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Crl. R.C.(MD)No.45 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 02.02.2022

DELIVERED ON : 22.02.2022

CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI

Crl. R.C. (MD)No.45 of 2022

and

Crl.M.P. (MD)Nos.926 and 928 of 2022

R.Mokkamayan

.. Petitioner/Accused No.6

Vs.

State through the Inspector of Police,
Othakadai Police Station,
Madurai District.

In Crime No.460 of 2012

.. Respondent/Complainant

Prayer : This criminal revision case is filed under Sections 397 r/w. 401 of Cr.P.C., to call for the records relating to the order in Cr.M.P.No.3256 of 2016 dated 10.02.2021 on the file of the learned Judicial Magistrate Court, Melur and to set aside the same and issue order to follow the earlier cognizance taken on 11.07.2013 to take cognizance under Section 147, 447, 294(b), 506(ii), 120(b) and 149 of IPC only.

For Petitioner

: Mr.Chandrasekar for
Mr.S.Sureshkumar

For Respondent

: Mr.S.Ravi,
Additional Public Prosecutor

ORDER

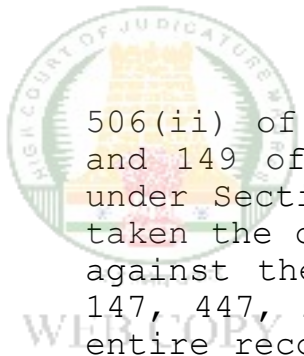
This petition has been filed to set aside the order passed in in Cr.M.P.No.3256 of 2016 dated 10.02.2021 on the file of the learned Judicial Magistrate Court, Melur.

2.The petitioner herein is the respondent and the respondent herein is the petitioner in Cr.M.P.No.3256 of 2016. The respondent herein has filed a petition in Cr.M.P.No.3256 of 2016 to add the charge under Section 3(1) of TNPPDL Act and commit the case to the Court of Sessions.

3.A Brief substance of the petition in Cr.M.P.No.3256 of 2016 is as follows:

The prosecution has lodged final report against the respondent accused for the offence punishable under Sections 147, 447, 294(b),

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



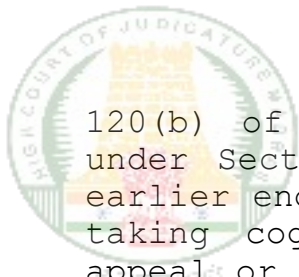
506(ii) of IPC r/w. Section 3(1) of TNPPDL Act and Sections 120(b) and 149 of IPC. The Court has taken cognizance of the case only under Sections 147, 447, 294(b), 506(ii), 120(b) and 149 of IPC and taken the case on file as C.C.No.81 of 2013. The charges were framed against the respondent accused only for the offence under Sections 147, 447, 294(b), 506(ii), 120(b) and 149 of IPC. A perusal of the entire records reveals that a case under Section 3(1) of TNPPDL Act was made out which is triable only by the Court of Sessions and a charge under Section 3(1) of TNPPDL Act has to be framed and the case has to be committed to the Court of Sessions.

4. Brief substance of the counter filed by the respondent therein is as follows:

The chargesheet was filed against the respondent accused under Sections 147, 447, 294(b), 506(ii) of IPC and under Section 3(1) of TNPPDL Act r/w. Section 149 of IPC. But the case was taken only on file under Sections 147, 447, 294(b), 506(ii) of IPC and the case was posted for trial. There is no documentary evidence to attract an offence under Section 3(1) of TNPPDL Act. In survey No.91/1A2, 91/1A3 of Thirumohur village, 2587 square feet was alleged to have been purchased by the defacto complainant. But there was no stone pillars erected along the boundaries and there was no coconut saplings in that plot. The respondent accused never dumped waste materials in the property of the defacto complainant. Since the defacto complainant is a Senior Police Officer, using his official power, he has lodged a false complaint against the respondent. The property was kept as a vacant site and the same was in the peaceful possession of the defacto complainant. Instead of filing a petition before the Principal District Court, this petition was wrongly filed before the Magistrate Court and prayed the petition to be dismissed with costs.

5. After hearing both sides, the trial Court allowed the petition and committed the case to the Sessions Court. Against the same, the petitioner has preferred this revision case.

