



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 05.01.2022

Delivered on : 31.01.2022

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CORAM:

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

Crl.O.P. (MD)No.15358 of 2019

and

Crl.M.P. (MD)Nos.9152 & 9153 of 2019

1.Senthilkumar

2.Selvi

3.Siva

4.Bhariraja

... Petitioners/
Accused Nos.1 to 4

vs.

1.State represented by
The Inspector of Police,
Devakkottai Taluk Police Station,
Devakkottai,
Sivagangai District.
(Crime No.170 of 2017)

...1st Respondent/
Complainant

2.Ramachandran
(R2 impleaded as per order of
this Court dated 11.11.2019
in Crl.M.P. (MD)No.9766/19
in Crl.O.P. (MD)No.15358/19)

...2nd Respondent

PRAYER : Criminal Original Petition filed under Section 482 Cr.P.C,
to call for the records and set aside the order passed in
Cr.M.P.No.366 of 2018 in C.C.No.116 of 2018 passed by the learned
Judicial Magistrate, Devakkottai dated 05.09.2018.

For Petitioners : Mr.G.Karuppasamy Pandiyan

For Respondents : Mr.R.Meenakshi Sundaram
Additional Public Prosecutor for R1

Mr.M.Balakrishnan for R2



O R D E R

This Criminal Original Petition is directed against the order passed in Cr.M.P.No.366 of 2018 in C.C.No.116 of 2018 dated 05.09.2018 on the file of the Court of the Judicial Magistrate, Devakkottai partly allowing the protest petition.

2.The petitioners are the accused in Crime No.170 of 2017 on the file of the first respondent police.

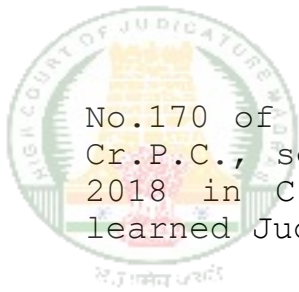
3.It is not in dispute that the third petitioner and the second respondent had lodged complaints for the occurrence allegedly held on 23.08.2017 and on that basis, two FIRs came to be registered, one in Crime No.169 of 2017 against the second respondent herein and one Vignesh for the alleged offences under Sections 294(b), 323, 324 and 506(ii) IPC and the second FIR in Crime No.170 of 2017 against the petitioners herein for the alleged offences under Sections 294(b), 323, 506(i) and 379 IPC.

4.It is also not in dispute that the first respondent after completing the investigation, has laid the charge sheet with respect to the Crime No.169 of 2017 and the case was taken on file and that the second respondent and another accused have been appearing before the concerned Court. But the first respondent has filed a final report in Crime No.170 of 2017 deleting two persons and excluding 3 Provisions of law, for which FIR was registered and thereby charge sheeted the petitioners 1 and 4 for the alleged offence under Section 294(b) IPC only.

5.Aggrieved by the said final report, the defacto complainant/second respondent has filed a protest petition in Cr.M.P.No.366 of 2018 alleging biased investigation and the defects and flaws in the investigation, sought for direction to appoint another Investigating Officer to conduct the investigation and file a final report. The first respondent police has filed a reply in the form of the special report to the protest petition opposing the allegations raised by the defacto complainant and sustaining the filing of final report against the two accused for the alleged offence under Section 294(b) IPC

6.The learned Judicial Magistrate, Devakkottai after enquiry has passed the impugned order dated 05.09.2018 partly allowing the protest petition and ordered for taking cognizance of the case against all the four petitioners and for all the offences shown in the FIR.

7.It is evident from the records that consequently, the case was taken on file in C.C.No.116 of 2018 on the file of the Court of the Judicial Magistrate, Devakkottai. Challenging the above order passed by the learned Judicial Magistrate, the accused in Crime



No.170 of 2017 have filed the present petition invoking Section 482 Cr.P.C., seeking orders to call for the records in Cr.M.P.No.366 of 2018 in C.C.No.116 of 2018 dated 05.09.2018 on the file of the learned Judicial Magistrate, Devakkottai and set aside the same.

