petitioner from the case. It is further contended that the 2nd Respondent has specifically stated that the 1st Respondent/Defacto Complainant had not carried out regular reconciliation of accounts and auditing for 3 years and to avoid the lapses on his part he has given the complaint by naming the Petitioner herein.

7. The 2nd Respondent/ Investigation officer has filed his final report dated 30.11.2015 before the Court and the same was taken on file in C.C.No.124 of 2016 and the summonses were issued to the accused/respondents-3&4. The petitioner herein was arrayed as witness(LW2) and the 1st Respondent is shown as LW1. The accused pleaded not guilty and trial was commenced. The 1st Respondent herein was examined as PW1 on 10.03.2017 and his evidence was recorded by chief examination. The 1st Respondent as a defacto complainant in Crime.No.25 of 2010, has filed petition under section 319 of Cr.P.C before the trial court in C.M.P.No.2763 of 2017 to include the Petitioner herein as accused in C.C.No.124 of 2016. The said application was allowed by the impugned order dated 22.09.2017 and the Petitioner was arrayed as an accused in C.C.No.124 of 2016.

8. Heard Mr.M.Sivavarthanan, learned counsel for the Petitioner and Mr.B.Arulmozhimaran, learned Government Advocate (Criminal Side) for the 2nd Respondent. Notice to the Respondent 1, 3 & 4 are served and no appearance for them and their names are printed in the cause list. A status report is filed by G.Tharageswari, Inspector of Police, DCB, Cuddalore District.

9. The learned counsel for Petitioner argued that the application in C.M.P.No.2763 of 2017 was heard by learned Judicial Magistrate, but no notice was ordered or served on the

Petitioner herein and the entire proceedings were conducted behind the back of the Petitioner and no opportunity was provided to the Petitioner for making objections in CMP.No.2763 of 2017.

10. The learned counsel for petitioner argued that the investigating officer by communication dated 20.03.2012 to the Superintending Engineer, Velar Basin Division and to the Executive Engineer has stated that he has dropped the name of the Petitioner from FIR. Investigating Officer has also intimated the Judicial Magistrate-II, Virudhachalam that he has dropped the Petitioner's name from the FIR in Crime No.25 of 2010. This fact is accepted in the status report filed by the 2nd Respondent therefore the contention of 1st Respondent in his petition that he was not served with the notice by the Investigation Officer/2nd Respondent before deleting the name of the Petitioner as accused, is factually incorrect and the investigating officer has followed the proper procedure before deleting the name of the Petitioner from Crime No.25 of 2010.

11. The learned Counsel for Petitioner submitted that the learned magistrate has noted that the 3rd and 4th respondents have no objection in including the name of the Petitioner as accused. The 3rd and 4th respondents are the accused in C.C.No.124 of 2016 and therefore they can have no say in the petition filed under Sec.319 Cr.P.C and therefore the learned magistrate erroneously decided the application under section 319 of Cr.P.C in C.M.P.No.2763 of 2017. It is further contended by the learned Counsel that the 1st Respondent has filed C.M.P.No.2763 of 2017 in his personal capacity and it cannot be treated as an application filed by Executive Engineer of PWD department.

12. The learned counsel argued that the investigating officer has recorded the statements of the witness and thereafter came to the conclusion that petitioner has no role in the crime and only the 3rd and 4th respondent have committed the offence. The status report filed by 2nd Respondent also confirms the same. The learned counsel further submitted as against that there are no incriminating material available on record and even the PW1 in his chief examination has not alleged any specific overt act against the Petitioner. Therefore the learned counsel argued that when no evidence is available to prosecute the petitioner, inclusion of his name as accused is unwarranted and the learned magistrate nowhere in the impugned order has discussed that evidences are available to prosecute the Petitioner. The learned counsel has relied on the decision of the Supreme Court in (2000) 3 SCC 262.

13. Lastly, the learned counsel contented that the 1st Respondent was inimical and hostile towards the Petitioner right from the beginning and he deliberately and wantonly gave complaint to the police by including the name of the Petitioner and the 1st Respondent was also instrumental in initiating the departmental proceedings against the Petitioner. Even in the departmental proceedings, the enquiry officer has given specific finding that the Petitioner has not misappropriated the government money. Since the Petitioner was able to overcome the disciplinary proceedings to some extent and has filed writ petitions, the 1st Respondent became furious and wanted to wreck vengeance against the Petitioner. It is contended by the learned counsel that in writ proceedings, the Petitioner had brought to the notice of this Court about the proceedings of the Superintending Engineer PWD, Cuddalore dated 1.11.2010 stating that the Executing Engineer/ 1st Respondent has not done reconciliation of accounts for many months and has not followed the Tamil Nadu PWD code and also the investigating officer has found that the 1st Respondent has not conducted audit for 3 years. Therefore to wreck vengeance, the 1st Respondent filed C.M.P.No.2763 of 2017 for inclusion of Petitioner's name as accused-A3 in C.C.No.124 of 2016 and prayed to set aside the impugned order.

14. The learned Government Advocate (Criminal Side) appearing for the 2nd Respondent submitted that the investigating officer after investigation filed the final report in C.C.No.124 of 2016 and the 3rd and 4th Respondent are prosecuted for offences under section 405, 406, 414, 420 r/w 109 IPC and the investigating officer deleted the name of the Petitioner in the present case only after investigation. With regard to deletion, the investigating officer sent intimation letter to the Judicial Magistrate and to the Superintending Engineer, Velar Basin Division. Since the 1st Respondent filed C.M.P.No.2763 of 2017 in C.C.No.124 of 2016 under section 319 of Cr.P.C, the learned Judicial Magistrate-II, Virudhachalm has decided the said application based on the statement of 1st Respondent as P.W.1 in the chief examination. Since the learned Judicial Magistrate has exercised his discretionary relief, he prayed for dismissal of this revision.

