IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-M-38877-2015
Date of decision: 22.08.2023

Shubhnet Anand

...Petitioner

Versus

State of Punjab and another .....Respondents

CORAM: HON'BLE MR. JUSTICE HARNARESH SINGH GILL

Present:- Mr. Sartej S. Narula, Advocate,
for the petitioner.

Mr. Gurdarshan Singh Sidhu, AAG, Punjab.

Mr. Manish Jain, Advocate,
for respondent No.2.

HARNARESH SINGH GILL, J. (ORAL)

1. Challenge in the present petition is to the order dated 04.07.2011 (Annexure P-38) passed by learned Sub Divisional Judicial Magistrate, Mohali, whereby cancellation report dated 24.07.2009 presented in FIR No.103 dated 25.04.2006, under Sections 406 and 420 IPC, registered at Police Station Phase-I, Mohali, was accepted.

2. The above-noted FIR was registered on the statement of the petitioner. As per the contents of FIR, respondent No.2 is the owner of DU Type Deluxe Apartment No.4540, Block D-4, 38 Floor, alongwith parking No.OCP-318, Sector 68, Mohali; that in March, 2005, one Syed Mohd. Akief Kazmi, who is brother in-law of respondent No.2, asked the petitioner and her husband that respondent No.2 being an allottee of the flat

in question, was interested in selling the same; that sale price of the flat was settled at Rs.16 lakh and that Syed Mohd. Akief Kazmi assured the petitioner that respondent No.2 had agreed to sell the flat and that having been assured that respondent No.2 would send the requisite power of attorney(s) and other documents to facilitate the sale of the flat, the petitioner had paid an amount of Rs.5 lakh, vide cheque No.035225 dated 13.03.2005 favouring Syed Mohd. Akief Kazmi. It is further alleged that respondent No.2 being resident of Ontario, Canada had executed a special power of attorney (hereinafter referred to as 'SPA') on 08.06.2005 in favour of Syed Mohd. Akief Kazmi, authorizing him to sell the property in question, receive the earnest money and issue receipt qua the same, and that at the same time, respondent No.2 had also executed a general power of attorney (hereafter referred to as 'GPA') dated 08.06.2005 in favour of one Sunil Kumar Chopra, to deal with the affairs of the flat, sell the same and sign all the documents. It is further alleged that Syed Mohd. Akief Kazmi and Sunil Kumar Chopra had been given absolute powers to sell the flat in question and do all the formalities regarding the sale transaction. It is further alleged that after having received an amount of Rs.5 lakh in advance on 13.03.2005, an agreement to sell dated 23.06.2005 was executed between respondent No.2 through his GPA i.e. Sunil Kumar Chopra and the petitioner; that as per the agreement, total sale consideration of the flat was settled as Rs.16 lakh and an amount of Rs.5 lakh had been paid through cheque dated 13.03.2005 in favour of Syed Mohd. Akief Kazmi, SPA of respondent No.2; that last date to finalize the deal was fixed as 10.07.2005; that to adhere to the terms and conditions of the agreement, the petitioner paid balance sale consideration amount of Rs.11 lakh on 01.07.2005 (Rs.9 lakh vide cheque No.477871 and Rs.2 lakh in cash) and aforesaid Sunil Kumar Chopra had issued a receipt to this effect and that the petitioner was given possession of the flat in question on having paid the complete amount on 01.07.2005 and only documentary formalities were to be completed so as to transfer the flat in favour of the petitioner.

3. It is further alleged that respondent No.2 also sent an affidavit dated 12.09.2005 duly notarized by the Notary in Cobourg, Canada, vide which he had admitted receipt of the full and final payment from the petitioner and deposed that however after completion of the deal, it was realized by the SPA and GPA of respondent No.2 that though GPA was attested by the Consulate General of India at Toronto, yet the same had not been notarized and accompanied by the notarized copies of the passport of respondent No.2 and thus, the same could not be embossed; that Sunil Kumar Chopra (GPA holder) wrote a letter dated 15.09.2005 to respondent No.2 to send the requisite documents and requested that a new power of attorney on the same terms be sent alongwith duly attested notarized copy of the passport, and that the petitioner was informed by aforesaid Sunil Kumar Chopra that respondent No.2 would send fresh papers in her name so as to facilitate the transfer of the flat in her favour. It is further alleged that however, respondent No.2 with dishonest intention raised demand of another amount of Rs.15 lakh to send the documents so as to get the sale deed registered in the name of the petitioner, but she had flatly refused to pay any further amount for the reason that nothing was due to be paid by

her, and that respondent No.2 got the GPA in favour of Sunil Kumar Chopra and SPA in favour of Syed Mohd. Akief Kazmi, cancelled.