8.The first contention of the petitioners is that they were not given right of audience by the learned Judicial Magistrate while deciding the protest petition and the same is in gross violation of natural justice. It is necessary to refer the judgment of the Hon'ble Supreme Court in ***Iris Computers Limited vs. Askari Infotech Private Limited and others*** reported in **2015 (14) SCC 399** and the Hon'ble Apex Court has clearly held that the accused has no right to be heard till process is issued and the relevant passage is extracted hereunder:-

"10.Therefore, the crux of the matter rests into the existence of two different scenarios; the former involving only the complainant's role and the latter introducing the accused. The former constitutes cognizance of the offence on complaint, satisfaction reached by the Magistrate that a prima facie case is made out and thereafter, issuance of process to the accused. It is only after the aforesaid stages are complete; the next stage is triggered enabling the accused to actively participate in the proceedings. The dismissal of complaint by the Magistrate under Section 203 evidently falls into the former stages of proceedings when the Magistrate has to base his opinion as to the existence of sufficient ground for proceeding towards the second stage on the statements of the complainant and the witnesses along with the result of the inquiry conducted under Section 202. It is for obvious reasons that none of the former stages in the Code provide for hearing the summoned accused, the said being only preliminary stages and the stage of hearing of the accused arising at subsequent stages provided for in the latter provisions in the Code. (See Bholu Ram vs. State of Punjab, 2008 9 SCC 140)"

Since it is only the protest petition filed by the defacto complainant challenging the finding of the Investigating Officer in the final report, the question of issuing notice and hearing the accused does not arise at all. Considering the above, the first contention of the petitioners is liable for instant rejection.

9.The learned counsel for the petitioners would submit that admittedly, there was no evidence to substantiate the claim of the defacto complainant in the protest petition and that the learned Magistrate without mentioning any valid reason has simply set aside the final report and ordered for taking cognizance of the case against all the accused and for all the offences shown in the FIR. He would further submit that the learned Magistrate has not considered the settled legal position that the Magistrate can accept the final report or reject the final report or can treat the protest



petition as a private complaint or order further investigation and that apart from the above courses, the Magistrate cannot do anything and that since the learned Magistrate has passed the impugned order in a mechanical fashion without adverting to the collection of evidence is liable to be set aside.

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10. Before entering into further discussion, it is necessary to refer the decision of this Court in ***Ranjith Soundarajan vs. State represented by the Inspector of Police, District Crime Branch, Dindigul and another*** reported in ***2021 (2) MWN(Cr) 155*** wherein this Court has dealt with the courses open to the Magistrate on receipt of the protest petition and the relevant passages are extracted hereunder:-

"9. There is no provision in the Criminal Procedure Code, which speaks about the Protest Petition. Generally, the objections filed to the Negative Report filed by the Police are called as the Protest Petitions and the same is permitted to be filed by the informant or the De facto Complainant in two category of cases.

10. In the first category, the Informant or the De facto Complainant files a Complaint before the Police directly and the Police, after investigation files a Final Report with negative finding in the form of referred Chargesheet and in such case, on receiving the notice, the informant or Complainant can file the Protest Petition, objecting to the decision taken by the Police.

11. In the second category, the De facto Complainant files a Complaint before the Court of Judicial Magistrate and the learned Magistrate without taking cognizance directly, forwards the same to the Police under Section 156 (3), Cr.P.C and the Police, after registering the case and completing the investigation files a Negative Report, then also the De facto Complainant on getting the notice, is entitled to file a Protest Petition.

12. In the first category of cases, the Magistrate will have three options that the Magistrate may agree with the decision of the Police and accept the Final Report and drop the proceedings or that he may take cognizance under Section 190(1)(b) of Cr.P.C., if he is satisfied with the materials produced by the Police, that there is sufficient ground to proceed, despite the fact that the Police has only filed the Negative Report or that the Magistrate may order for further investigation, in case if he is satisfied that the investigation already conducted is not proper.



