



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
RESERVED ON : 19.04.2021
DELIVERED ON : 20.09.2021
CORAM

THE HONOURABLE MR.JUSTICE **SATHI KUMAR SUKUMARA KURUP**

CRL.R.C.(MD) No.538 of 2017

and

CRL.M.P.(MD)No.6035 of 2017

Rajasingh

: Petitioner

Vs.

1.The State,
represented by Sub-Inspector of Police,
Sivakasi Town Police Station,
Virudhunagar District.
(Cr.No.404 of 2008)

2.Raghavan

3.Mohankumar

: Respondents

PRAYER: Criminal Revision Petition filed under Section 397 Cr.P.C. r/w. Section 401 of Criminal Procedure Code, to call for the records in Crl.M.P.No.10908 of 2016, dated 02.03.2017 in C.C.No.99 of 2008 on the file of the Judicial Magistrate Court, Sivakasi, Virudhunagar District and set aside the same as illegal.

For Petitioner	: Mr.Veerakathiravan Senior Counsel for Mr.M.Solaisamy
For R1	: Mr.A.P.G.Ohm Chairma Prabhu, Government Advocate (crl.side)
For R2	:Mr.S.Muthukumar
For R3	:Mr.S.Ramasamy

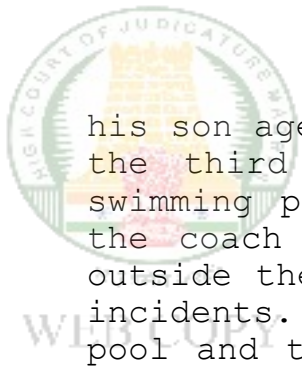
ORDER

This revision is filed as against the judgment in Cr.M.P.No.10908 of 2016, in C.C.No.99 of 2008, dated 02.03.2017 by the learned Judicial Magistrate, Sivakasi, Virudhunagar District.

2.Heard Mr.Veera Kathiravan, learned Senior Counsel for Mr.M.Solaisamy, learned Counsel for the petitioner, Mr.A.P.G.Ohm Chairma Prabhu, learned Government Advocate (Crl.side) appearing for the first respondent, Mr.S.Muthu Kumar, learned Counsel for the second respondent and Mr.S.Ramasamy, learned Counsel for the third respondent.

3.The facts relevant to the case in brief are as follows:

3.1.The third respondent/de-facto complainant, believing the works of the advertisement of the Bell Hotel Management, admitted

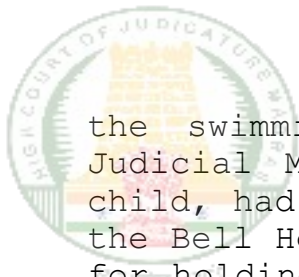


his son aged about nine old in the swimming coaching. On 01.05.2008, the third respondent/de-facto complainant left his child in the swimming pool and watched what was happening there. At that time, the coach asked the third respondent/de-facto complainant to wait outside the pool stating that they would be responsible for all the incidents. After some time, the petitioner heard the noise from the pool and the third respondent/de-facto complainant went inside and saw the incident that his son was rescued from the water. Immediately, the son of the third respondent/de-facto complainant was taken to hospital and there, it was declared that his son had already stopped his last breathe. Thereafter, the third respondent/de-facto complainant lodged a complaint before the Sivakasi Town Police Station and the same was registered in Crime No.404 of 2008 only against the coach, who is the in-charge of the swimming coaching. Aggrieved by the registration of FIR, leaving the Management of Bell Hotel, the third respondent/de-facto complainant filed a petition before this Court in Crl.O.P.(MD) No.6563 of 2008 seeking to include the Bell Hotel Management in the case. This Court by order dated 16.07.2009 disposed the case with an observation that the petitioner therein/third respondent herein to move before the learned Judicial Magistrate concerned during the course of examination of witnesses, for further investigation or to include any other person as accused for the offence made out by them. Accordingly, the third respondent/de-facto complainant filed a petition under Section 319 of Cr.P.C. in Cr.M.P.No.10908 of 2016 in C.C.No.99 of 2008 before the learned Judicial Magistrate, Sivakasi, seeking to array the Managing Director of Bell Hotel, viz., Mr.Raja Singh, S/o.Chelladurai, as accused in the case. After hearing both sides and based on the decision of the Hon'ble Supreme Court, the learned Judicial Magistrate, Sivakasi, came to the conclusion that the petition filed under Section 319 of Cr.P.C. has to be allowed in the interest of justice and accordingly, allowed the petition directing to include the Managing Director of Bell Hotel viz., Mr.C.Raja Singh in the case and to issue summon to him.