6. On the side of the revision petitioner, it is stated that the allegation made out against the petitioner is false and frivolous. There is no documentary evidence to attract the offence under Section 3(1) of TNPPDL Act. In survey No.91/1A2, 91/1A3 of Thirumohur village, no stone pillars was erected along the boundaries and there was no coconut saplings planted in the area. The petitioner has not dumped any waste material in the property. The petition was filed by the complainant without any supporting documents or statements. Instead of filing petition before the Principal Sessions Court, the complainant has filed this petition before the learned Judicial Magistrate, which is not maintainable. The impugned order was passed, when there was no change of circumstances in the case. Unless there is evidence or record to support the addition or alteration, the power to add or alter the charge cannot be exercised. There was no allegation under Section



120(b) of IPC. But, the Judicial Magistrate has framed a charge under Section 120 (b). The prosecution has failed to question the earlier endorsement of the learned Judicial Magistrate, Melur, while taking cognizance of the case on 11.07.2013. Without filing an appeal or revision, the doctrine of *Functus officio* will come into force.

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7. On the side of the petitioner, it is stated that a case can be taken cognizance by the learned Judicial Magistrate only once. The learned Judicial Magistrate cannot take cognizance of the offence twice. In support of this contention, a judgment of Kerala High Court in the case of **Kesavan Natesan v. Madhavan Peethambharan and others** reported in **1984 Cr1 324**, wherein it is stated as follows:

"If 'taking cognizance' means only 'becoming aware of' or 'taking judicial notice of' an offence, whatever might be the situation in a given case, in law the Magistrate takes cognizance or becomes aware of an offence only once. In that sense, it is correct to say that Magistrate cannot take cognizance of an offence twice."

8. On the side of the revision petitioner, it is stated that a party aggrieved by the act of the learned Judicial Magistrate in taking cognizance of the case has to approach only the appellate Court or the High Court. In this case, instead of approaching the appellate Court or the High Court, the prosecution has approached the successor of the same Judicial Magistrate and filed the petition, after a lapse of three years. Filing the appeal before the very same Court is not maintainable.

9. The learned counsel for the petitioner would rely upon a judgment of the Calcutta High Court in the case of **Central Bureau of Investigation v. Joydeb Dasgupta** reported in **2007 (1) CHN 458**, wherein it is stated as follows:

"Furthermore, one of the cardinal principles of procedural law is that a successor Judge cannot sit in appeal or revision over an order passed by his predecessor Judge in the same matter to examine whether cognizance was good or bad in law. Judicial discipline in such a case requires that the party aggrieved with the order of cognizance should move before superior Court for redress. The observation of this Court in the case of *K.R. Chatterjee (supra)* may be relied on."

10. On the side of the prosecution, it is stated that since the charge was already framed, the prosecution is having the right to file a petition under Section 216 Cr.P.C and the prosecution need



not file a revision against the order of the earlier Judicial Magistrate.

11. On the side of the revision petitioner, it is stated that after the charge sheet was submitted by the police, after the Judicial Magistrate took cognizance of an offence, the prosecution cannot file an application under Section 190 (1) (c) of Cr.P.C., to take cognizance of additional offence along with previous one. It is not open to the Judicial Magistrate, to take cognizance of an Additional offence, the order of the second cognizance is illegal and without jurisdiction. The then Judicial Magistrate has taken cognizance of the offence only under Section 147, 447, 294(b), 506 (ii), 120(b) and 149 of I.P.C and he has particularly, deleted the offence under Section 3(1) of TNPPDL Act, by a specific endorsement in the charge sheet. That endorsement was not questioned by the prosecution.

12. On the side of the revision petitioner, it is stated that a successor Magistrate passing an order in same matter, that was decided by the predecessor Judge and has examined whether cognizance was good or bad in law and that the order of taking cognizance for the second time by the successor Judge is not maintainable. A judgment of the Calcutta High Court in the case of **Central Bureau of Investigation v. Joydeb Dasgupta** reported in **2007 (1) CHN 458** is cited.

13. On the side of the revision petitioner, it is further stated that the prosecution has no *locus standi* to file a petition under Section 216 of Cr.P.C. It is for the Court to decide whether to add or alter the charge. Without filing any further statements and without filing any other document, the prosecution has moved the Judicial Magistrate with the petition under Section 216 of Cr.P.C., and the order has to be set aside.