13. In the 2nd category of cases, the Magistrate can adopt the above three courses and in addition to that, an another course is available to the Magistrate that he may proceed to act under Sections 200 & 202, Cr.P.C., upon considering the original Complaint or by treating the Protest Petition as the Complaint.

14. In the present case, as already pointed out, the Revision Petitioner has directly filed the Complaint before the First Respondent-Police and after filing of the Negative Report, he filed the Protest Petition. It is evident from the impugned Order, that the Protest Petition was filed by the Revision Petitioner on 29.8.2013 and the same was taken on file on 26.9.2013, that the De facto Complainant was absent on 13.7.2016 till 5.30. pm and there was no representation for him on that day and that the learned Magistrate by observing that there was no progress on the side of the De facto Complainant and after perusing the entire records and also the Final Report filed by the Police, has closed the Protest Petition and also the FIR in Crime No.48 of 2010 as 'mistake of fact'.

15. The main contention of the Revision Petitioner is that his Protest Petition ought to have been taken as a Private Complaint under Section 190 read with 200, Cr.P.C., and ought to have been proceeded in accordance with law. At this juncture, it is necessary to refer the decision of the Honourable Supreme Court in Vishnu Kumar Tiwari v. State of Uttar Pradesh, 2019 (3) MWN (Cr.) 197 (SC): 2019 (5) CTC 603 (SC): 2019 (8) SCC 27:

"41. In the facts of this case, having regard to the nature of the allegations contained in the Protest Petition and the Annexures, which essentially consisted of Affidavits, if the Magistrate was convinced on the basis of the consideration of the Final Report, the statements under Section 161 of the Code that no prima facie case is made out, certainly the Magistrate could not be compelled to take cognizance by treating the Protest Petition as a Complaint. The fact that he may have jurisdiction in a case to treat the Protest Petition as a Complaint, is a different matter. Undoubtedly, if he treats the Protest Petition as a Complaint, he would have to follow the procedure prescribed under Sections 200 & 202 of the Code, if the latter Section also commends itself to the Magistrate. In other words, necessarily, the Complainant and his Witnesses would have to be examined. No doubt, depending upon the material which is made available to a Magistrate by the Complainant



in the Protest Petition, it may be capable of being relied on in a particular case having regard to its inherent nature and impact on the conclusions in the Final Report. That is, if the material is such that it persuades the Court to disagree with the conclusions arrived at by the Investigating Officer, cognizance could be taken under Section 190(1)(b) of the Code for which there is no necessity to examine the Witnesses under Section 200 of the Code. But as the Magistrate could not be compelled to treat the Protest Petition as a Complaint, the remedy of the Complainant would be to file a fresh Complaint and invite the Magistrate to follow the procedure under Section 200 of the Code or Section 200 read with Section 202 of the Code. Therefore, we are of the view that in the facts of this case, we cannot support the decision of the High Court.

42. It is true that law mandates notice to the Informant/Complainant where the Magistrate contemplates accepting the Final Report. On receipt of Notice, the informant may address the Court ventilating his objections to the Final Report. This he usually does in the form of the Protest Petition. In Mahabir Prasad Agarwala v. State, AIR 1958 Ori. 11, a learned Judge of the High Court of Orissa, took the view that a Protest Petition is in the nature of a Complaint and should be examined in accordance with provisions of Chapter XVI of the Criminal Procedure Code. We, however, also noticed that in Qasim and others v. State and others, 1984 Crl.LJ 1677, a learned Single Judge of the High Court of Judicature at Allahabad, inter alia, held as follows:

"4.In the case of Abhinandan Jha MANU/SC/0054/1967 (supra) also what was observed was 'it is not very clear as to whether the Magistrate has chosen to treat the Protest Petition as Complaint.' This observation would not mean that every Protest Petition must necessarily be treated as Complaint whether it satisfies the conditions of the Complaint or not. A private Complaint is to contain a complete list of Witnesses to be examined. A further examination of Complainant is made under Section 200, Cr.P.C. If the Magistrate did not treat the Protest Petition as a Complaint, the Protest Petition not satisfying all the conditions of the Complaint to his mind, it would not mean that the case has become a Complaint case. In fact, in majority of cases when a Final Report is submitted, the Magistrate has to simply consider whether on the materials in the Case



Diary no case is made out as to accept the Final Report or whether case diary discloses a prima facie case as to take cognizance. The Protest Petition in such situation simply serves the purpose of drawing Magistrate's attention to the materials in the case diary and invite a careful scrutiny and exercise of the mind by the Magistrate so it cannot be held that simply because there is a Protest Petition the case is to become a Complaint case."

In the present case, no doubt, the Revision Petitioner in his Protest Petition has listed out the documents and the Witnesses to be examined. As rightly contended by the learned Government Advocate (Criminal Side), the Magistrate is vested with the discretion either to treat the Protest Petition as a Complaint under Section 200, Cr.P.C., and proceed in accordance with law, or the Magistrate can close the Protest Petition by giving liberty to the Informant or De facto Complainant to file a private Complaint.

16. The Hon'ble Supreme Court in the above decision, has specifically held that the Magistrate could not be compelled to take cognizance by treating the Protest Petition as Complaint. Hence, the main contention of the Revision Petitioner that the learned Magistrate ought to have treated the Protest Petition as Complaint under Section 190 read with 200 Cr.P.C., is devoid of merits and the same is liable for rejection."

11. In the case on hand, admittedly, as already pointed out, FIR was registered for the alleged offences under Sections 294(b), 323, 506(i) and 379 IPC against the four accused/petitioners and the final report has been filed by the first respondent only against the two accused, the petitioners 1 and 4 herein for the alleged offence under Section 294(b) IPC. The learned Magistrate after considering the protest petition has passed the impugned order taking cognizance of the case against all the four accused for the offences under Sections 294(b), 323, 506(i) and 379 IPC.

12. It is evident from the impugned order that the first respondent has taken a stand that the defacto complainant Ramachandran and one Vignesh, in order to suppress the attack made by them on the other side, gave a false complaint and without sustaining any injury got admitted in the hospital and that the said Vignesh had left the hospital by himself. The learned Magistrate, in the impugned order, by referring the above stand of the first respondent has observed that the first respondent has neither examined any of the medical officers nor produced any of the medical evidence to prove those aspects and as such, the report of the first respondent cannot be accepted as genuine and satisfactory.



13.As rightly pointed out by the learned counsel for the petitioners if that be the reason, then the learned Magistrate should have directed the first respondent to conduct further investigation.

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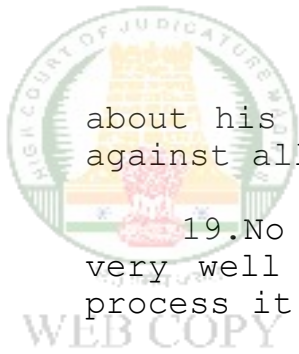
14.The learned Magistrate has further observed in the impugned order that the defacto complainant Ramachandran in the statement recorded under Section 161(3) Cr.P.C. has reiterated all the averments raised in his complaint and thereby implicating all the accused and all the offences committed by them, but the Investigating Officer without assigning any reason for rejecting the statement of the defacto complainant and for not considering the complaint as well as the statement, has filed the final report and as such, the report cannot be considered as complete and acceptable.

15.Admittedly, the copy of the final report filed by the first respondent is not available before this Court. But considering the impugned order and also the contentions of both the parties, it is clear that the first respondent along with the final report has filed the statement of other witnesses recorded under Section 161(3) Cr.P.C. implicating the petitioners 1 and 4 only and that too for the alleged offence under Section 294(b) IPC.