15. The 1st Respondent has not appeared before this Court in spite of notice served on him, the 3rd and 4th Respondent also not appearing before this Court and they being accused in C.C.No.124 of 2016 can have no say in the present revision.

16. The point for consideration in the present revision is whether the learned Judicial Magistrate has exercised the powers

under section 319 of Cr.P.C in a proper manne ? On perusal of all the materials before this Court it is evident that the revision petitioner is not made as a party respondent in C.M.P.No.2763 of 2017 in C.C.No.124 of 2016. The learned Judicial Magistrate has also not issued notice to the revision petitioner before deciding the application filed under section 319 of Cr.P.C. and admittedly no opportunity of hearing was given to the revision petitioner. Therefore the impugned order in C.M.P.No.2763 of 2017 in C.C.No.124 of 2016 is liable to be set aside on the ground of violation of principle of natural justice.

17. The power available to the learned Judicial Magistrate under section 319 of Cr.P.C. is discretionary in nature and therefore this Court has to examine where the said power has been properly exercised. The judgment of the Apex Court reported in (2000) 3 SCC 262 has categorically held that the power of the court available under section 319 of Cr.P.C. is discretionary and it has to exercise such discretion with great care and perspicacity. It is also held that such discretionary power should be exercised only to achieve criminal justice and the court should not turn against another person whenever it comes across evidence connecting that other person also with the offence. In the present case, just because the 1st Respondent had given the complaint by naming the Petitioner it is not necessary that the Petitioner should stand trial. Thus the learned Magistrate has not properly exercised the discretionary.

18. The learned Magistrate has failed to see that when deciding an application under 319 of Cr.P.C., the court is required to consider whether any evidence is available to prosecute the person sought to be summoned as an accused and whether such evidence would be sufficient to convict the person being summoned. In the impugned order there is no discussion regarding the evidence available against the Petitioner and therefore the findings of the learned judicial Magistrate are improper and contrary to law.

19. After careful consideration of materials available on record as well as the submissions made by either side I am of the considered view the learned Magistrate has not properly exercised the powers conferred under the provisions of Section 319 of Cr.P.C. and therefore impugned order of the learned Magistrate is therefore liable to be set-aside.

20.In the result, this Criminal Revision Case is allowed by setting aside the order passed in CMP.No.2763 of 2017 in C.C.No.124 of 2016 on the file of the learned Judicial Magistrate No.II, Virudhachalam, dated 22.09.2017.

Sd/-
Assistant Registrar(CS-I)

//True Copy//

Sub Assistant Registrar

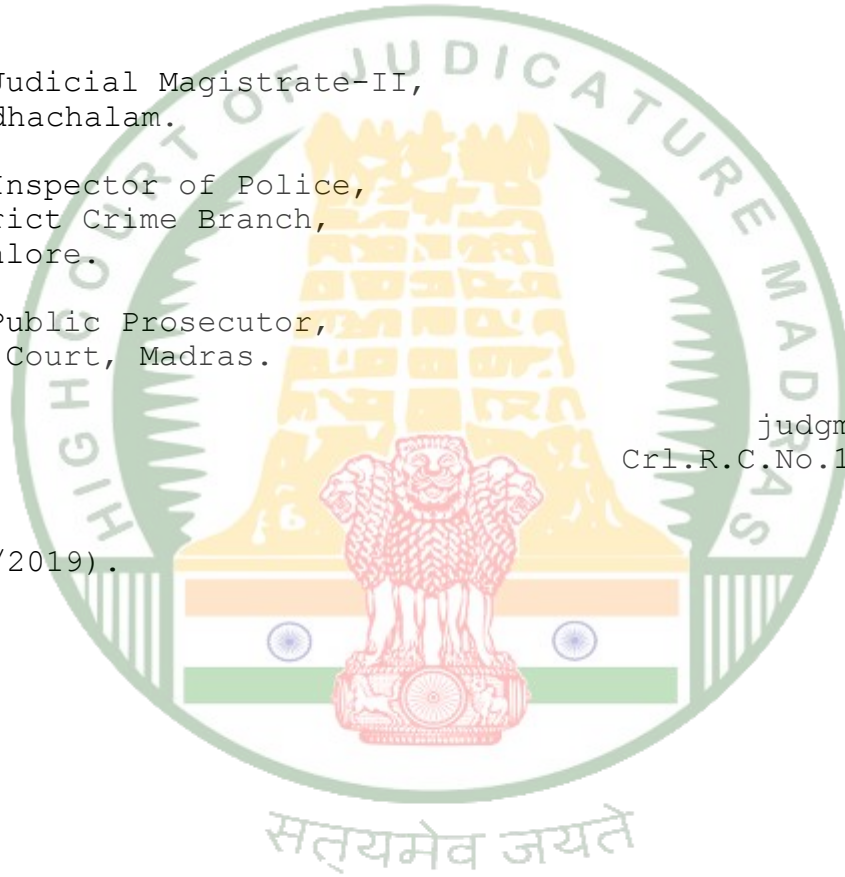
vs

To

- 1) The Judicial Magistrate-II,
Virudhachalam.
- 2) The Inspector of Police,
District Crime Branch,
Cuddalore.
- 3) The Public Prosecutor,
High Court, Madras.

judgment made in
Crl.R.C.No.1560 of 2017

KJ(CO)
SSM(04/04/2019).



WEB COPY