14. On the side of the prosecution, it is stated that the Judicial Magistrate is having the power to alter or add any charges at any time of the proceedings before pronouncing the judgment. It is further stated that the prosecution is having every right to file a petition under Section 216 Cr.P.C.

15. On the side of the revision petitioner, it is stated that such alteration or addition to any charge must be done on the basis of some evidence on record. A Judgment of the High Court of Sikkim in the case of **Rocky Benedick v. State of Sikkim** reported in **2003 Cr. L. J. 3309 (3312) (Sikk)** is cited.

16. On the side of the revision petitioner, it is further stated that the power under Section 216 of Cr.P.C., is exclusive to the Court and there is no right for any party neither the defacto complainant nor the prosecution to seek such alteration or addition



of charge by filing any application as a matter of fact. In support of this contention, a judgment of the Hon'ble Supreme Court in the case of **K.Karthialakshmi v. Sri Ganesh** reported in **(2017) 3 SCC 347** is cited.

17. On the side of the revision petitioner, it is further stated that the offence under Section 3(1) of TNPPDL is not made out as the property is only a private property. It is further stated that the TNPPDL Act is applicable only when a private property was damaged during the course of political or communal agitation and the Act is not applicable for solitary incidents.

18. The learned counsel for the petitioner would rely upon a judgment of this Court in the case of **Sam Stalin v. State** reported in **2021 (3) MLJ (Cr1) 585**, wherein it is stated as follows:

"As rightly pointed out by Mr.T.Ebenezer, learned counsel for the appellant, in the judgment in Crl.A. (MD)No.273 of 2008, which was disposed of by a learned Single Judge of this Court, on 27.09.2018, it was observed that the provisions of Tamil Nadu Properties (Prevention of Damage and Loss), Act, originally protected the public properties only. Subsequently, it was amended, whereby, private properties, which were damaged in the course of agitation by the political parties or other such groups, either communal, religious, linguistic agitating against the State and in the course of the agitation, the vehicles and the properties, even though belonging to private parties, are also damaged, are included. But in the solitary incidents, the private properties whether, building or vehicle are not covered under the amendment. For those purpose, already provisions are available under IPC. The Investigation Officer mechanically invoking the provisions of Tamil Nadu Properties (Prevention of Damage and Loss), Act, which cannot be accepted by a Court of Law, as it is against the legislation intended by the amendment brought by the State."

19. The learned counsel for the petitioner would rely upon a judgment of this Court in the case of **Logu @ Loganathan v. State in Crl.A. (MD)No.273 of 2008**, wherein it is stated as follows:

"The very object of the amendment makes it very clear that the Tamil Nadu Property (Prevention of Damage & Loss) Act, as stood before the amendment was enacted to prevent damage or loss caused to any private property during political parties or communal, language or ethnic agitation, demonstration



or other activities. Originally, there was no provision to make a loss for the private property and also punishment for cause damage to the private property. Therefore, it was decided to include the private property in the amendment. The object of the Act makes it very clear that only during such political party agitations or ethnic agitations, demonstration or other activities or communal clash if any private properties are damaged to fix the liability on such groups, the amendment has been brought in. The object itself is to compensate the loss of the private properties for the damage caused by the said groups. Therefore, I am of the view that ordinary mischief caused by any individual, in a fight, they cannot be brought under Section 3(1) of the TNPPDL Act. It is a routine practice of the police to implicate even the individual, who allegedly causes damage of property worth about hundred rupees under Section 3(1) of TNPPDL Act. Such practice should be stopped herewith. The object of the Act has to be given preference. Not in every case, Section 3(1) of TNPPDL Act can be invoked. Considering the above and also the facts of the case, this Court holds that the prosecution has failed to establish the guilt of the accused."