4. It is further alleged that despite completion of deal with the petitioner on 01.07.2005, respondent No.2 had given the authority to sell the flat to one Irfan Javed Lone. The petitioner made a complaint to the police and after enquiry, the above-noted FIR was registered. Thereafter, respondent No.2 through his newly appointed GPA had filed a complaint against the petitioner and his previous GPA and SPA, under Section 156 (3) Cr.P.C. However, the said complaint was treated as a private complaint. It is further mentioned that respondent No.2 was declared a proclaimed offender in the present FIR No.103 dated 25.04.2006; that challan report under Section 173 Cr.P.C. was presented against respondent No.2 on 02.01.2009; that prosecution witnesses were ordered to be summoned under Section 299 Cr.P.C.; that however, respondent No.2 was arrested on 20.06.2009, but released on bail on 25.06.2009. In June, 2009, an application for re-investigation in the FIR in question was moved on behalf of respondent No.2. The Superintendent of Police, Investigation, Crime Wing, Punjab, submitted the report on 26.06.2009, with remarks that the case was not based on facts and opinion of the DA Legal was necessary, but challan had been presented before the Court without taking any opinion.

5. It is further alleged that SSP Mohali, without seeking prior permission from the competent court, had marked the case to DSP (City) Mohali, for re-investigation of the case despite the fact that report under Section 173(2) Cr.P.C., was already presented in the Court and no requisite

permission of the court had been sought. DSP (City-II) Mohali, recommended for cancellation of the FIR in question and submitted the report on 18.07.2009 for opinion of DA (Legal), SAS Nagar. It is further stated that on the basis of report of DSP (City-II) SAS Nagar, and DA (Legal), SAS Nagar, cancellation report was presented, which had been accepted, vide impugned order. Hence, the present petition.

6. Learned counsel for the petitioner has contended that the impugned order passed by the court below was perverse and against the law, and that while accepting cancellation report, the petitioner was not given an opportunity of hearing. He further contended that the impugned order was non-speaking on the ground that the court below had not even made an iota of reference qua facts of the case, allegations in the FIR, statements of witnesses under Section 161 Cr.P.C., and the report under Section 173 Cr.P.C. and rather, it was noticed that an exhaustive investigation had been done and there was no need for further investigation. He further contended that while accepting cancellation report, it was mandatory for the Magistrate to consider the challan report already presented against respondent No.2. He further contended that initially, challan was presented, but without seeking any permission from the competent court, re-investigation was conducted and subsequently, cancellation report had been presented. In support of his contentions, learned counsel relied upon the judgment rendered by the Hon'ble Supreme Court in 'Vinay Tyagi Vs. Irshad Ali @ Deepak and others', 2013(2) R.C.R. (Criminal) 197.

7. On the other hand, learned State counsel has submitted that

initially, respondent No.2 was declared a proclaimed offender; that however on 20.06.2009, respondent No.2 was arrested at IGI, Airport, New Delhi; that after a thorough investigation conducted by the police, cancellation report had been presented before the concerned court and that vide impugned order dated 04.07.2011 (Annexure P-38), learned Magistrate had accepted the cancellation report while noticing the fact that the complainant was untraceable despite the fact that repeated notices had been sent to her.

8. Learned counsel for respondent No.2 submits that during investigation, it was found that Sunil Kumar Chopra was unable to mention as to on which date and before whom the money had been paid to respondent No.2; that as per the passport of respondent No.2, he was found residing in Canada in the year 2005; that during investigation, it was also found that Syed Mohd. Akief Kazmi and Sunil Kumar Chopra had neither received any money nor authorized anybody to do so on his behalf uptil 08.06.2005. He further contended that the petitioner, Syed Mohd. Akief Kazmi and Sunil Kumar Chopra, in connivance with each other, had duped respondent No.2 and that respondent No.2 had never allowed anyone to hand over the possession of his flat to the petitioner.