3.2.Aggrieved by the said order, the petitioner has filed this Criminal Revision Petition seeking to set aside the order passed in Cr.M.P.No.10908 of 2016, in C.C.No.99 of 2008, dated 02.03.2017.

4.The learned Senior Counsel for the Revision Petitioner relies on the Ruling of this Court in Crl.O.P.No.4518 of 2007, dated 10.10.2014 passed by His Lordship Mr.Justice S.Nagamuthu. In that case, the addition of another person, as an accused, by the learned XIII Metropolitan Magistrate, Egmore, Chennai, was quashed by this Court on the ground that he had not provided the safety measures, was not accepted by this Court, as the same is not proximate for the cause of death of the child in the swimming pool.

5.Here in this case also, the Investigation Officer had examined the witnesses and laid final report against the trainer of



the swimming pool only. During the trial before the learned Judicial Magistrate, the de-facto complainant, the father of the child, had in the course of the evidence mentioned that the owner of the Bell Hotel had not provided safety equipment, like, iron railing for holding by the wards, who were undergoing training for swimming and no partition was available in the swimming pool to prevent the trainees moving to the deep part of the swimming pool, where they will not be able to swim and face the risk of drowning. There was no partition to prevent the wards entering the deep portion of the swimming pool.

6.The owner of the hotel was not cautious enough to put up safety measures to prevent the wards, who are undergoing training, getting into the deep portion of the swimming pool and getting drowned. Therefore, the owner of the Bell Hotel is also liable for the death of the son of the de-facto complainant. Based on this part of the deposition of the de-facto complainant, the learned Magistrate invoked the powers of Magistrate under Section 319 of Cr.P.C. Therefore, the prosecution had filed a petition seeking to include the name of the owner of the Bell Hotel as a co-accused under Section 319 of Cr.P.C.

7.The reasoning stated in the order of this Court, in Crl.O.P.No.4518 of 2007, dated 10.10.2014, is not applicable to the case on hand. Here, there is evidence from the deposition of de-facto complainant that arrangements for preventing the wards undergoing training getting into the deep portion was not provided by the owner of the Hotel. Therefore, he is to be arrayed as accused. There is evidence that the de-facto complainant approached this Court to include the name of the owner of the Hotel for not providing safety measures, as a co-accused in the charge sheet. Crl.O.P.(MD)No.6563 of 2008 was filed before this Court. This Court, in Crl.O.P.(MD)No.6563 of 2008, had directed the petitioner to file appropriate application at the stage of the trial or at the completion of the trial before judgment was pronounced to include the owner of the Hotel, as a co-accused. Based on the direction given by this Court only, the de-facto complainant, as PW-1, had stated the facts and filed application under Section 319 of Cr.P.C., to include the name of the owner of the Hotel for not providing safety equipment to prevent the wards, who undergoing swimming training, from getting drowned in the swimming pool.

8.As per the interpretation given to Section 319 of Cr.P.C., the object of the Section is to ensure that no one who appears to be guilty, except trial in relation to that guilt, where, the evidence shows the involvement of the person in the commission of the crime, the Court should exercise its power under Section 319 Cr.P.C., and summon him as an additional accused, as per the reported Ruling of the Honourable Supreme Court in the case of **Sambhaji vs State of Maharashtra, reported in 2008 Crl.L.J 1123.**



9.If the reasoning laid down in Crl.O.P.No.4518 of 2007, dated 10.10.2014, is accepted, the facts of the case in Crl.O.P.No.4518 of 2007 will be repeated. The Court has a duty to prevent crimes. Here, the facts mentioned in Crl.O.P.No.4518 of 2007, have been repeated, i.e., a child undergoing swimming drowned, only the trainer was arrayed as accused due to the lackadaisical approach of the Investigation Officer. The shoddy investigation cannot be a ground for acquittal. The Court has powers to add additional accused, if there is any evidence available before the Court, where the witnesses speak about the culpability of other persons, who are not before the Court to array him as co-accused regarding indifference or not providing the safety measures before ever commencing the programme for swimming classes and collecting fees from the general public on the swimming class.