20. The learned counsel for the petitioner would rely upon a judgment of this Court in the case of **Thirumalaisamy and others v. State in Crl.A. (MD) No.414 of 2009**, wherein it is stated as follows:

"The learned counsel for the appellants/A1 to A4 submitted that it is the case of the prosecution that only due to accident, the accused caused damage the front and back glass of the vehicle and to attract Section 3(1) of TNPPDL Act, there was damage caused to the public property during political parties or communal, language or ethnic agitation, demonstration or other activities and there was no provision to make a loss for the private property and also punishment for causing damage to the private property and in this case, the bus was damaged only due to the accident and hence, the offence under Section 3(1) of TNPPDL Act is not made out. In support of this submission, the learned counsel for the appellants/A1 to A3 relied upon a judgment of this Court in the case of Logu @ Loganathan v. State rep. By the Inspector of Police, Taluk Police Station, Thanjavur (Crl.A. (MD) No.273 of 2008 decided on 27.09.2018), wherein it has been held at para 8 as follows:

The very object of the amendment makes it very

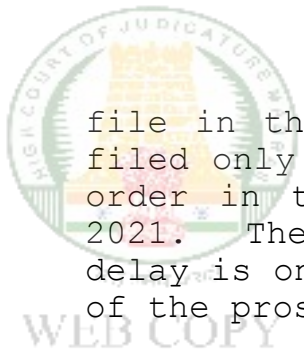


clear that the Tamil Nadu Property (Prevention of Damage & Loss) Act, as stood before the amendment was enacted to prevent damage or loss caused to any private property during political parties or communal, language or ethnic agitation, demonstration or other activities. Originally, there was no provision to make a loss for the private property and also punishment for cause damage to the private property. Therefore, it was decided to include the private property in the amendment. The object of the Act makes it clear that only during such political party agitations or ethnic agitations, demonstration or other activities or communal clash if any private properties are damaged to fix the liability on such groups, the amendment has been brought in. The object itself is to compensate the loss of the private properties for the damage caused by the said groups. Therefore, I am of the view that ordinary mischief caused by any individual, in a fight, they cannot be brought under Section 3(1) of the TNPPDL Act. It is routine practice of the police to implicate even the individual, who allegedly causes damage of property worth about hundred rupees under Section 3(1) of TNPPDL Act. Such practice should be stopped herewith. The object of the Act has to be given preference. Not in every case, Section 3(1) of TNPPDL Act can be invoked. Considering the above and also the facts of the case, this Court holds that the prosecution has failed to establish the guilt of the accused."

21. On the side of the prosecution, it is stated that TNPPDL Act is applicable to damages to private properties. There is no need for the property to have been damaged during the course of any political or communal agitations. After the amendment in the year 1994, the word public was omitted and that now the word property includes private properties also.

22. On the side of the prosecution, it is further stated that totally 12 persons involved in the offence. The petitioner is A6 in the case. This revision petitioner has approached this Court, only after a lapse of one year from the date of the order of the Judicial Magistrate, in Cr.M.P.No.3256 of 2016,. The case was committed by the Judicial Magistrate on 29.04.2021 and that the case is pending at the stage of framing of charges for the past eight months. Only with an intention to drag on the case, the petitioner has come forward with this revision.

23. On the side of the revision petitioner, it is stated that the alleged occurrence is said to have taken place in the year 2005. But, the complaint was filed only in the year 2012, ie. after a lapse of 7 years. Charge sheet was filed and the same was taken on



file in the year 2013. The petition under Section 216 Cr.P.C was filed only in the year 2016, ie. after a lapse of three years. The order in this petition was passed by the Court only in the year 2021. The revision petitioner is not dragging on the case. The delay is only on the part of the defacto complainant and on the part of the prosecution.

24. The case against the petitioner and others is that they formed into an unlawful assembly and trespassed into the property of the defacto complainant and they removed the stone pillars erected along the boundaries and damaged the property by dumping quarry waste and when the same was questioned by the defacto complainant, the petitioners and others scolded the defacto complainant in filthy language and threatened him with dire consequences. The Police filed a chargesheet under Sections 147, 447, 294(b), 506(ii) of IPC r/w. Section 3(1) of TNPPDL Act and under Sections 120(b) and 149 of IPC. On 11.07.2013, at the time of taking cognizance of the offence, the then learned Judicial Magistrate, Melur has taken up the case on file under Sections 147, 447, 294(b), 506(ii), 120(b) and 149 of IPC and he has made an endorsement that the alleged property do not come under the definition of TNPPDL Act and that he deleted the offence under Section 3(1) of TNPPDL Act. On 17.12.2014, the then learned Judicial Magistrate, Melur, has framed charges under Section 147, 447, 294(b) and 506(ii) of IPC and the case was posted for examination of the witnesses. On 19.07.2016, the respondent has filed a petition under Section 216(1)(4) of Cr.P.C., in Cr.M.P.No.3256 of 2016 and that petition was allowed by the Judicial Magistrate on 10.02.2021 and he has committed the case to the Sessions Court. Against the order, the petitioner has filed this revision.