9. I have heard the learned counsel for the parties.

10. In the present case, after investigation, challan was presented against respondent No.2 on 02.01.2009. However after conducting re-investigation, cancellation report was filed and the same was accepted, vide impugned order dated 04.07.2011, by noticing that the petitioner was untraceable despite the fact that repeated notices had been sent to her and

that the exhaustive investigation had been conducted by the investigating agency and, therefore, there was no scope for further investigation. A perusal of the order dated 04.07.2011 passed in complaint case filed by respondent No.2 would show that notice was issued to the petitioner (accused therein) for 20.10.2011 through Ministry of Home Affairs. However on 04.07.2011, cancellation report filed in the above-noted FIR was accepted by noticing that the petitioner (complainant therein) was untraceable. Thus, it transpires that no opportunity of hearing was given to the petitioner at the time of accepting the cancellation report.

11. Furthermore, while accepting the cancellation report, the Magistrate has to consider the entire record, including the challan report and the cancellation report and the documents filed alongwith these reports. However, there was no reference qua the facts of the case, allegations in the FIR, statements of witnesses under Section 161 Cr.P.C., and challan report under Section 173 Cr.P.C. As such, the impugned order passed by learned Magistrate is non-speaking.

12. In addition, post presentation of challan report against respondent No.2, re-investigation had been conducted by the investigating agency. Once a report under Section 173(2) Cr.P.C., has been filed, it can only be cancelled, proceeded with further or case closed by the court of competent jurisdiction and that too, in accordance with law. It is a settled law that the police has to seek permission of the concerned court for 'further investigation', which is the continuation of a previous investigation. In the case of a 'fresh investigation' or 're-investigation', there has to be a definite order, coupled with the specific direction as to the fate of the

investigation already conducted. In the present case, after re-investigation, cancellation report was filed. However, there is nothing on record to show as to whether any requisite permission was obtained before conducting re-investigation. Even the concerned Superintendent of Police specifically mentioned that permission of the court was necessary to be obtained before conducting any further investigation. Furthermore, the enquiry report dated 18.07.2009 submitted by the DSP concerned would show that fraud had been committed by aforesaid Syed Mohd. Akief Kazmi and Sunil Kumar Chopra, but not by respondent No.2.

13. On the basis of the facts on record coupled with the rival submissions made by the parties, the further investigation had been conducted by the police without seeking permission of the Court. It is settled law that no further investigation can be conducted by the police without the prior permission of the competent court.

14. The Hon'ble Supreme Court in <u>Vinay Tyagi's case (supra)</u> has held as under:

> "*16. However, in the case of a 'fresh investigation', 'reinvestigation' or 'de novo investigation' there has to be a definite order of the court. The order of the Court unambiguously should state as to whether the previous investigation, for reasons to be recorded, is incapable of being acted upon. Neither the Investigating agency nor the Magistrate has any power to order or conduct 'fresh investigation'. This is primarily for the reason that it would be opposed to the scheme of the Code. It is essential that even an order of 'fresh'/'de novo' investigation passed by the higher judiciary should*

always be coupled with a specific direction as to the fate of the investigation already conducted. The cases where such direction can be issued are few and far between. This is based upon a fundamental principle of our criminal jurisprudence which is that it is the right of a suspect or an accused to have a just and fair investigation and trial. This principle flows from the constitutional mandate contained in Articles 21 and 22 of the Constitution of India. Where the investigation ex facie is unfair, tainted, mala fide and smacks of foul play, the courts would set aside such an investigation and direct fresh or de novo investigation and, if necessary, even by another independent investigating agency. As already noticed, this is a power of wide plenitude and, therefore, has to be exercised sparingly. The principle of rarest of rare cases would squarely apply to such cases. Unless the unfairness of the investigation is such that it pricks the judicial conscience of the Court, the Court should be reluctant to interfere in such matters to the extent of quashing an investigation and directing a 'fresh investigation'. In the case of Sidhartha Vashisht v. State (NCT of Delhi) [(2010) 6 SCC 1], the Court stated that it is not only the responsibility of the investigating agency, but also that of the courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. An equally enforceable canon of the criminal law is that high responsibility lies upon the investigating agency not to conduct an investigation in a tainted or unfair manner. The investigation should not prima facie be indicative of a biased mind and every effort should be made to bring the guilty to law as nobody stands above law de hors his *position and influence in the society. The maxim contra veritatem lex nunquam aliquid permittit applies to exercise of powers by the courts while granting approval or declining to accept the report. In the case of Gudalure M.J. Cherian & Ors. v. Union of India & Ors. [(1992) 1 SCC 397], this Court stated the principle that in cases where charge-sheets have been filed after completion of investigation and request is made belatedly to reopen the investigation, such investigation being entrusted to a specialized agency would normally be declined by the court of competent jurisdiction but nevertheless in a given situation to do justice between the parties and to instil confidence in public mind, it may become necessary to pass such orders. Further, in the case of R.S. Sodhi, Advocate v. State of U.P. [1994 SCC Supp. (1) 142], where allegations were made against a police officer, the Court ordered the investigation to be transferred to CBI with an intent to maintain credibility of investigation, public confidence and in the interest of justice. Ordinarily, the courts would not exercise such jurisdiction but the expression 'ordinarily' means normally and it is used where there can be an exception. It means in the large majority of cases but not invariably. 'Ordinarily' excludes extra-ordinary or special circumstances. In other words, if special circumstances exist, the court may exercise its jurisdiction to direct 'fresh investigation' and even transfer cases to courts of higher jurisdiction which may pass such directions.*