10.Therefore, to prevent such occurrence in future, the Court has a duty to punish those who are responsible, who had provided swimming pool and collected fee and employed trainer, but not providing safety measures to prevent the wards undergoing training from getting drowned in the swimming pool. Therefore, it is a proximate ground for the cause of death due to negligence. The "due to negligence" is squarely attributable to the culpability of the owner of the Hotel. Therefore, this Court differs from the opinion expressed by the learned Judge of this Court in Crl.O.P.No.4518 of 2007, dated 10.10.2014.

11.The learned Counsel for the revision petitioner relied on the Ruling of the Madya Pradesh High Court, reported in **1991 Crl.L.J.473**, in the case of **B.P.Ram and another vs State of Madhya Pradesh**:

"Penal Code (45 of 1860), S.304-A - Criminal P.C. (2 of 1974), S.482 - Death by negligence - Swimming pool run by club - Boy surreptitiously entering swimming pool and drowned - Prosecution against Honorary Secretary and choukidar of club for having not kept life-saving guard or notice of caution on pool - Not maintainable."

12.The learned Senior Counsel for the Revision Petitioner relied on the Ruling of Delhi High Court reported in **2009 (1) Crimes 432 (Del)** in the case of **Baldev Raj Kapur vs State**:

"Indian Penal Code, 1860- Section 304 Part - II and 308 - Revision against order of framing charge for offences under - Four storeyed building under construction collapsed and resulted in death of six labourers and grievous injuries to eight other labourers - Petitioner was owner of property and construction was being carried by contractor co-accused proclaimed offender - Petitioner was not present on spot when building collapsed - No direct nexus of petitioner with stages of construction of

Prosecution had to show prima facie that act

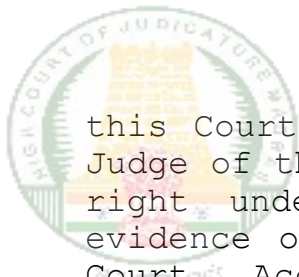


complained of was done with knowledge, with awareness of accused about the consequence - Direct nexus between death of a person and act of accused was essential to attract section 304 Part - II IPC - Petitioner could not be held vicariously liable for the offence - Impugned order could not be sustained - Even no offence under Section 304A IPC could not said made out from the material as there was no direct nexus between petitioner and rash and negligent act."

13.Regarding the reported ruling of Madhya Pradesh High Court in **1991 Cr1.L.J.473**, in the case of **B.P.Ram and another vs State of Madhya Pradesh**, the facts are different, even though they are similar to the death of a boy in a swimming pool. The prosecution accused Honorary Secretary and chowkidar of the club for not having the life safety guard or notice of caution on pool. In that case, the boy, who drowned in the pool run by the club of the officials and staff of Bhilai Steel Plant. The club was run by elected officer bearers of the Bhilai Steel Plant Staff Association. The boy, who entered the club surreptitiously for which the chowkidar cannot be held liable or the Honorary Secretary cannot be held liable.

14.The next ruling relied upon by the learned Senior Counsel for the Revision Petitioner is the reported ruling of Delhi High Court in **2009 1 Crime 431 (Del)**, in the case of **Baldev Raj Kapur vs State**. The facts of the reported case are different. The facts of the case are that eight labourers suffered grievous injuries. Six labourers died, when the five storeyed building under construction collapsed. The owner of the building was arrayed as accused when he was not at all present in the site of construction. The contractor, who had engaged labourers, was arrayed as accused in that case because of the criminal negligence and his culpability, when the Court has passed an order arraying the owner of the building as a co-accused. The owner of the building had filed revision, which was allowed by the Hon'ble Delhi High Court stating that the owner of the building was not present in the site and no direct nexus of the owner by the construction of the building.