25. As per the TNPPDL Act, amended as 46 of 1994, dated 04.08.1994, the word 'public' has been omitted and hence, the contention of the revision petitioner regarding the applicability of the Act to the private property is not maintainable.

26. The then Judicial Magistrate has taken cognizance of the offence only under Sections 147, 447, 294(b), 506(ii), 120 (b), and 149 of I.P.C. He has particularly deleted the offence under Section 3(1) of TNPPDL Act, by a specific endorsement in the charge sheet. That endorsement was not questioned by the prosecution. Under Section 190 (1) of Cr.P.C., cognizance of an offence cannot be taken twice. The prosecution has failed to question the same. The remedy available to the prosecution is to approach the Superior Court or by way of filing a revision. No such effort was taken by the prosecution.

27. The trial Court has discussed the right of the trial Court to alter the charges, but, has failed to discuss anything regarding the facts of the case.



28. There is no doubt that under Section 216 of Cr.P.C., the Court may alter or add to any charge, upon its own opinion or on an application by the prosecution, which should be made immediately, after the charge is explained by the Magistrate. Though charge was framed on 17.01.2014, the prosecution has failed to question the same immediately. Only after a lapse of two years, this petition was filed by the prosecution.

29. The occurrence is said to have taken place in the year 2005. The complaint was filed only in the year 2012, ie. after a lapse of 7 years. The defacto complainant, who is a Law Graduate, working as a Sub Inspector of Police at that time, is claiming that he was afraid of the petitioner and has failed to file the complaint in time. The case was taken on file in the year 2013. Charge was framed in the year 2014. But, the prosecution has filed this petition only in the year 2016. There is a delay on the part of the defacto complainant and on the part of the prosecution.

30. Under Section 216 Cr.P.C, the Magistrate / Officer is having the power to alter the charge at any point of time before pronouncing judgment. If during the trial, the trial Court on consideration of broad probability of the case based upon the total effect of the evidence and documents produced is satisfied that any Addition or alteration of the charge is necessary, the trial Court can alter or add charges. The prosecution is entitled to file a petition under Section 216 of Cr.P.C., with additional records or with additional statements or with additional evidences. The prosecution has not produced any such additional records or statements along with this petition. Before examining any witness, before perusing the documents, the trial Court has come to a conclusion to add a charge.

31. As per Section 323 Cr.P.C, after commencement of enquiry or trial, if the Magistrate Court finds at any stage of the proceedings before signing the judgment that the case is one which ought to be tried by a Honourable Court of Sessions, the Magistrate shall commit it to the Honourable Court of Sessions.

32. In the impugned order, the trial Court has made an observation that there is a prima facie case made out to show that "the accused had committed an offence by destroying the land mark fixed by the authority of a public servant." Even in the complaint, it is clearly stated that stone pillars surrounding the boundaries were erected by the defacto complainant. The above observation of the trial Court, clearly reveals that the trial Court has failed to peruse the available records.

33. Two distinct offences are stated in the complaint:- ((i) the defacto complainant came to know that somebody uprooted the



pillars and destroyed the coconut saplings by dumping quarry waste. On the basis of the wordings of his neighbours, the defacto complainant questioned the petitioner and others and (ii) the petitioner and others scolded the defacto complainant in filthy language and threatened him with dire consequences. Considering the nature of the complaint, considering the delay in lodging the complaint, considering the wrong observation made by the trial Court, it is decided that it will be proper for the trial Court, to examine witnesses and if in the course of the trial any additional charge / offence is made out in the course of trial, the trial Court can add or alter the charge.

34. On examination of witness, if an offence triable by the Court of Sessions is made out, the trial Court is at liberty to commit the case to the Court of Sessions. With the above observation, the impugned order is set aside. This Criminal Revision Case is allowed. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (As)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

Mrn/Ls

Note : In view of the present lock down owing to COVID - 19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

To

- 1.The Judicial Magistrate,
Melur, Madurai District.
- 2.The Inspector of Police,
Othakadai Police Station,
Madurai District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

Crl. R.C.(MD)No.45 of 2022

22.02.2022