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30. Having analysed the provisions of the Code and the various judgments as afore-indicated, we would state the following conclusions in regard to the powers *of a magistrate in terms of Section 173(2) read with Section 173(8) and Section 156(3) of the Code :*

1. The Magistrate has no power to direct 'reinvestigation' or 'fresh investigation' (de novo) in the case initiated on the basis of a police report.

2. A Magistrate has the power to direct 'further investigation' after filing of a police report in terms of Section 173(6) of the Code.

3. The view expressed in (2) above is in conformity with the principle of law stated in Bhagwant Singh's case (supra) by a three Judge Bench and thus in conformity with the doctrine of precedence.

4. Neither the scheme of the Code nor any specific provision therein bars exercise of such jurisdiction by the Magistrate. The language of Section 173(2) cannot be construed so restrictively as to deprive the Magistrate of such powers particularly in face of the provisions of Section 156(3) and the language of Section 173 (8) itself. In fact, such power would have to be read into the language of Section 173(8).

5. The Code is a procedural document, thus, it must receive a construction which would advance the cause of justice and legislative object sought to be achieved. It does not stand to reason that the legislature provided power of further investigation to the police even after filing a report, but intended to curtail the power of the Court to the extent that even where the facts of the case and the ends of justice demand, the Court can still not direct the investigating agency *to conduct further investigation which it could do on its own.*

6. It has been a procedure of proprietary that the police has to seek permission of the Court to continue 'further investigation' and file supplementary chargesheet. This approach has been approved by this Court in a number of judgments. This as such would support the view that we are taking in the present case.

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40.2. No investigating agency is empowered to conduct a 'fresh', 'de novo' or 're-investigation' in relation to the offence for which it has already filed a report in terms of Section 173(2) of the Code. It is only upon the orders of the higher courts empowered to pass such orders that aforesaid investigation can be conducted, in which event the higher courts will have to pass a specific order with regard to the fate of the investigation already conducted and the report so filed before the court of the learned magistrate.

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50. Once the Court has taken this view, there is no question of treating the first report as being withdrawn, cancelled or capable of being excluded from the records by the implication. In fact, except by a specific order of a higher court competent to make said orders, the previous as well as supplementary report shall form part of the record which the trial court is expected to consider for arriving at any appropriate conclusion, in accordance with law. It is also interesting to note that the CBI itself understood the order of the court and conducted only 'further investigation' as is evident from the status report filed by the CBI before the High

> *Court on 28th November, 2007.*
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> *51. In our considered view, the trial court has to consider the entire record, including both the Delhi Police Report filed under Section 173(2) of the Code as well as the Closure Report filed by the CBI and the documents filed along with these reports."*

15. In view of the law laid down by this Court in Vinay Tyagi's case (supra), the present petition is allowed and the impugned order dated 04.07.2011 (Annexure P-38) is set aside. The concerned Magistrate is directed to proceed with further in accordance with law.

22.08.2023 **(HARNARESH SINGH GILL)**
parveen kumar **JUDGE**

Whether reasoned/speaking? Yes/No
Whether reportable? Yes/No