15.The person, who sought to be arrayed, viz., the Revision Petitioner is directly in-charge of the premises including the swimming pool. He has appointed the trainee, the sole accused herein. The person, who is to be arrayed, the Revision Petitioner, has received the fees for coaching classes for swimming. Therefore, he is duty bound to provide safety jackets to the children, who are to be given swimming training. Not only that, the liability and culpability of the Revision Petitioner was raised by the father of the child, who died immediately after filing of the charge sheet in the Court of the learned Judicial Magistrate by filing a petition under Section 482 Cr.P.C., in Cr1.O.P.(MD)No.6563 of 2008, wherein,



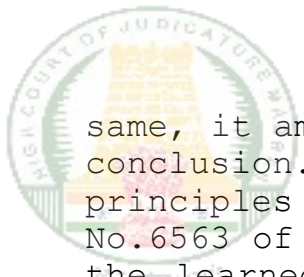
this Court had disposed of the petition by the then learned Single Judge of this Court directing the father of the child to agitate his right under Section 379 Cr.P.C., before the Trial Court when evidence of the father of the child was recorded before the Trial Court. Accordingly, he had filed Cr.M.P.No.10908 of 2016 before the learned Trial Judge seeking to array the petitioner herein as co-accused for his criminal liability directly in relation to the conduct of the swimming classes.

16.As discussed above, the distinction of the case before this Court is that this Court had to allow the order passed by this Court in Crl.O.P.(MD)No.6563 of 2008 to its logical conclusion as per Section 319 Cr.P.C., before pronouncing the judgment by the learned Trial Judge. Otherwise, it amounts to miscarriage of justice, thereby, confusing the Trial Judge and also creating disappointment to the defacto complainant, who had believed the order of this Court in Crl.O.P.(MD)No.6563 of 2008. Therefore, this Court is of the view that the petition filed under Section 319 Cr.P.C., had to be allowed to its logical end till the conclusion of the trial, otherwise, it amounts to interference by the High Court in the trial proceedings creating confusion to the Trial Judges and creating confusion in the minds of the defacto complainant and resulting in the disappointment and helplessness.

17.If this Court accepts the arguments of the learned Senior Counsel for the Revision Petitioner that this Court cannot deviate from the order passed by another learned Judge of this Court in Crl.O.P.No.4518 of 2007, dated 10.10.2014, it amounts to defeating the order already passed in Crl.O.P.(MD)No.6563 of 2008, based on which, the learned Judicial Magistrate had passed the orders invoking the powers under Section 319 of Cr.P.C., by issuing summons to the persons, who is to be arrayed and impleaded as a co-accused based on the deposition of the defacto-complainant regarding his role in not providing safety measures in the swimming pool to the children, who were admitted for swimming programme after collecting fees from their parents in the said swimming course.

18.Mere providing instructor will not be sufficient. When children, who are being admitted for swimming course, who had no skill in swimming, enter the swimming pool, there is likelihood of children getting drowned in the swimming pool, if they had not been provided with safety jackets and other safety measures to prevent drowning. Therefore, the owner of the hotel, who had introduced the swimming programme without providing safety measures, is also proximately related to the culpability of the crime.

19.After Crl.O.P.(MD)No.6563 of 2008 filed by the de-facto complainant was allowed, the learned Judicial Magistrate had passed an order in Crl.M.P.(MD)No.10908 of 2016 including the co-accused under Section 319 of Cr.P.C. After that, if this Court scuttles the



same, it amounts to preventing the due process of law to its logical conclusion. Not only that, the conduct of the Court is against the principles of estoppel, wherein, by giving direction in Crl.O.P.(MD) No.6563 of 2008 to the de-facto complainant to approach the Court of the learned Judicial Magistrate by filing appropriate petition and the de-facto complainant having filed such a petition, the learned Judicial Magistrate had acted as per the order in Crl.O.P.(MD) No.6563 of 2008 and this Court cannot now at this stage defeat the same, as it is contrary to the provisions of principles of estoppel.