16.As rightly pointed out by the learned counsel for the petitioners, though the learned Magistrate has commented the conduct of the first respondent in rejecting the complaint and the statement of the defacto complainant under Section 161(3) Cr.P.C., the learned Magistrate has not assigned any reason or ground for rejecting the statement of other witnesses recorded under Section 161(3) Cr.P.C. It is clearly evident from the impugned order that the learned Magistrate, only on the basis of the complaint and the statement of the defacto complainant recorded under Section 161(3) Cr.P.C. has ordered for taking cognizance of the case against all the four accused and for the alleged offences stated in the FIR.

17.No doubt, it is settled law that even if a negative report is filed by Investigating Officer, the Magistrate if he is satisfied, on the basis of the consideration of the final report and the statements under Section 161 Cr.P.C. that *prima facie* case is made out, can take cognizance under Section 190(1)(b) of the Court but the only condition is that there must be some materials available for the Magistrate to get himself satisfied that there existed *prima facie* case for taking cognizance.

18.In the case on hand, except the statement of the defacto complainant under Section 161(3) Cr.P.C. there is no other material available for taking cognizance of the case against the other two persons and for the offences under Sections 323, 506(1) and 379 IPC. The learned Magistrate in the impugned order has no where whispered



about his satisfaction that there existed a *prima facie* to proceed against all the accused for all the offences alleged in the FIR.

19.No doubt, as already pointed out, the learned Magistrate can very well treat the protest petition as a complaint petition and process it under Sections 200 and 202 Cr.P.C.

20.In the case on hand, the learned Magistrate has not adopted such a course but he has taken cognizance only on the basis of the complaint and the statement of the defacto complainant under Section 161(3) Cr.P.C.

21.As rightly contended by the learned counsel for the petitioners, the defacto complainant by sensing that cognizance cannot be taken for all the offences and against all the accused shown in the FIR with the available records (i.e) the final report and the statement of the witnesses recorded under Section 161(3) Cr.P.C., has sought for the direction to appoint another Investigating Officer to conduct the investigation and to file a fresh final report, but the learned Magistrate by holding that the question of appointing another Investigating Officer and for filing of fresh final report does not arise, has decided to allow the protest petition partly.

22.Considering the above, this Court has no hesitation to hold that the order of the learned Magistrate taking cognizance against all the accused for all the offences shown in the FIR is not good in law and the same is liable to be set aside.

23.The learned Judicial Magistrate, Devakkottai is directed to consider the protest petition along with the final report and the statement of the witnesses and to follow any of the three courses available to him, as referred in the judgments cited supra and to proceed in accordance with law.

24.With the above direction, this criminal original petition is allowed and the order passed in Cr.M.P.No.366 of 2018 in C.C.No.116 of 2018 by the learned Judicial Magistrate, Devakkottai dated 05.09.2018 is set aside. Consequently, connected miscellaneous petitions are closed.

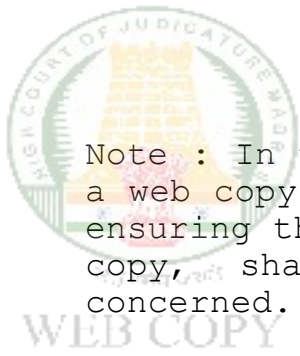
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Assistant Registrar (CS-III)

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Sub Assistant Registrar(CS)



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,
Devakkottai.
- 2.The Inspector of Police,
Devakkottai Taluk Police Station,
Devakkottai,
Sivagangai District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.M.BALAKRISHNAN, Advocate (SR-3255[F] dated
31/01/2022)

Crl.O.P. (MD)No.15358 of 2019
and
Crl.M.P. (MD)Nos.9152 & 9153 of 2019
31.01.2022

RK(28/02/2022) 10P 5C