20.The Court had come to the rescue of the defacto complainant by taking effective steps, even though the State, as Investigation Agency, failed to initiate action against the other persons, who were involved in this crime. The Investigation Officer had only arrayed the trainer of the swimming programme alone and left out the person, who collected fee from the parents of the wards, who were admitted for the swimming course. The trainer is employed by hotel owner to give swimming training to those children, who were not skilled in swimming. Therefore, when introducing such a course, the owner of the hotel is duty bound to provide all necessary safety measures for each of the individual children to prevent them from getting drowned in the swimming pool. Therefore, the Investigation Officer ignoring that part of the culpability and laying final report before the Court of the learned Judicial Magistrate had caused miscarriage of justice. Therefore, this Court had to stand by its earlier order in Crl.O.P.(MD)No.6563 of 2008 to meet the ends of justice.

21.On the other hand, if this petition filed by the petitioner in Crl.R.C.(MD)No.538 of 2017 is allowed, it causes confusion in the minds of the Trial Judge as contradictory orders emanating from High Court scuttling fair trial. Also, allowing Crl.R.C.(MD)No.538 of 2017, is contrary to the orders passed in Crl.O.P.(MD)No.6563 of 2008, which results in disappointment and desperation to the de-facto complainant, who had filed Crl.O.P.(MD)No.6563 of 2008 and who is waiting for the fair trial guaranteed as per the provisions of Constitution of India to its citizens. If this petition in Crl.R.C (MD)No.538 of 2017 is allowed, it will result in violation of principles of promissory estoppel, as per Section 115 of the Indian Evidence Act.

22.By the order of this Court in Crl.O.P.(MD)No.6563 of 2008, the de-facto complainant acted. The learned Judicial Magistrate also had acted as per the order of this Court, before trial concluded. The same has to be continued to its logical conclusion of trial. If contrary order is passed, it violates fair hearing and violation of principles of promissory estoppel. Earlier, by its order in Crl.O.P.(MD)No.6563 of 2008, this Court had given hope for fair trial to the de-facto complainant/PW-1 in C.C.No.99 OF 2008 before the learned Judicial Magistrate of the same Court. This



Court cannot now grant just an opposite order contrary to its earlier order, which will cause confusion and against the principles of fair trial, which is a guaranteed right to the citizens of this country by the Constitution of India.

23. Therefore, the prayer of the petitioner in Crl.R.C.(MD) No.538 of 2017 is to be dismissed, as it is contrary to the principles of estoppel under Section 115 of Indian Evidence Act and against the order in Crl.O.P.(MD)No.6563 of 2008 and against the principles of fair trial guaranteed to the citizens of this country including the de-facto complainant/PW-1 before the trial Court.

24. If this Criminal Revision Case is dismissed, no prejudice will be caused to the petitioner. He can defend himself in the trial Court. Whereas, if this petition is allowed, it curtails the fair trial, as the petitioner in Crl.O.P.(MD)No.6563 of 2008 was given a promise before this Court that he will have a fair trial before the Court of the learned Judicial Magistrate and that he can raise his grievance to implead/array the owner of the Hotel, who is culpable for causing the death of the child in the swimming pool by his negligence. When the petition filed under Section 319 of Cr.P.C., was allowed and the petitioner was arrayed as Accused No.2 before the Court of the learned Judicial Magistrate during trial, it will be against the principles of promissory estoppel, where, the defacto complainant was made to believe that he can implead the other persons against whom he had complained of criminal liability and culpability. When he impleaded the petitioner herein, the very same Court allowing the petition amounts to violation of principles of promissory estoppel, thereby, causing disappointment in the law abiding citizen and it is against the principles of fair trial. Therefore, in the light of the above discussion, this revision cannot at all be allowed and is to be dismissed in the light of the earlier order passed by this Court in Crl.O.P.(MD)No.6563 of 2008.

In the result, this revision is not maintainable and is to be dismissed and accordingly dismissed. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

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Sub Assistant Registrar(CS)

cmr



To

1.The Judicial Magistrate,
Sivakasi,
Virudhunagar District.

2.The Sub-Inspector of Police,
Sivakasi Town Police Station,
Virudhunagar District.

3. The Section Officer, Criminal Records (2C)
Madurai Bench of Madras High Court, Madurai

+1 CC to M/s.M.SOLAISAMY, Advocate (SR-29663[F] dated 20/09/2021)

CRL.R.C. (MD) No.538 of 2017
20.09.2021

SR(CO)

KB(12.11.2021) 9P 6C